COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0456-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADRIENNE LUBER,

DEFENDANT-PETITIONER.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Reversed.*

¶1 VERGERONT, J.[1] Adrienne Luber petitions for leave to appeal a non-final order that denied her motion to dismiss a second trial on a charge of driving with a prohibited alcohol content (PAC) after a jury had deadlocked on that charge and found her not guilty on the charge of operating a motor vehicle

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

while intoxicated (OWI). We grant leave to appeal pursuant to WIS. STAT. § 808.03(2) (1997-98).

¶2 Luber contends that a retrial on the PAC charge violates her constitutional guarantee against double jeopardy on two different grounds and that a retrial is also barred by statute, by the doctrine of collateral estoppel, and because the trial court erroneously declared a mistrial. We decide only one issue because it is dispositive: we conclude a second trial on the PAC charge would constitute double jeopardy because there was insufficient evidence at the first trial to convict Luber on that charge. Therefore, we reverse the trial court's order denying Luber's motion to dismiss that charge.

BACKGROUND

¶3 The complaint charged Luber with operating a motor vehicle while intoxicated contrary to WIS. STAT. § 346.63(1)(a) (1997-98)[2] and operating a motor vehicle with a prohibited alcohol concentration contrary to § 346.63(1)(b), as a fourth offense. Because this was a fourth offense, the prohibited alcohol concentration was .08 or more. *See* WIS. STAT. § 340.01(46m)(b).

¶4 The complaint alleged that on August 15, 1998, at 2:43 a.m. State Patrol Trooper Ricardo Perez stopped Luber while she was operating a motor vehicle, placed her under arrest, and a blood sample taken at 4:40 a.m. revealed a blood alcohol content (BAC) of .147% by weight of alcohol in her blood. The charges were tried to a jury and the jury found Luber not guilty of OWI but it deadlocked on the charge of operating a motor vehicle with a PAC.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶5 The court entered a judgment of acquittal on the OWI charge and declared a mistrial on the PAC charge. It denied Luber's oral motion for a dismissal of the PAC charge on the ground that there was no evidence establishing the BAC at the time of driving, as opposed to two hours later. The court explained that in its view there was sufficient evidence for a reasonable jury to find beyond a reasonable doubt that the State had proved all the elements, while acknowledging there was also a basis for a reasonable jury to find that the State had not done so.[3]

¶6 After the State indicated its intention to retry Luber on the PAC charge, Luber moved to dismiss that charge on a number of grounds, including the one we address on this appeal: the evidence presented at the first trial was insufficient to support a conviction on the PAC charge and therefore a second trial constituted double jeopardy. The court denied the motion, again ruling there was sufficient evidence for a jury to conclude that Luber was guilty of operating a motor vehicle with a PAC.

DISCUSSION

¶7 The United States and Wisconsin Constitutions both protect against being placed twice in jeopardy for the same offense.[4] In ***Burks v. United States***, 437 U.S. 1, 12-14 (1978), the Court held that the double jeopardy clause precludes a second trial once a reviewing court has found the evidence legally insufficient, and the only available remedy is the direction of a judgment of acquittal. Luber relies on ***Burks*** to argue that a second trial on the PAC charge is precluded by the

[3] Previously, at the close of the State's case, Luber had moved to dismiss both counts for insufficient evidence and the court had denied that motion.

[4] *See* U.S. CONST. amend. V and WIS. CONST., art. I, § 8.

double jeopardy clause because the evidence at the first trial was insufficient to sustain a verdict of guilty on that charge. The State responds that the evidence at the first trial was sufficient to support a guilty verdict on that charge, but does not dispute the proposition that, if the evidence was not sufficient, the double jeopardy clause prohibits a second trial on that charge. We treat the failure to dispute this proposition as a concession, *see* ***State v. Davidson***, 222 Wis. 2d 233, 253-54, 589 N.W.2d 38 (Ct. App. 1998) (*rev'd. on other grounds*), and we confine our inquiry to whether there was sufficient evidence on that charge.

