

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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 Nos. 2015AP612
2015AP613
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2013TR6816
2013TR6817**

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF EAU CLAIRE,

PLAINTIFF-RESPONDENT,

V.

SUSAN M. SANDAS,

DEFENDANT-APPELLANT.

APPEALS from a judgment of the circuit court for Eau Claire County: KRISTINA M. BOURGET, Judge. *Affirmed.*

¶1 STARK, P.J.¹ Susan Sandas appeals a judgment convicting her of first-offense operating while under the influence of an intoxicant or other drug

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

contrary to WIS. STAT. § 346.63(1)(a) and operating left of the center line contrary to WIS. STAT. § 346.05(1).² Sandas argues the County failed to present sufficient evidence to support the jury's verdicts. Sandas further argues the circuit court erred by failing to grant her pretrial motion to dismiss and posttrial motion for a judgment of acquittal notwithstanding the verdicts, and in allowing the witnesses, including Sandas, to testify regarding prescription medication that was not detected in Sandas' system. We conclude credible evidence was presented to sustain the jury's verdicts. We also conclude Sandas' remaining arguments are undeveloped and therefore decline to consider them further. Accordingly, we affirm the judgment.

BACKGROUND

¶2 Sandas was cited for operating while under the influence of an intoxicant or other drug and operating left of the center line. Sandas moved to dismiss both charges based upon "lack of reasonable grounds to arrest" and lack of probable cause to charge. The circuit court denied her motion in a written decision after an evidentiary hearing.

¶3 At the six-person jury trial, a citizen witness testified that he called 911 after observing a vehicle driving "very erratically." He explained the driver, later identified as Sandas, was "swerving hard to the right and then overcompensating by swerving left"; he believed the driver was "compromised in some way." The witness also stated he became especially worried when Sandas, on a series of blind hills, began "swerving right into the gravel shoulder of the

² These appeals were consolidated by an order dated April 13, 2015.

road and then swerving back left and overcompensating beyond the fog line or the centerline a couple of times on those blind hills.” According to the witness, Sandas’ erratic driving on the blind hills “could have easily resulted in a high-speed collision.” The witness also testified Sandas came “within mere inches of [a] curb while swerving right.” He indicated at the forty-five-mile-per-hour speed they were traveling, Sandas could have lost control of her vehicle if she hit the curb. The witness explained that he remained on the phone with the 911 operator as he followed Sandas for approximately twenty minutes and contemporaneously reported his observations to the operator. The 911 recording was played for the jury.

¶4 Patrol officer Timothy Porn testified he stopped Sandas after receiving information regarding a possibly impaired driver. Porn noticed Sandas had a “glazed look over her eyes as if perhaps she was impaired with something,” but he did not smell any alcohol. Porn testified he believed “there was an issue of some type of impairment other than fatigue.” Porn asked Sandas to step out of her vehicle, at which time he observed Sandas to be “unstable on her feet.” According to Porn, sheriff’s patrol deputy Dustin Walters took over the investigation because the initial observations took place outside the city limits.

¶5 Deputy Walters testified he noticed Sandas’ pupils were “very constricted,” which he explained was common in people who are potentially impaired by narcotics. He also stated that Sandas’ eyes were glazed over, “her speech was kinda slow and slurred,” and “she swayed back and forth and just seemed generally unsteady.” Sandas told him she had a prescription for narcotics but had not taken any that day and did not have the prescription with her. Sandas would not identify the medication by name. Walters further testified he asked Sandas to perform standard field sobriety tests, including the horizontal gaze

nystagmus (HGN), walk-and-turn, and one-leg stand tests. Walters observed signs of impairment during all three tests, including nystagmus (involuntary jerkiness of the eyes) during the HGN test. The squad video depicting Sandas' performance on the field sobriety tests was played for the jury.

¶6 William Johnson, a chemist supervisor with the toxicology section of the State Hygiene Laboratory, testified regarding the results of Sandas' blood sample taken after her arrest. According to Johnson, the sample did not contain alcohol, but it did contain Fluoxetine, its metabolite or breakdown product Norfluoxetine, and Oxycodone. Johnson indicated the levels of the drugs in Sandas' system were within the therapeutic range. Johnson further testified a person can be impaired for driving even when those drugs are within the therapeutic range. However, he could not state whether Sandas was impaired at the time of her driving based solely on the levels in her system.

