COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP736-CR **Cir. Ct. No. 2007CF138**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL P. CARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Reversed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Daniel Card appeals a judgment of conviction. He argues that the evidence was insufficient because the State proved that he

possessed Oxycontin, but did not prove that Oxycontin contains the prohibited substance oxycodone.[1] We agree that the evidence was insufficient. We reverse.

¶2 As germane to this appeal, Card was charged with one count of possession of a schedule II narcotic (oxycodone) without a prescription. The jury instruction stated these elements: (1) Card possessed a substance; (2) the substance was "Oxycodone"; and (3) Card knew or believed that the substance was a controlled substance. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶3 Card argues that, although there was trial evidence that he possessed Oxycontin, there was no evidence that Oxycontin contains oxycodone. The State appears to concede that there is no evidence in the record that directly makes that connection. However, the State offers several other arguments in response.

¶4 The State first argues that Card's attorney made a "judicial admission" during his opening statement. As argued by the State, a judicial admission is an express waiver, made in court by the party or the party's attorney, conceding for the purposes of trial the truth of some alleged fact, and it has the effect of a confessory pleading in that the fact is then taken as true, so that one party need offer no evidence to prove it and the other party is not allowed to

[1] In this opinion, we capitalize the brand name product Oxycontin, but do not capitalize the generic substance name oxycodone.

disprove it. *See* ***Fletcher v. Eagle River Mem'l Hosp., Inc.***, 156 Wis. 2d 165, 175, 456 N.W.2d 788 (1990).

¶5 The State focuses on this passage from defense counsel's opening statement:

> This case concerns the allegations – there is no dispute about this that they concern prescription drugs. The fancy name is controlled substances. Controlled by law are substances that you cannot have unless you have a valid prescription or some other legal reason to have the drug. Some prescription drugs, most of them, fall into that category. The two at issue here are the pain killers, oxycodone, which is the generic or the chemical name for it. It goes by Oxycontin. Percocet, you may know it as the, you know, the tradenames for it, and hydrocodone. Now, most hydrocodone has different commercial names, too, but the most common one is Vicodin. You will hear all of that. None of that is in dispute.

¶6 The State argues that this passage constituted a judicial admission that oxycodone is an ingredient in Oxycontin. We reject this argument for two reasons.

¶7 First, as the State recognizes, to be considered a judicial admission a statement must be "clear, deliberate, and unequivocal." *See* ***id.*** at 174. In other words, a judicial admission is something an attorney or litigant should do knowingly, not inadvertently. The statement by Card's attorney does not meet that description. The paragraph we quote above appears early in the opening statement, when counsel is putting forth the defense theory that Card was "set up" in a way to make it appear that he had possessed the pills in question. The attorney's statements can be read as describing what he expects the jury will hear from the State's witnesses ("You will hear all of that."). Card's attorney does not say words to the effect that the jury need not hear evidence on this topic because it

is conceded.[2] Further the statement is reasonably read as saying that, *when the State presents that evidence*, the defense will not dispute it at trial.

¶8 In keeping with the proposition that judicial admissions must intentionally be made as judicial admissions, the ***Fletcher*** court speaks in terms of giving counsel who makes the admission the "'opportunity ... to explain and qualify such statements ... before conclusive action is taken on'" them. ***Id.*** (citation omitted); *see also* ***City of Stoughton v. Thomasson Lumber Co.***, 2004 WI App 6, ¶26, 269 Wis. 2d 339, 675 N.W.2d 487 (Ct. App. 2003). Because neither party here apparently perceived that Card's attorney intended to make a judicial admission, his counsel was given no such opportunity.

¶9 Second, ***Fletcher*** does not contemplate that judicial admissions will be recognized as such for the first time on appeal. In ***Fletcher***, the court described the decision to accept a judicial admission as a discretionary one for the circuit court. As to the judicial admission, the ***Fletcher*** court wrote: "[W]e first address the question of whether the trial court exercised discretion in reaching the conclusion that the defendant ... had indeed made any admission that was binding, *i.e.*, did the trial court abuse its discretion in that respect." ***Fletcher***, 156 Wis. 2d at 174. The ***Fletcher*** court later wrote: "[B]oth parties may be substantially limited in their right to produce facts once the [circuit] court recognizes a judicial admission. Wigmore recognizes that whether to treat a statement or purported

[2] ***Fletcher v. Eagle River Memorial Hospital, Inc.***, 156 Wis. 2d 165, 456 N.W.2d 788 (1990), indicates that a judicial admission may preclude the presentation of evidence on the subject of the admission. The ***Fletcher*** court wrote: "A judicial admission is conclusive on the party making it. Once made it not only forecloses the admitter from contradicting the admission, but also *may foreclose the opposing party from offering additional supporting or explanatory evidence, for such evidence by reason of the admission is immaterial surplusage*." ***Id.*** at 177 (emphasis added).

concession as a judicial admission rests in the sound discretion of the [circuit] court." ***Id.*** at 177. Thus, it is clear that the ***Fletcher*** court assumed that circuit courts must first decide whether a judicial admission has occurred.

