

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 14, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2005AP1036-CR**

**Cir. Ct. No. 2003CT2344**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ALBERT E. MORROW,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgment of the circuit court for Milwaukee County:  
DANIEL L. KONKOL, Judge. *Reversed and cause remanded for further proceedings.*

¶1 KESSLER, J.<sup>1</sup> Albert E. Morrow appeals from a judgment of conviction for operating under the influence of an intoxicant, third offense,

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04). Some correspondence related to this file indicates the case is being decided by a three-judge panel, but that is erroneous.

(continued)

contrary to WIS. STAT. § 346.63(1)(a).<sup>2</sup> Morrow argues: (1) the evidence of his intoxication should have been suppressed because there was no probable cause to arrest him; and (2) the trial court erroneously exercised its discretion when it denied Morrow's motion in limine to present evidence that the complaining citizen witness had a reason to testify falsely about Morrow's driving because Morrow had a prior relationship with the citizen's wife. We conclude there was probable cause to arrest Morrow and, therefore, reject his first argument. However, we agree that Morrow was entitled to introduce additional evidence about the citizen witness's motive to lie. Therefore, we reverse and remand for a new trial.

### **BACKGROUND**

¶2 The following facts are based on testimony from a motion hearing and a jury trial. On February 28, 2003, the police received a 911 call from a citizen who indicated he was following a vehicle that was being driven erratically. The citizen, who was in his own vehicle with his wife, followed the other vehicle for approximately ten minutes, reporting what was happening as he drove. He ultimately told the operator that the driver had parked his vehicle and gone into a tavern. The citizen parked near the tavern to wait for the police.

¶3 Several officers responded to the call, arriving approximately two minutes after the citizen. Two officers spoke with the citizen and he told them what he had observed.

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All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> The jury also found Morrow guilty of operating a prohibited alcohol concentration of .08 or more, contrary to WIS. STAT. § 346.63(1)(b). Pursuant to § 346.63(1)(c), there is "a single conviction for purposes of sentencing and for purposes of counting convictions...."

¶4 A third officer, Alberto Riestra, arrived and conferred with the first two officers, who told him the driver was in the bar. Riestra entered the bar and located a person who matched the description given; that person was Morrow. Riestra asked Morrow if he was driving an Avalanche pick-up truck, and Morrow indicated he was.

¶5 Riestra asked Morrow to come outside. Once outside, Riestra told Morrow that the police had received a complaint that Morrow had driven erratically and that there was a “suspicion of him being intoxicated.” Morrow denied he was intoxicated.

¶6 Riestra conducted the Horizontal Gaze Nystagmus (HGN) field sobriety test and observed Morrow. When asked to describe his observations, Riestra testified:

[H]e moved his head. Our instructions are that you’re not allowed to move your head, just his eyes. He moved his head even though I told him three or four times not to move his head. He had a lack of smooth-tracking. He was onset of 45 degrees. Besides that, I could see he had bloodshot eyes and he had a strong odor of alcoholic beverages coming from his mouth.

....

At that point I felt that there was enough to take him [in] under operating while intoxicated.

Riestra said Morrow refused to perform additional field sobriety tests.

¶7 Despite concluding that Morrow was intoxicated, Riestra did not arrest Morrow because when he asked the other two police officers where the citizen witness was, “the witness was nowhere to be found.” Riestra testified the other officers said they had not taken contact information from the witness because they had instead followed Riestra into the bar out of concern for his

safety. Riestra at that point made a decision not to arrest Morrow because there was no witness who could testify about Morrow's erratic driving. Riestra said he "basically told [Morrow] today is your lucky day, [and] if you're going to continue to drink, please call a cab or get somebody that hasn't been drinking to drive your car...."

¶8 As Riestra was leaving the parking lot, the citizen witness approached him and asked why Morrow had been let go. Riestra testified: "I explained to him that the reason we let [Morrow] go was because we thought that [the citizen] had left and we didn't believe we had a witness at the time[.]" Riestra said the citizen then started asking him if Morrow could be arrested because, as it turned out, the citizen had a restraining order against Morrow. Riestra said he told the citizen that he did not see grounds for a restraining order violation since it was the citizen who had followed Morrow.

¶9 Riestra said that as he and the citizen were talking, Morrow came out of the bar and "ended up getting into the witness'[s] face, yelling and screaming. They were swearing. There was a banging on windows or on the car of the witness." Riestra said Morrow kept getting more aggressive. Riestra asked Morrow numerous times to leave and when he refused, Riestra placed Morrow under arrest for operating while intoxicated. A blood test later showed Morrow's blood alcohol content at the time of the blood draw to be .017, more than twice the legal limit.

