OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

September 22, 2020

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Christopher P. August
Assistant State Public Defender
735 N. Water Street, Ste. 912
Milwaukee, WI 53202-4116

Nicholas DeSantis
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Elizabeth A. Longo
Assistant District Attorney
821 W. State St., Ste. 405
Milwaukee, WI 53233

You are hereby notified that the Court has entered the following opinion and order:

2019AP1826-CR State of Wisconsin v. Clifford Gregory Jackson, Jr.
(L.C. # 2016CF2220)

Before Dugan, Donald and White, 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).

Clifford Gregory Jackson, Jr., appeals a judgment entered after a bench trial in which the circuit court found him guilty of two felonies: (1) homicide by intoxicated use of a vehicle as a person with one or more prior convictions related to intoxicated use of a vehicle, *see* WIS. STAT.

§ 940.09(1)(a), (1c)(b) (2015-16);[1] and (2) causing the death of another person by operating a motor vehicle while his operating privileges were revoked, *see* WIS. STAT. § 343.44(1)(a), (2)(ag)3. Jackson claims that the evidence was insufficient to prove an essential element of both offenses, namely, that his operation of a vehicle was a substantial factor in causing the victim's death. 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 (2017-18). We summarily affirm.

The evidence presented at trial showed that, on May 4, 2016, at approximately 9:50 p.m., Jackson was driving a Hyundai sedan on North 35th Street in Milwaukee, where the speed limit is thirty miles per hour. He had two convictions for operating a motor vehicle while intoxicated, his operating privileges were revoked, he had a blood alcohol content of .287, and he was travelling at a speed of approximately sixty-four to sixty-six miles per hour. On the same date and at the same time, T.H. was driving a GMC sport utility vehicle at a speed of approximately fifteen to twenty miles per hour. She and Jackson both entered the intersection of North 35th Street and West Custer Avenue, where Jackson's sedan struck T.H.'s GMC with such force that T.H. was ejected from her vehicle. First responders found T.H. underneath a tree. They brought her to the hospital, where medical personnel determined that her injuries included bilateral femur fractures, a right distal radius fracture, a pelvic ring fracture, multiple rib fractures, a spinal fracture, a left hemothorax, a lacerated pancreas, a ruptured spleen, and bleeding on the brain.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

T.H. remained hospitalized for four months. She was discharged in September 2016, and returned to her home. In February 2017, she was admitted to hospice. Her medical records show that when she entered hospice, the attending physician provided a five-point assessment: "1. Multiorgan failure with liver and kidney being predominant[;] 2. GI bleeding probably due to portal hypertension and/or peptic ulcer disease[;] 3. Ulcerated pancolitis and primary sclerosing cholangitis[;] 4. Pain[;] 5. Motor vehicle accident with major abdominal organ surgery[.]" She passed away on February 25, 2017. Her final diagnoses reflect more than two dozen medical conditions.[2]

Dr. Brian Peterson, the Milwaukee County Medical Examiner, testified for the State after the parties stipulated that he was an expert in the field of forensic pathology. He told the circuit court that he did not conduct an autopsy but instead reviewed portions of T.H.'s medical records and an investigative report prepared by personnel in his office. Based on his review of that material, he concluded to a reasonable degree of medical certainty that the cause of T.H.'s death was multiple blunt force injuries resulting from the May 4, 2016 collision and that the collision was "a substantial factor in [T.H].'s death." Peterson said that he reached this conclusion because, according to the medical records, T.H. never returned to the same physical condition that she was in before the collision. He pointed specifically to her ongoing short term memory loss, inability to walk on her own, and inability to care for herself, disabilities that did not exist before the collision but that did exist afterwards and that persisted until her death. Peterson

[2] T.H.'s final diagnoses included: three types of sepsis; acute kidney failure; hepatic failure; urinary tract infection; liver transplant rejection; gastrointestinal hemorrhage; hypovolemic shock failure to thrive; anorexia; cachexia; malnutrition; cholangitis; ulcerative colitis; anemia; gastroesophageal reflux disease without esophagitis; bi-polar disorder; sickle cell trait; complete loss of teeth; history of other venous thrombosis and embolism; streptococcal infection; resistance to vancomycin; history of pulmonary embolism; history of healed traumatic fracture; and history of traumatic brain injury.

acknowledged that he could not identify the "specific physiological mechanisms" that were "at play" in her death, explaining that "we can't see that with autopsy." Rather, he explained that in "a typical accident case with some recovery," he determines cause of death by looking at the deceased's "condition before [the accident] and condition after." He testified that this analysis is standard practice in forensic pathology.