¶10 For these reasons, we conclude that Card did not make a judicial admission.

¶11 The State next argues that, due to the above statement by his attorney, Card should be judicially estopped from arguing on appeal that the evidence was not sufficient. As argued by the State, the elements of judicial estoppel are: (1) the later position of the party must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court (here, the circuit court) to adopt its position. *See* ***Salveson v. Douglas County***, 2001 WI 100, ¶38, 245 Wis. 2d 497, 630 N.W.2d 182.

¶12 As to the first element, the State's argument suffers the same flaw as its argument on judicial admission. Because Card's counsel did not clearly make a judicial admission, it is not now "clearly" inconsistent to argue that the State failed to present sufficient evidence on the topic.

¶13 As to the third element, we are unable to see in what sense Card "convinced the first court" to adopt his "position." The State does not point to any decision or action by the circuit court that evinced an adoption of the proposition that the State was relieved of proving that the pills contained oxycodone.

¶14 The State next argues that we should take judicial notice that Oxycontin contains oxycodone. Even if we were to do that, however, we are unable to see how that benefits the State. We are not the fact finder. Our function

is to review the decision made by the jury, and we do that based on the evidence and instructions before the jury at the time of its verdict. Judicial notice plays no role in that process.

¶15 The State's last argument is that, when this trial is considered as a whole and in light of common knowledge about oxycodone, it did present evidence sufficient to prove that Oxycontin contains oxycodone. This argument is actually a combination of several arguments that we will address in series.

¶16 We begin with the State's reliance on defense counsel's opening statement. According to the State, the jury could consider defense counsel's remarks that we have already quoted and discussed. This argument is meritless—in our search for sufficient evidence, we may not look to non-evidentiary opening statements. Indeed, the jury was properly instructed that remarks of counsel are not evidence.

¶17 We turn to the State's reliance on common knowledge. The jury was instructed that it could take into account "matters of your common knowledge and your observations and experience in the affairs of life." The State argues that we should consider it to be common knowledge that Oxycontin contains oxycodone. To support its argument, the State directs our attention to cases outside Wisconsin that have adopted the State's proposition and to various sources discussing the widespread presence of oxycodone in current American society.

¶18 To the extent the sources the State relies on support the view that it is common knowledge that Oxycontin is a narcotic painkiller that requires a prescription, makes people feel good, or has addictive potential, the support misses the mark. Obviously, people can use Oxycontin, abuse Oxycontin, or know others who use it, without ever knowing the name of the active ingredient. By analogy,

how many aspirin users know that acetylsalicylic acid is the active ingredient in that drug? The question here is whether it is common knowledge that oxycodone is an ingredient in Oxycontin.

¶19 Neither party has discussed Wisconsin cases in which something has been held to be, or not to be, of sufficient common knowledge that it may be assumed that jurors know the information. In our own non-exhaustive review of the case law, it appears that most recent discussions of "common knowledge" occur in discussing whether expert testimony is required. *See, e.g.*, ***Racine Cnty. v. Oracular Milwaukee, Inc.***, 2010 WI 25, ¶28, 323 Wis. 2d 682, 781 N.W.2d 88 ("[E]xpert testimony is not necessary to assist the trier of fact concerning matters of common knowledge or those within the realm of ordinary experience.").

¶20 However, we did find some examples in the context of sufficiency of the evidence. In deciding whether the evidence was sufficient to prove the defendant's knowledge of cocaine possession in a mainly empty vial, the Wisconsin Supreme Court held it to be common knowledge that "unless one takes extraordinary measures to remove the contents of a bottle after all usable amounts are gone, some of those contents will remain behind." ***Poellinger***, 153 Wis. 2d at 509. In a review for sufficiency of the evidence on use of a "dangerous weapon," we stated that it "is common knowledge that dogs can inflict severe injury and can be instructed to attack." ***State v. Sinks***, 168 Wis. 2d 245, 254, 483 N.W.2d 286 (Ct. App. 1992).

¶21 We conclude that, for something to be common knowledge, it must be known by a substantial proportion of the adults in the community, not just a knowledgeable minority. Most adults will know the truth of the above statements

about bottles and dogs from their own personal experience. However, we do not believe the same can be said about the pharmacological contents of Oxycontin.

¶22 We understand that this conclusion may be puzzling to some persons involved in the criminal justice system for whom it may be common knowledge that Oxycontin contains oxycodone. But the test is whether such knowledge is pervasive among the general public in the way that residue in bottles and biting dogs represent common knowledge. We have insufficient reason to believe that it is.

¶23 With defense counsel's statement and common knowledge out of the picture, we are left with just the two fragments of testimony that the State asks us to rely on in which oxycodone was briefly mentioned. We decline to describe these fragments and their context in detail. It is sufficient to say that they do not, either singly or in combination, provide sufficient evidence to prove that Oxycontin contains oxycodone, or that the pills in the bottle contained oxycodone.

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).