¶8 The parties agree that in reviewing the sufficiency of the evidence, we may not reverse unless, viewing the evidence in the light most favorable to the State, the evidence is so insufficient in probative value and force that no trier of fact, acting reasonably, could have found Luber guilty beyond a reasonable doubt on the PAC charge. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). This is essentially the same standard that trial courts are to employ in deciding a motion to dismiss based on insufficient evidence. *See* ***Lofton v. State***, 83 Wis. 2d 472, 483, 266 N.W.2d 576 (1978). The trial court in this case applied the correct standard, but we reach a different result on the application of the standard to the record than did the trial court. Viewing the evidence most favorably to the prosecution, we conclude the record is not sufficient to permit a reasonable fact finder to determine, beyond a reasonable doubt, that Luber's BAC at the time she was driving was .08 or more.

¶9 Trooper Perez testified that he stopped Luber for speeding at approximately 2:43 a.m. and Luber testified she left the tavern at 2:30 a.m., and was driving. The blood sample was drawn at approximately 4:40 a.m. William Johnson, a senior chemist at the State Hygiene Lab testified that he performed

tests on a blood sample from Luber and the results were a blood ethanol concentration of .147 grams per one hundred milliliters.[5]

¶10 On cross-examination Johnson acknowledged that if the only information he was allowed to consider was the BAC at 4:40 a.m., he could provide an estimate of the person's BAC an hour earlier or an hour later but could not give "a number as valid as this test result without an actual test," and the estimate would be based on averages. Similarly, he could provide only an estimate of Luber's BAC at 2:40 a.m. by performing a calculation based on averages. In response to defense counsel's questions, Johnson explained that there are three phases in the body's metabolization of alcohol: the absorption phase, when the body is absorbing the alcohol into the bloodstream; the peak, when the maximum blood alcohol concentration is reached; and the elimination phase, although, Johnson pointed out, the body is eliminating alcohol throughout the entire process—during the absorption and peak phases as well as the elimination phase. During the absorption phase, the blood alcohol level is rising, because, although there is elimination, the rate of absorption exceeds the rate of elimination.

¶11 Johnson agreed the elimination rate varies among individuals: he was familiar with an extreme of .008 per hour at one end of the range and .035 at the other. He also agreed that the absorption rate varies among individuals, although "not quite as significantly as the elimination rate." Johnson would

[5] The jury was instructed that the analysis of Luber's blood sample was "relevant evidence that [she] had a prohibited alcohol concentration at the time of the alleged operating" and the jury could "consider the evidence regarding the analysis of the blood sample and the evidence of how the body absorbs and eliminates alcohol, along with all the other evidence in the case, giving it just such weight as you determine it is entitled to received."

assume that, with respect to the alcohol Luber consumed before the stop, she was in the elimination phase at the time of the blood test, but he acknowledged it was possible she could be somewhere near the peak. "Depending on the exact time frame for the hour before the stop," he testified, "if there was a large amount of alcohol consumed just before the stop, then there's a potential for unabsorbed alcohol." He agreed that a crucial factor in determining the phase she was in at 2:40 a.m. was whether alcohol was consumed in the hour before then.

¶12 On redirect Johnson made these three calculations. (1) With a BAC of .147 at 4:40 a.m. and assuming an elimination rate between 2:40 to 4:40 a.m. of .015 per hour, which is a well-established average elimination rate, the BAC at 2:40 a.m. would be between .17 and .18 grams per one hundred milliliters, assuming also that all of the alcohol consumed prior to 2:40 a.m. was completely absorbed into the bloodstream. (2) The effect on the BAC of an average female weighing 126 pounds is .038 for every twelve-ounce beer or one ounce of 100-proof alcohol, so that if a female of that weight had 3.9, or four twelve-ounce beers or one-ounce shots of 100-proof alcohol in her bloodstream at one time, not taking into account any elimination, one "would expect a maximum blood alcohol concentration of about .147, .15." (Later questioning established that the .038 figure is called "the Widmark R factor.") (3) If he were correct in using .015 as the average elimination rate in the first calculation, which put the BAC at the time of the stop at between .17 and .18 assuming no unabsorbed alcohol and given a BAC at 4:40 a.m. of .147, then for Luber's BAC to be below .08 at 2:43 a.m. there would have had to have been roughly two and one-half twelve-ounce beers or two and one-half ounces of 100-proof alcohol unabsorbed in her stomach at that time.

