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**DISTRICT II**

September 6, 2023

To:

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Circuit Court Judge  
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Electronic Notice

Monica Paz  
Clerk of Circuit Court  
Waukesha County Courthouse  
Electronic Notice

Michael C. Sanders  
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You are hereby notified that the Court has entered the following opinion and order:

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2022AP864-CR

State of Wisconsin v. Ricky E. Adair (L.C. #2018CF1292)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Ricky E. Adair appeals from a judgment of conviction, following a jury trial, for operating with a prohibited blood alcohol concentration (BAC) and felony bail jumping. Adair argues the evidence presented at trial was insufficient to support the jury's determination that he operated a motor vehicle with a BAC greater than .02 grams of alcohol per 100 milliliters of blood. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The State charged Adair with operating with a prohibited BAC and felony bail jumping.<sup>2</sup> At trial, the jury was advised that Adair was subject to a requirement that he not operate a motor vehicle with a BAC greater than .02.<sup>3</sup> The parties also stipulated that, on August 28, 2018, Adair was on bail for a felony matter, and one of the conditions of bail was that he not use or possess alcohol.

Wisconsin Community Services (WCS) case manager Courtney Remus testified that on August 28th, Adair arrived at WCS for a pretrial monitoring appointment. Remus had been monitoring Adair for a while, and at every appointment she administered a preliminary breath test (PBT). When Adair arrived for his appointment, Remus gave him a PBT. Based on the PBT reading, Remus had Adair wait ten minutes and then gave Adair a second PBT.<sup>4</sup> After the second PBT, Remus asked Adair if he had driven to WCS, and he said he had done so. Remus took Adair's car keys, and she called the police. Remus testified twenty to thirty minutes elapsed between when Adair arrived at WCS and when she called the police.

Officers Cody Manders and Ryan Edwards were dispatched to WCS at 12:04 p.m. Manders observed Adair's eyes were red, glassy, and had a little yellow tint to them. These observations were consistent with what Manders had previously observed in the eyes of people who have consumed alcohol. Manders conducted field sobriety tests, Adair exhibited some clues of impairment, and Manders believed Adair had consumed alcohol. Manders placed Adair under

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<sup>2</sup> The State also charged Adair with operating while intoxicated but dismissed that count before trial.

<sup>3</sup> Before trial, Adair stipulated that, for counting purposes, he had seven prior convictions for operating while intoxicated or operating with a prohibited alcohol concentration.

<sup>4</sup> The results of the PBTs were not presented at trial.

arrest, and Adair consented to a blood draw. Adair's blood was drawn at 1:22 p.m. Edwards searched Adair's vehicle, which was located in the WCS parking lot, and he did not find any indication that Adair had been drinking in the vehicle.

State crime lab toxicologist Amy Sasman tested Adair's blood sample, and the result indicated a BAC of .022. Sasman testified that she performed retrograde extrapolation on the blood test result to determine Adair's likely BAC at 12:04 p.m., which was the time police were dispatched. In making her calculations, Sasman assumed that all the alcohol Adair had consumed was fully absorbed at 12:04 p.m. and that Adair did not drink alcohol after 12:04 p.m. Sasman testified absorption time varies, but alcohol is typically absorbed within fifteen minutes to one hour. Sasman concluded that, depending on Adair's elimination rate, Adair's BAC was likely between .035 and .054 at 12:04 p.m. The State presented an exhibit showing Sasman's retrograde extrapolation calculations. Sasman acknowledged that if Adair had consumed alcohol at 11:45 a.m., shortly before Remus called the police and police were dispatched, her retrograde extrapolation would be incorrect.

The defense presented expert testimony from James Oehldrich, who agreed that retrograde extrapolation is only accurate if all the alcohol a person has consumed has been absorbed. Oehldrich testified that things such as smoking or eating a meal will slow absorption. Adair did not testify. The jury convicted Adair of operating with a prohibited BAC and felony bail jumping. He appeals.

On appeal, Adair argues the evidence presented at trial was insufficient to support the jury's determination that his BAC was greater than .02 when he operated a motor vehicle. When reviewing the sufficiency of the evidence, we "may not substitute [our] 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, 507, 451 N.W.2d 752 (1990). “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt,” we “may not overturn a verdict even if [we] believe[] that the trier of fact should not have found guilt based on the evidence before it.” *Id.*

We conclude the evidence presented at Adair’s trial is not “so lacking in probative value and force that it can be said as a matter of law that no reasonable trier of fact could have drawn the inference” that Adair’s BAC was greater than .02 when he drove to WCS. *See Poellinger*, 153 Wis. 2d at 509. The jury heard Adair was on bail at the time of this offense and that one of the conditions of bail was that he not use or possess alcohol. Remus had been monitoring Adair to ensure he complied with his bail conditions and at each appointment would give Adair a PBT. Adair arrived at WCS for his PBT between 11:34 and 11:44 a.m. Officers found no evidence that Adair had been drinking in his vehicle, and there was no evidence Adair consumed alcohol while at WCS. Adair had two PBTs at WCS and waited ten minutes in between each test. Sasman testified that it takes fifteen minutes to one hour for alcohol to be fully absorbed into the body. She concluded that, depending on Adair’s elimination rate, when police were dispatched at 12:04 p.m., Adair’s BAC was likely between .035 and .054.

Based on this evidence, the jury could have reasonably inferred that Adair drank alcohol sometime before driving to WCS for his PBT and that his BAC level was above .02 when he drove to WCS. The evidence presented at trial was sufficient to permit the jury to find Adair guilty of operating with a prohibited BAC beyond a reasonable doubt. *See id.*

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*