¶10 Morrow moved to suppress evidence of his intoxication on grounds that there was no probable cause to arrest him. After a hearing at which Riestra and the citizen witness testified, the trial court denied the motion. The trial court implicitly found the testimony of both witnesses to be credible. The trial court

ruled that there was evidence, provided by the citizen witness, that Morrow had driven erratically. The trial court further found that there was sufficient evidence of intoxication, including the officer's observations of Morrow's failure of the HGN test, Morrow's bloodshot eyes, and a strong odor of intoxicants coming from Morrow's mouth. The trial court concluded: "With the observations that the officer was making, and in conjunction with the other information that the officer had with regard to the driving, certainly at that point the officer then did have probable cause to arrest the defendant for operating while intoxicated."

¶11 The trial court was not troubled by the fact that Riestra did not immediately arrest Morrow after determining he was intoxicated. The trial court explained:

[A]t that point the officer did not act on that information because that's when the officer found that he did not have any witness ... [or] any information to corroborate that the defendant had been driving, without any witness that could actually put the defendant behind the wheel of a vehicle on the street, the officer felt at that point that he didn't have sufficient information to proceed with the prosecution.

The trial court found that once the witness again came forward, the officer was able to act on the probable cause to arrest, and was justified in doing so.

¶12 Prior to trial, the trial court held a hearing on Morrow's motion in limine to cross-examine the citizen witness about his knowledge of Morrow's previous sexual relationship with the citizen's wife, and on Morrow's motion to prohibit all parties from disclosing to the jury that the citizen and his wife had a harassment injunction against Morrow. At that hearing, the citizen witness testified that he received telephone calls from Morrow approximately nine months prior to the alleged drunk driving incident, and that during those calls, Morrow told the citizen details about Morrow's previous sexual relationship with the

citizen's wife. The citizen said Morrow also tried to convince the citizen "that there was something going on while [my wife and I] were married."

¶13 The citizen said he asked his wife about Morrow, and she acknowledged that years earlier, before they had gotten married, she dated and had a single sexual encounter with Morrow, who was one of her coworkers. The citizen and his wife contacted the authorities and ultimately obtained a harassment injunction against Morrow.

¶14 The trial court denied Morrow's motion to allow questioning of the citizen witness about his knowledge of Morrow's previous sexual relationship with the citizen's wife. It also denied Morrow's motion in limine to exclude evidence of the harassment injunction, ruling that evidence there was a harassment injunction against Morrow—but not details of the reasons for that injunction—could be admitted. The trial court explained its rulings on both motions:

I think what counsel is almost asking is that if anybody has ever dated somebody before somebody gets married, and somebody calls up and makes criminal accusations against someone, that creates motivation [to lie]. I find that so remote. It's just not providing any clear basis for the motivation that is being suggested here.... The fact that [the citizen and his wife] have a harassment injunction against the defendant, I think that's something that can go to motivation. But as to the basis for what the harassment involved, I think that is just too much of a stretch.... [A]s to this conduct that's being indicated here, dating and possible sexual activity before the [citizen and his wife] were even married, I think that just is too far a field [sic], too remote. I don't feel, from what's been indicated here, that played any role in the report to the police. And so I'm not going to allow that that can be used. But as indicated ... [the] injunction can be brought up, [but] the underlying basis for the injunction, that will not be relevant.

¶15 The case proceeded to trial. Officer Riestra and the citizen were the only witnesses for the State and testified consistent with the testimony they offered at the probable cause motion hearing. The defense presented no witnesses, arguing in closing that there was insufficient evidence that Morrow had driven while intoxicated. Specifically, the defense argued that Morrow could have consumed the intoxicants in the twenty minutes he was in the bar, prior to being arrested.

¶16 The jury found Morrow guilty and he was sentenced. This appeal followed.

## DISCUSSION

¶17 Morrow presents two arguments on appeal: (1) the evidence of his intoxication should have been suppressed because there was no probable cause to arrest him; and (2) the trial court erroneously exercised its discretion when it denied Morrow's motion in limine to cross-examine the citizen about his motives to testify falsely, given the history between the citizen, his wife and Morrow. We examine each in turn.

### I. Probable cause

¶18 Morrow claims that Riestra lacked probable cause to arrest him. In operating while intoxicated cases, probable cause will be found “where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). “[T]he circumstances within the arresting officer's knowledge need not be sufficient to make the

defendant's guilt more probable than not[.]” *State v. Riddle*, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995). In analyzing determinations of probable cause, we will accept the trial court's findings of fact unless they are clearly erroneous, *State v. Watson*, 227 Wis. 2d 167, 196, 595 N.W.2d 403 (1999), but we decide independently whether the facts of a given case constitute probable cause to arrest, *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996).

