COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1238-CR **Cir. Ct. No. 2005CT301**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANA E. BECKWITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Dana Beckwith appeals the judgment of conviction for operating a motor vehicle with a prohibited alcohol content (PAC) of .08 or more, second offense, contrary to WIS. STAT. § 346.63(1)(b). She

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

contends that the circuit court erred in prohibiting her from impeaching the State's witness because of WIS. STAT. § 343.305(8)(b)3. and that the statute is unconstitutionally vague. Assuming without deciding that Beckwith is correct that there was error, we conclude the error was harmless. We therefore affirm.

¶2 Beckwith was charged both with driving while under the influence of an intoxicant (OWI) and driving with a PAC contrary to WIS. STAT. § 346.63(1)(a) and (b), respectively, second offense. At the trial, the State presented an employee of the Wisconsin State Laboratory of Hygiene's toxicology section, who testified that the analysis of Beckwith's blood, which was drawn after her arrest, showed a blood alcohol concentration of 0.138 grams/100 ml. The State also called the arresting officer. He testified that, at approximately 2:30 a.m., he observed Beckwith making an illegal U-turn and stopped Beckwith's vehicle. He observed that her eyes were red and glassy, she smelled of alcohol, and she stated that she had four or five or six drinks that night. He administered three field sobriety tests and placed her under arrest for OWI.

¶3 Beckwith also testified at trial. She acknowledged that she had six drinks from 4:30 p.m. to 1:30 a.m., but, she testified, she did not feel drunk. She also contradicted some details of the arresting officer's testimony, including her performance on the field sobriety tests.

¶4 The jury returned a verdict of guilty on the PAC charge but not guilty on the OWI charge.

DISCUSSION

¶5 Beckwith contends the circuit court erred in ruling that she could not impeach the arresting officer with testimony that he gave at two administrative

review hearings under WIS. STAT. § 343.305(8) in cases involving persons other than herself. The circuit court ruled that the officer's testimony from those hearings was inadmissible because § 343.305(8)(b)3. provides that "[n]o testimony given by any witness [at an administrative hearing under § 343.305(8)] may be used at any subsequent action or proceeding." The court, however, did permit Beckwith's counsel to cross-examine the arresting officer and suggest or bring out that the officer had previously been confused in testimony on the clues he was looking for in administering the field sobriety tests. Beckwith contends that the court's ruling violated her right to due process of law because it prevented her from fully presenting her defense and that this statutory provision is unconstitutionally vague.

¶6 We do not address Beckwith's claims of error because we conclude that, even if there was error, the error was harmless. The supreme court has stated that an error is harmless if the State—the beneficiary of the error—proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***State v. Hale***, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637 (citing ***Chapman v. California***, 386 U.S. 18, 24 (1967)). The supreme court has also used the formulation that an error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citing ***Neder v. United States***, 527 U.S. 1, 18 (1999)). These tests are equivalent in that an error does not contribute to the verdict if the court concludes that beyond a reasonable doubt a rational jury would have reached the same verdict without the error. ***Id.***, ¶48 n.14. The factors that aid a court in determining whether an error is harmless include:

> [T]he frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

Hale, 277 Wis. 2d 593, ¶61.

¶7 In this case the jury returned a verdict of guilty on the PAC charge and not guilty on the OWI charge. The jury evidently credited the testimony of the State lab employee, without which there would not have been evidence on a necessary element of the PAC charge.[2] We are satisfied that a reasonable jury would have convicted Beckwith on the PAC charge even if she had been permitted to impeach the arresting officer with respect to his knowledge of the field sobriety tests. The jury evidently was not persuaded by the arresting officer's testimony

[2] The jury was instructed that the following elements must be proved beyond a reasonable doubt to find Beckwith guilty of operating with a PAC:

> 1. The defendant operated a motor vehicle on a highway;
>
> 2. The defendant had a prohibited alcohol concentration at the time the defendant operated a motor vehicle.
>
> "Prohibited alcohol concentration" means .08 grams or more of alcohol in 100 milliliters of the person's blood.

The jury was also instructed that the following elements must be proved beyond a reasonable doubt to find Beckwith guilty of operating while under the influence of an intoxicant:

> 1. The defendant operated a motor vehicle on a highway.
>
> 2. The defendant was under the influence of an intoxicant at the time the defendant operated a motor vehicle.
>
> "Under the influence of an intoxicant" means the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.

that Beckwith's ability to drive was impaired, even without the impeaching testimony. But, most importantly, the arresting officer's testimony on the field sobriety tests was simply irrelevant to the elements of the PAC charge. Evidence impeaching that testimony would not affect a reasonable jury's view of the State lab employee's testimony supporting the PAC charge.

¶8 We conclude that, beyond a reasonable doubt, any error in not permitting Beckwith to impeach the arresting officer with respect to the field sobriety tests did not contribute to the PAC verdict; or, in alternative phrasing, no reasonable jury would have found Beckwith not guilty of the PAC count had it heard the proffered impeaching testimony. Accordingly, any error in excluding that evidence was harmless.

By the Court.—Judgment affirmed.

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