¶13 Luber gave this account of her drinking at a tavern before she was stopped. She arrived at the bar between 11:20 and 11:25 p.m. A companion

bought her a Miller Lite and she drank that over the next hour, finishing it at around 12:30 a.m. She ordered another Miller Lite between 12:30 and 12:45 a.m. and finished that about 1:30 a.m. Either she ordered, or a companion ordered, a third Miller Lite about 1:50 a.m., which she drank. She also had "maybe two sips" of a Miller Lite a companion ordered for her "around two." In the ten or fifteen minutes before bar time at 2:30 a.m., she had two shots, one of Tequila Rose and one Dr. McGillicuddy's. The Miller Lites were twelve ounces, and the shots over one ounce each. She did not feel affected by any of this alcohol.

¶14 Two of Luber's companions, who were also drinking alcohol, testified that Luber had three beers and two shots.

¶15 Luber contends that the evidence is insufficient because Johnson's calculations were: (1) based on an average elimination rate; (2) based on an assumed weight of 126 pounds without evidence of her weight; and (3) based on assumptions about the absorption of alcohol in her bloodstream by 2:40 a.m. without any evidence on absorption time or rates, in general, or for Luber in particular. We do not agree that the evidence is insufficient on the first two grounds, but we conclude it is insufficient on the third.

¶16 Luber's challenge to the use of an average elimination rate apparently assumes the State must present evidence of Luber's individual elimination rate [6] However, this court has held that it was error for a trial court to exclude a "Blood Alcohol Chart" from a Department of Transportation publication that showed "estimated percent of alcohol in the blood by number of drinks in

[6] Johnson testified that it is possible to determine an individual's elimination rate by taking blood samples at more than one point in time.

relation to body weight" solely because there was no expert testimony to explain it. ***State v. Hinz***, 121 Wis. 2d 282, 284-86 n.3, 360 N.W.2d 56 (Ct. App. 1984). In so ruling, we recognized that the chart was based on averages and was therefore not conclusive, but we held the chart was admissible as long as this limitation was explained to the jury. *See* ***id.*** at 286-88. Applying the same reasoning here, we conclude that Johnson's testimony of the average elimination rate is admissible testimony and is relevant to prove Luber's elimination rate. Although Johnson testified to the variation in elimination rates, there was no evidence suggesting that Luber's elimination rate was not average. We do not agree that the State had to present evidence that she was average or "was likely to be average." We conclude that a reasonable jury could credit Johnson's testimony that the applicable average elimination rate was .015 per hour and could decide that rate is the proper rate to apply to Luber.

¶17 With respect to Luber's contention that there is no evidence of Luber's weight, we have examined the trial testimony and exhibits carefully and have found no evidence of her weight. The State has pointed to none. Johnson used a weight of 126 pounds because the prosecutor asked him to assume that weight, and we agree with Luber that is not evidence. However, the jurors saw Luber, and they were capable of deciding, based on her appearance, whether or not 126 pounds was a fair approximation of her weight. Of course, unlike the trial court, this court is not in a position to decide by looking at Luber whether a reasonable juror could determine that 126 pounds was a fair approximation of her weight, and the trial court did not comment on this, presumably because it was not a point specifically raised by Luber at trial. For purposes of our appellate review on this point, we are persuaded that we may look to parts of the record that were not presented to the jury to decide whether a reasonable jury could conclude from

Luber's appearance that 126 pounds was a reasonable approximation of her weight. The summons she was issued lists her weight as 123 pounds. We are satisfied that a reasonable jury could determine that 126 pounds was an appropriate weight for Johnson to use in his calculations.