¶7 The County called Sandas to testify adversely. Sandas stated she is prescribed Oxycodone and Fluoxetine, along with other medications that did not appear in the blood test. The County questioned Sandas, a nurse, regarding the effects of those drugs both when taken alone and in combination. Sandas objected to the County's questions regarding the other prescription medications, since those medications were not found in her system. Sandas also moved for a mistrial on the same grounds, arguing the County's questions regarding the other medications were "an attempt to poison the jury, to unduly influence the jury with evidence that's irrelevant, immaterial and only prejudicial." The court overruled Sandas' objections and denied her motion for a mistrial.

¶8 Sandas called her primary care provider, Dr. Richard Alfuth, to testify. Alfuth testified he did not have any evidence to indicate Sandas was

abusing prescription drugs. He also believed Sandas would be safe to operate a vehicle if she took the medication as prescribed. However, Alfuth acknowledged he did not have any contact with Sandas on the day she was arrested, and he never observed Sandas' driving. Alfuth further acknowledged Oxycodone and Fluoxetine could cause dizziness, confusion, and drowsiness.

¶9 Sandas also called as a witness Thomas Burr, a forensic scientist. Burr testified neither Fluoxetine nor Oxycodone could have caused the nystagmus observed during the field sobriety tests. Burr instead indicated it was his opinion that Sandas was not impaired by the drugs and that the nystagmus deputy Walters observed had been caused by fatigue.

¶10 The jury found Sandas guilty of operating a motor vehicle while under the influence of a drug and operating left of the center line. Sandas moved for a judgment of acquittal notwithstanding the verdicts and, in the alternative, for a new trial. Sandas argued the County did not meet its burden of proof, the testimony of Dr. Alfuth supported her position, and the prosecutor engaged in misconduct by "referencing other substances not involved with this case." The circuit court, in a written decision, denied Sandas' motion, and Sandas appeals.

DISCUSSION

¶11 Sandas first argues the evidence presented at trial was insufficient to support the jury's verdicts, and the verdicts should be set aside. We disagree. "Our review of a jury's verdict is narrow." See *Morden v. Continental AG*, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We will sustain a jury's verdict if there is any credible evidence in the record to support it, even if the evidence is contradicted and the contradictory evidence appears stronger and more convincing. *Id.*, ¶¶38-39.

¶12 Here, the record contains ample credible evidence to sustain the jury’s verdict finding Sandas guilty of operating under the influence of a drug. The County had to prove by clear, satisfactory, and convincing evidence that Sandas drove or operated a motor vehicle and did so while under the influence of a drug to a degree that rendered her incapable of safely driving. *See* WIS. STAT. §§ 346.63(1)(a), 800.08(3). The testimony at trial revealed Sandas was driving erratically, had glazed eyes, was unsteady on her feet, displayed signs of impairment during field sobriety tests, and tested positive for Oxycodone and Fluoxetine, which could cause impairment even at therapeutic levels. While Dr. Alfuth and Thomas Burr provided contradictory testimony, it is the role of the jury, not an appellate court, “to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *See State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

¶13 The record also contains credible evidence to sustain the jury’s verdict finding Sandas guilty of operating left of the center line. A citizen witness, who had never met Sandas, testified that Sandas crossed the center line on more than one occasion. The jury was entitled to believe the witness’s testimony. *See Morden*, 235 Wis. 2d 325, ¶39.

¶14 Sandas nevertheless argues the operating-left-of-center-line conviction should not be upheld without further eye witness corroboration by law enforcement. However, Sandas fails to cite any legal authority to support this claim, with the exception of citing generally to *Alabama v. White*, 496 U.S. 325 (1990), in her reply brief. Arguments raised for the first time in a reply brief will not be considered. *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). Moreover, Sandas fails to explain how *White*—a case that considered whether an anonymous telephone tip

exhibited sufficient indicia of reliability for officers to make an investigatory stop, *see White*, 496 U.S. at 326-27—supports her claim that further law enforcement corroboration was required for a conviction when the witness in this case was not an anonymous tipster and testified at trial. We consider this argument undeveloped and decline to consider it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶15 Sandas also contends the circuit court erred in failing to grant her pretrial motion to dismiss and posttrial motion for a judgment of acquittal notwithstanding the verdicts, and in allowing the witnesses to testify regarding prescription medications that were not detected in Sandas' system. These arguments are inadequately briefed. Sandas fails to provide citation to the record on appeal or legal authority and ignores our standard of review. She merely takes umbrage with the circuit court's rulings. We therefore decline to consider these arguments further. *See Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (“[W]e will not abandon our neutrality to develop arguments.” (citation omitted)); *Pettit*, 171 Wis. 2d at 646.

By the Court.—Judgment affirmed.

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