Jackson testified as the sole defense witness. He admitted that he was driving without a license, at an excessive speed, and with a prohibited blood alcohol content of .287 when he collided with T.H. on May 4, 2016.[3] He told the circuit court that he believed it should reject the State's theory that the collision was a substantial factor in causing T.H.'s death because the medical records showed that T.H. suffered from many serious medical conditions both before and after the collision. Jackson went on to say that he had retained a pathologist who disagreed with Peterson's conclusion about the cause of T.H.'s death but that the defense expert was not willing to testify at trial. From the witness stand, Jackson proposed entering the defense pathologist's report as evidence, but his trial counsel said that she would not agree to that proposal. The circuit court told the parties that it was willing to listen to testimony about the substance of the report, and defense counsel responded that she "would leave it to the State to describe the contents of that report." The State then advised that the report "comes down to [the defense expert] saying that the accident was part of the causation." Nonetheless, the State objected to the circuit court considering any information about the report, arguing that such

[3] Wisconsin law prohibits operating a motor vehicle with a blood alcohol concentration of .08 or greater. *See* WIS. STAT. § 340.01(46m)(a).

consideration was unfair to both parties because the expert was unavailable. The circuit court agreed with the State.

In closing argument, Jackson asked the circuit court to find him guilty of the lesser included offenses of causing great bodily harm by intoxicated use of a vehicle and causing great bodily harm while operating a motor vehicle with a revoked license. He emphasized that, according to the medical records, T.H. had "significant health problems" prior to the collision and was admitted to hospice with many medical conditions. He went on to argue that the State had offered "no proof ... that [those conditions] were related to the" incident of May 4, 2016. The circuit court rejected Jackson's theory of the case. Instead, the circuit court credited Peterson's testimony and found Jackson guilty as charged of homicide by intoxicated use of a vehicle while he had at least one prior conviction related to intoxicated use of a vehicle; and causing the death of another person by operating a motor vehicle while his operating privileges were revoked.[4] Jackson appeals, raising the single claim that the evidence was insufficient to prove that his conduct caused T.H.'s death.

Whether evidence presented at trial was sufficient to sustain a guilty verdict is a question of law that we review independently. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. Our review is "highly deferential." *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We may not substitute our judgment for that of the factfinder "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so

[4] Upon finding Jackson guilty of homicide by intoxicated use of a vehicle in violation of WIS. STAT. § 940.09(1)(a), the circuit court dismissed a charge of homicide while operating a vehicle with a prohibited alcohol content in violation of § 940.09(1)(b). *See* § 940.09(1m)(a)-(b); *see also* ***State v. Bohacheff***, 114 Wis. 2d 402, 413, 338 N.W.2d 466 (1983).

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). We must affirm a guilty verdict "[i]f 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," even if we believe that the trier of fact should not have found guilt based on the evidence presented. *See* ***id.*** We apply the same standard of review regardless of whether the trier of fact is a jury or the circuit court. *See* ***State v. Schulpius***, 2006 WI App 263, ¶11, 298 Wis. 2d 155, 726 N.W.2d 706.

The two crimes at issue here share a common element. The circuit court could not find Jackson guilty of either crime unless the State proved beyond a reasonable doubt that Jackson's operation of a vehicle caused T.H.'s death. *See* WIS JI—CRIMINAL 1185; WIS JI—CRIMINAL 2623A. "An actor causes death if his or her conduct is a 'substantial factor' in bringing about that result." ***State v. Neumann***, 2013 WI 58, ¶95, 348 Wis. 2d 455, 832 N.W.2d 560 (citation omitted). The parties agree that the foregoing definition of causation applies to both crimes. *See* WIS JI—CRIMINAL 1185 (stating that "'[c]ause' means that the defendant's operation of a vehicle was a substantial factor in producing the death" (footnote omitted)); WIS JI—CRIMINAL 2623A (stating that "'[c]ause' means that the defendant's act [of operating a vehicle] was a substantial factor in producing the ... death" (parenthesis omitted)). According to Jackson, however, the State failed to produce sufficient evidence to prove causation. We disagree.