¶18 It follows that a reasonable jury could determine, if it chose to accept Johnson's testimony, that at the time of the stop Luber had an estimated BAC of .17 or.18 if all the alcohol she had consumed before the stop had been absorbed into her bloodstream at the time of the stop. However, we have carefully reviewed the record and can find no testimony from Johnson, and no evidence from any other source, on absorption rates—either an average or Luber's in particular—nor any evidence that at the time of the stop all the alcohol Luber drank would likely have been absorbed into her bloodstream. Johnson was never asked about the average absorption rate, nor how much alcohol would have been absorbed into Luber's bloodstream at the time she was driving, given the testimony on her drinking that night. Luber's counsel elicited testimony from Johnson that there was a range in absorption rates, and elicited testimony on the various factors that may affect the absorption rate, but Johnson never stated what the range or the average was.[7]

[7] We observe that on cross-examination Luber's counsel asked Johnson the following question and received the following answer:

> QUESTION: And the time after drinking in which it takes to reach a peak phase, just like the elimination situation we're talking about, there's research in which it's taken five minutes, and there's research in which it's taken four hours for individuals, right, to reach peak?
>
> ANSWER: It does vary. I can't testify as to those extremes, but it does vary, yes.

(continued)

¶19 Johnson's reference to the importance of what alcohol Luber consumed in the one hour before 2:40 a.m. may permit a reasonable fact finder to conclude that everything Luber drank before 1:40 a.m. was absorbed into her bloodstream. However, the only specific evidence of the timing of her alcohol consumption that night is that she had two shots and some amount of beer within that time period.[8] It is true the jury need not accept her testimony, nor her companion's testimony of how much she had to drink and when. However, the jury may not rely on its disbelief in their testimony as affirmative evidence of different amounts consumed or different times of consumption. *See* ***Stewart v. State***, 83 Wis. 2d 185, 194-95, 265 N.W.2d 489 (1978). Therefore, without the testimony of Luber and her companions on the timing of her drinks, there is no basis on which a reasonable jury could conclude that the timing of her drinks was such that all the alcohol had been absorbed into her bloodstream when she was driving.

¶20 The other calculations that Johnson made do not overcome the deficiency in the evidence on absorption. His calculation that the alcohol from about four drinks in the bloodstream of a female weighing 126 pounds would yield

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Because Johnson stated he could not testify to those extremes, the range contained in the attorney's question is not evidence. We therefore need not decide whether evidence of a range of that size, standing alone and without evidence of an average, would be a sufficient basis for a reasonable jury to conclude that all the alcohol Luber drank had been absorbed into her bloodstream at the time of the stop. We also observe that Luber's counsel presented charts in questioning Johnson that showed various graphs of the three phases and these charts may have contained some information on absorption rates. However, the exhibit list shows that these charts, after being accepted into evidence, were withdrawn, and they are not in the record before us.

[8] Luber testified she had one beer, "two sips of another" and two shots after 1:50 a.m. One companion, Philip Bambrough, testified Luber had three Miller Lites before 2:00 a.m. and two shots beginning fifteen to twenty minutes before bar time. Sean Barton testified she had two to three beers up until 2:00 a.m. and two shots—one "just a little after two," and the second "just after they called last call."

a BAC of approximately .147 or .15 expressly assumes that the alcohol from the four drinks has been completely absorbed and none has been eliminated. Using the same Widmark R factor of .038 that Johnson used in this calculation, a reasonable jury could decide that Luber would have a BAC of .08 if she consumed between 2.1 and 2.2 drinks, as defined by Johnson, if all the alcohol were absorbed into her bloodstream and none had been eliminated. However, the only reasonable inference from Johnson's testimony, interpreting it most favorably to the State, is that in order to arrive at a BAC for Luber at a particular time using the Widmark R factor and the number of drinks, there would need to be evidence from which one could reasonably infer the times of the drinks, the elimination rate and the absorption rate. There is evidence of the first two but, as we have explained above, not the last.

¶21 Johnson's third calculation was that a female weighing 126 pounds could have a BAC of .147 at 4:40 a.m. and a BAC below .08 two hours earlier if alcohol from two and one-half drinks had not yet been absorbed into her bloodstream. Again, without evidence that Luber had less unabsorbed alcohol than that in her bloodstream, a reasonable juror could not conclude her BAC at 2:40 a.m. was .08 or above.