¶19 Morrow argues that there was insufficient evidence of intoxication. He states: “While the evidence in Mr. Morrow’s case might have risen to the level of suspicion required for a preliminary breath test, the evidence did not rise to the level necessary to establish probable cause to arrest Mr. Morrow” for operating while intoxicated. Morrow points to a lack of testimony that he “had any difficulty with his speech, normal balance, or motor coordination.” He adds: “Riestra failed to explain the significance of his observations on the field sobriety test that he conducted.” Finally, Morrow suggests the fact that Riestra did not immediately arrest Morrow after performing the field sobriety tests is proof that Riestra did not believe Morrow was sufficiently intoxicated to arrest him.

¶20 We conclude, looking at the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest, *see Nordness*, 128 Wis. 2d at 35, that a reasonable police officer would have probable cause to believe that Morrow was operating a vehicle while under the influence of an intoxicant. The trial court found there was sufficient evidence to establish probable cause to believe that Morrow had been driving erratically. It found that there were numerous indications of intoxication: performance on the HGN test, bloodshot eyes and an odor of intoxicants. It also found that Morrow refused to participate



in additional field sobriety tests.<sup>3</sup> These findings are not challenged, and are not clearly erroneous. Based on these facts, looking at the totality of the circumstances, Riestra had probable cause to believe that Morrow had been operating a motor vehicle while under the influence of an intoxicant.

¶21 The fact that Riestra did not immediately arrest Morrow is explained by the fact that Riestra thought the citizen witness could not be located. It does not negate Riestra's reasonable belief that Morrow had been operating while intoxicated. Rather, Riestra's decision not to immediately arrest Morrow reflected his belief that unless the identity of the witness was known, the case could not realistically proceed. Once the witness was located in the parking lot, Riestra acted on the existing probable cause to arrest. We discern no error.

¶22 For these reasons, we conclude that there was probable cause to arrest Morrow. Thus, we reject Morrow's argument that the evidence of his intoxication should be suppressed.

## **II. Impeachment of the citizen witness**

¶23 Morrow contends that he is entitled to a new trial because the trial court erroneously denied his motion to cross-examine the citizen about his knowledge of Morrow's previous relationship with the citizen's wife. "The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely." *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978).

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<sup>3</sup> A defendant's refusal to submit to a field sobriety test may be used to establish probable cause to arrest. *State v. Babbitt*, 188 Wis. 2d 349, 360-63, 525 N.W.2d 102 (Ct. App. 1994).

“The proper standard for the test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony.”

*State v. Lindh*, 161 Wis. 2d 324, 348, 468 N.W.2d 168 (1991) (citation omitted).

“There must be a reasonable relation between the evidence sought to be introduced and the proposition to be proved before the cross-examination will be allowed.”

*Id.*

¶24 The trial court’s decision to allow or deny cross-examination on a particular topic is a discretionary one. *Id.* “The appellate court should reverse a trial court’s determination to limit or prohibit a certain area of cross-examination offered to show bias only if the trial court’s determination represents a prejudicial [erroneous exercise] of discretion.” *Id.* at 348-49. We will affirm the trial court’s exercise of discretion if the trial court “examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.” *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

¶25 Even if we conclude that the trial court erroneously exercised its discretion in admitting or excluding evidence, a new trial is not necessarily warranted. *Id.*, ¶30. “The appellate court must conduct a harmless error analysis to determine whether the error ‘affected the substantial rights of the party.’ If the error did not affect the substantial rights of the party, the error is considered harmless.” *Id.* The substantial rights of the parties are affected only if there is a reasonable possibility that the error contributed to the outcome of the case. *Id.*, ¶32. “A reasonable possibility of a different outcome is a possibility sufficient to

‘undermine confidence in the outcome.’” *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (citation omitted).

¶26 Morrow argues that he should have been allowed to cross-examine the citizen about his knowledge of Morrow’s prior relationship with the citizen’s wife. He explains:

Mr. Morrow sought to introduce evidence that [the citizen] knew that Mr. Morrow had a sexual relationship with [the citizen’s wife]. [The citizen] had found this information out approximately nine months prior to this incident.... The defense argued that this evidence was relevant because it would show [the citizen’s] bias against Mr. Morrow, and his motive to fabricate his testimony regarding Mr. Morrow’s operation of the vehicle. The defense in essence wanted to show that [the citizen] was biased against Mr. Morrow because Mr. Morrow had slept with his wife and had claimed that he had slept with his wife during the [] marriage....

....

[T]he fact that [the citizen] found out about the affair only nine months earlier would have tended to show [] bias ... and would have provided a motive for [the citizen] to fabricate his testimony. It is important to note, that [the citizen] is the only witness who testified about Mr. Morrow’s driving.... The above evidence would tend to make [the citizen’s] account of Mr. Morrow’s driving less probable.

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The fact that Mr. Morrow was claiming that he had coveted [the citizen’s] wife would surely create a bias on [the citizen’s] part.