The State presented testimony from Peterson, an expert in forensic pathology. He said that he reviewed T.H.'s medical records and the investigative report that his office staff prepared. He concluded that T.H.'s cause of death was blunt force injuries that she sustained in the

collision. He explained that he reached his conclusion because after the collision, T.H. never returned to the same physical condition she was in before the collision.

Jackson does not dispute that Peterson identified the collision as the cause of T.H.'s death. Instead, he contends that the medical records do not demonstrate the necessary causation. In support, he catalogues the conditions that, according to the medical records, afflicted T.H. at the time of her death, and he states that "the records do not establish a specific causal link between those conditions and the earlier accident." We are not persuaded that this argument demonstrates any deficiency in the evidence presented. The State's expert witness explained the link between the May 4, 2016 collision and T.H.'s death: specifically, T.H. never returned to the condition she was in before the collision. The testimony of a single expert is sufficient to support a verdict if the expert is not inherently or patently incredible. *See* ***State v. Lombard***, 2003 WI App 163, ¶¶20-22, 266 Wis. 2d 887, 669 N.W.2d 157.

Jackson next asserts that T.H.'s medical records undermine Peterson's testimony because they contain a "baffling array" of medical conditions that neither Peterson nor any other source tied directly to the May 4, 2016 collision. The weight to assign to a witness's testimony, however, rests with the factfinder. *See* ***Poellinger***, 153 Wis. 2d at 504. In the instant case, Peterson explained that when "drawing that line between the in[cident] and death," the standard practice in forensic pathology is to consider the deceased's pre-collision and post-collision functioning. The circuit court was free to believe the State's expert witness, to credit his description of the principles used in his field, and to give his opinions and conclusions the weight that the circuit court believed they deserved. *See* ***State v. Zanelli***, 223 Wis. 2d 545, 554, 589 N.W.2d 687 (Ct. App. 1998).

Jackson nonetheless argues that Peterson's testimony was "unpersuasive." In support, Jackson reminds us that Peterson acknowledged his inability to identify the precise physiological mechanism of death and thus did not explain, for example, whether T.H. suffered "a stroke or a heart attack." *Cf.* 98 Am. Jur. Proof of Facts 3d 87 § 31 (explaining that "'cause of death' is the disease or event that led to the decedent's fatal condition, whereas 'mechanism of death' defines the nature of the final moment of life"). The State responds that proof of the physiological mechanism of death is not required. As an analogous circumstance, the State asserts that a factfinder considering the alleged homicide of a shooting victim need not determine whether the mechanism of death was blood loss or a collapsed lung. Jackson does not disagree with the State "in the case of a shooting victim who dies shortly after being shot," but he argues that "[the mechanism of death] is a relevant consideration when considering a victim who was apparently discharged home and who was apparently not expected to die from her injuries." We see no legal basis for drawing such a distinction. The question before us is whether the State presented sufficient evidence to prove that Jackson's collision with T.H. was a substantial factor in her death. Peterson's testimony was sufficient to support that conclusion. *See* ***Lombard***, 266 Wis. 2d 887, ¶¶20-22. Jackson does not cite any authority, and we know of none, that requires the State also to identify the precise physiological occurrence that connected the fatal injuries T.H. received to the moment her heart ceased to pump.

Finally, we reject Jackson's argument that "available evidence suggests that [T.H.] was treated, recovered, and released" from the hospital, thus severing the connection between the collision on May 4, 2016, and T.H.'s death. When reviewing the sufficiency of evidence to support a conviction, "an appellate court need not concern itself in any way with evidence which might support other theories of the crime." *See* ***Poellinger***, 153 Wis. 2d at 507-08. Rather, we

"need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." ***Id.*** at 508. Peterson's testimony supported the State's theory and was sufficient to prove that the collision caused T.H.'s death. Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2017-18).

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

Sheila T. Reiff
Clerk of Court of Appeals