¶22 The State refers us to several pieces of testimony in response to Luber's argument on the insufficiency of evidence, but none provide a basis for inferring an absorption rate, for estimating how much alcohol was absorbed into Luber's bloodstream at the time she was driving, or for an alternative manner of estimating Luber's BAC at the time she was driving. First, the State points out that Luber by her own admission had at least five drinks, that given discrepancies in the testimony on who paid for her drinks, she could have had as many as seven, and that the jury could have reasonably believed she had even more than seven,

because it could have found her testimony and that of her companions not credible. We agree the jury could resolve any discrepancies in testimony against Luber with the caveat stated above—that disbelief in testimony in itself, does not constitute affirmative evidence of something else. However, the number of drinks Luber consumed does not fill in the gap in the evidence: the only reasonable inference from Johnson's testing is that the BAC measures only the alcohol that has been absorbed into the bloodstream and, therefore, in addition to the number of drinks consumed, there must be evidence of when the drinks were consumed and how long it takes from consumption for the alcohol to be absorbed into the bloodstream (putting aside, for the moment, the issue of elimination) in order to estimate her BAC at any particular time.

¶23 The State also points to Johnson's testimony on the effects that a BAC of .08 might have on a person, including memory loss. However, this testimony expressly assumes a BAC of .08; it does not provide a reasonable basis for inferring that Luber had such a BAC at the time she was driving.[9]

¶24 Finally, the State contends that Johnson testified "the blood alcohol test of the defendant's blood was the only reliable evidence of her blood alcohol level at the time of operation." This is not an accurate description of Johnson's testimony, even viewing it in the light most favorably to the State. The portion of the transcript the State cites to is the following:

> QUESTION: Mr. Johnson, you indicated earlier that you did not know what Ms. Luber's absorption rate was; is that correct?
>
> ANSWER: Correct.

[9] The prosecutor did not ask Johnson whether any particular behavior exhibited by Luber indicated a BAC of .08 or over.

QUESTION: Or her elimination rate?

ANSWER: Correct.

QUESTION: You indicated that you are familiar, however, with the idea of retrograde analysis –

ANSWER: Yes.

QUESTION: -- of someone's blood alcohol level?

If I was to give you your choice between three ways of determining a person's blood alcohol level – and I'll list them for you – could you tell me which one is the most accurate. The first would be a chemical test; the second would be a retrograde analysis based on drinking history; and the third would be a combination of the first two. Which would you consider to be the most accurate?

ANSWER: The chemical test.

QUESTION: The chemical test alone?

ANSWER: Yes.

¶25 This testimony cannot reasonably be interpreted to mean that the BAC test result at 4:40 a.m., in itself, is the only reliable evidence of her BAC at the time of driving. Johnson consistently testified that knowing only Luber's BAC at 4:40 a.m., he could not estimate her BAC two hours earlier without either making a calculation based on averages and assumptions or having information on Luber's metabolization of alcohol. He also testified earlier that only an actual test at another time would establish a BAC for that other time that was as valid as the BAC determined for 4:40 a.m. based on the sample taken at 4:40 a.m. The only reasonable reading of the testimony to which the State cites is that Johnson is restating his earlier testimony that a chemical test of a sample is the most accurate way to determine a person's BAC at the time the sample is taken. A reasonable jury could not find, based on the above quoted testimony of Johnson, that Luber's BAC at 4:40 a.m. was, in itself, evidence that her BAC when she was driving was over .08.

¶26 In summary we conclude that viewing the evidence most favorably to the State, and drawing all reasonable inferences from the evidence in favor of the State, no reasonable juror could determine that Luber had a BAC at .08 or above at the time she was driving. Therefore, the State is precluded from trying Luber on this charge a second time. Accordingly, we reverse the trial court's order denying Luber's motion and direct the court to enter an order dismissing the PAC charge.

By the Court.—Order reversed.

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