¶27 In response, the State argues that the trial court’s decision to exclude the evidence was reasonable:

By excluding evidence of the particulars of a dating relationship between Mr. Morrow ... [and the citizen’s wife], the trial court was making the point that Mr. Morrow was charged with “Operating While Intoxicated,” not with

some crime relating to a harassment injunction. The trial court was simply ensuring that the jury would not confuse these two issues, which the court is entitled to do under Wis. Stat. § 904.03. Based upon the potentially explicit nature of the evidence Mr. Morrow sought to introduce, the trial court had a reasonable basis to believe that this evidence would confuse the jury.... Therefore, the court properly exercised its discretion in limiting the scope of the evidence admitted without denying Mr. Morrow the opportunity to present [the citizen's] possible bias.

For example, the trial court permitted some evidence of [the citizen's] potential bias ... [when it] allowed in evidence of the restraining order ... thus putting the alleged bias before the jury.

¶28 We conclude that the trial court erroneously exercised its discretion when it denied Morrow the opportunity to cross-examine the citizen about the citizen's knowledge of Morrow's previous relationship with the citizen's wife. The citizen was the only witness to provide evidence that Morrow had driven erratically. He also had a potential motive to testify falsely—to punish Morrow for: (1) having had a sexual relationship with the citizen's wife; (2) calling the citizen to talk about it; and (3) suggesting that he had had sexual relations with the citizen's wife even after she got married. The jury was not permitted to hear any cross-examination about these issues. Instead, all the jury learned was that the citizen had an existing harassment injunction against Morrow. While this may have provided proof that the parties knew each other, it did not allow Morrow to sufficiently explore potential bias, and may have actually harmed Morrow's case because it provided evidence there had been some unidentified prior bad act that led to the issuance of the injunction.

¶29 The citizen in this case was not a stranger to Morrow. While the fact that the witness knew Morrow in the past does not necessarily mean he lied about Morrow's driving, there exists a potential for bias. The trial court's decision to

forbid all cross-examination concerning the telephone calls and the prior relationship between Morrow and the citizen's wife was not reasonable under the circumstances here.<sup>4</sup> We conclude that the trial court erroneously exercised its discretion.

¶30 Our inquiry is not at an end, however. We must determine whether the trial court's erroneous exercise of discretion was harmless. The State presents only limited argument that the error was harmless, stating:

Since substantial evidence of potential bias was admitted [*i.e.*, by allowing the jury to hear that there was a harassment injunction against Morrow], even if this court were to disagree with the trial court's decision to exclude more evidence of bias, the trial court's ruling was not prejudicial. The trial court, after listening to the evidence and observing the demeanor of the witnesses, made the decision to limit the scope of the evidence, obviously preferring to try the OWI case before it and not the harassment allegations.

¶31 We disagree that the error was harmless. For the reasons noted above, it was important for the jury to know that the citizen had a motive to testify falsely. Admission of evidence of the harassment injunction told the jury only that the two men knew each other. It provided no basis to conclude that the citizen would be angry with Morrow, or would wish to punish him. The jury could only

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<sup>4</sup> We do not suggest that the trial court was required to allow unlimited testimony about the citizen's potential bias. The trial court could have limited the length and extent of testimony about the telephone calls and the sexual relationship. The precise words Morrow used during the telephone calls are not necessarily relevant; the fact that he told the citizen that he had had, and continued to have, a sexual relationship with the citizen's wife *is* evidence that could lead a jury to believe the citizen was biased. Prohibiting any exploration about the telephone calls and the prior relationship was an erroneous exercise of discretion. On retrial, it remains within the trial court's discretion to decide the appropriate scope of cross-examination, keeping in mind this court's decision that Morrow must be able to bring out the facts that Morrow had a previous sexual relationship with the citizen's wife and that Morrow told the citizen about that relationship nine months before the alleged drunk driving incident.

speculate about why an injunction had been issued. It is not reasonable to assume that the jury would conclude that anyone who obtained a harassment injunction has a motive to lie about the person enjoined. If the jury had heard about the citizen's possible motive to testify falsely, there is a reasonable possibility that they may have rejected the citizen's testimony about Morrow's erratic driving, possibly resulting in an acquittal.<sup>5</sup> Because there is a reasonable possibility of a different outcome, see *Evelyn C.R.*, 246 Wis. 2d 1, ¶28, Morrow is entitled to a new trial at which he can cross-examine the citizen about his knowledge that Morrow had a previous sexual relationship with the citizen's wife and how he came to learn that information.

*By the Court.*—Judgment reversed and cause remanded for further proceedings.

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

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<sup>5</sup> If Morrow was not driving erratically, it gives new life to his defense strategy of arguing that he consumed the intoxicants that elevated his blood alcohol content at the bar *after* driving, rather than *before* driving.

