

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 11, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-2330-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTA BROJANAC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
MICHAEL O. BOHREN, Judge.¹ *Affirmed.*

¶1 ANDERSON, J.² Christa Brojanac appeals from an order denying her motion for a new trial on the charge of operating a motor vehicle while

¹ Judge Michael O. Bohren conducted the hearing on Brojanac's motion for a new trial and signed the order denying the motion. Judge Donald J. Hassin, Jr., presided over the jury trial and signed the judgment of conviction.

intoxicated, third offense. Brojanac claims that she is entitled to a new trial because newly discovered evidence of the temperature at General Mitchell International Airport in Milwaukee on the night of her arrest contradicts police officers' testimony of the temperature in Oconomowoc. We affirm since Brojanac has failed to establish by clear and convincing evidence that the newly discovered evidence created a reasonable probability of a different result if a new trial were conducted.

¶2 Brojanac was arrested for her third offense drunk driving during the early morning hours of November 6, 1997, by city of Oconomowoc police officers.³ She entered a not guilty plea and demanded a jury trial. After a one-day jury trial on July 13, 1999, she was found guilty. Her 120-day jail sentence was stayed pending appeal.

¶3 Officer Glen Welnak was on routine patrol in the early morning of November 6, 1997, and at approximately 1:00 a.m., he drove past Lorleberg True Value Hardware Store and did not observe any vehicle in the rear lot of the business. Roughly one hour later, he was dispatched to the same location to back up Officer Mark Schrang who had discovered a vehicle parked in Lorleberg's rear lot.

¶4 Schrang was doing building checks when, at approximately 2:00 a.m., he observed a suspicious vehicle in a well-lighted area, close to the loading

² This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

³ Brojanac was charged with one count of operating a motor vehicle while intoxicated, third offense, in violation of WIS. STAT. §§ 346.63(1)(a), 346.65(2) and 343.30(1q)(b), and operating with a prohibited blood alcohol concentration, third offense, in violation of §§ 346.63(1)(b), 346.65(2) and 343.30(1q)(b).

dock in the rear of the Lorleberg building. Schrang started to do a license plate check when he saw an individual behind the wheel of the car and called for assistance. While waiting for back-up, Schrang walked around the vehicle. He shined his flashlight into the vehicle and saw a woman behind the steering wheel with her head down, her dress pulled up, her pantyhose pulled down to her mid-thigh and her hand down by her crotch. Later, Schrang identified the female driver as Brojanac.

¶5 When Welnak arrived, he and Schrang assessed the situation. They did not observe any other person in the area. Schrang's assessment included the findings that the lights of the vehicle were off, the hood was cold to the touch and there was no condensation on any interior window. The lack of condensation was important to Schrang because the temperature that night was between zero and ten degrees and if the vehicle had been turned off for a lengthy period of time, in his experience, there would be condensation on the interior windows.

¶6 Schrang began to rap on the driver's window in an attempt to rouse the female driver. When the driver finally stirred, she attempted to operate the electric windows but was unable to do so because the car was not on. Schrang opened the driver's door and was greeted with the strong odor of intoxicants. Brojanac's speech was very slurred and she was very incoherent. In response to a question, Brojanac said she thought she was "in Waukesha and she was driving to Waukesha to pick up a friend." Brojanac acknowledged that she was the owner of the car and told Schrang that she was the driver of the car and no one else had been in the car with her.

¶7 Schrang's observations of the interior of the car confirmed Brojanac's statement that she was alone. The car had bucket seats in the front and

a rear bench seat. The officer saw numerous articles on the passenger's seat and the rear seat, including a briefcase, cups and "a lot of extra stuff." In his opinion, for anyone to have ridden in the passenger's seat, it would have had to be cleaned off.

¶8 Schrang directed Brojanac to get out of the vehicle. As she started to get out, "she realized the condition of her clothing and where her hand was. She asked me to step back." The officer stayed close for safety reasons but allowed Brojanac to "adjust herself." He testified, "As she was doing this she pulled a white coffee cup from her crotch area. At that time I had no idea what was in the cup." Welnak asked if there was an alcoholic beverage in the cup, and Brojanac said no, that it was coffee. Welnak asked her to hand him the cup and when she did not, he tried to grab the cup, she took a drink and made a grimace. From the smell of the liquid, Schrang was able to verify that it was urine.

¶9 Once Brojanac was outside of her car, she was very unsteady and had to be assisted to the rear of the car by Welnak. Based on the results of the field sobriety tests, Schrang arrested Brojanac for drunk driving. Brojanac was transported to a local hospital where, after being issued a citation and read the Informing the Accused form, she consented to a chemical test of her blood. While at the hospital, Brojanac never told Schrang that she was not the driver of the vehicle.

¶10 Brojanac testified on her own behalf. She testified that she started drinking champagne around 4:00 p.m. on November 5, 1997. Later that evening, she went with some friends to a reception at the Wisconsin Club. Because she had been drinking, she did not drive to the reception. She testified that at the reception, she drank beer and after awhile "I wanted to go home. I was drunk and

tired and I didn't want to be out anymore and I needed to go home.” Because plans she had made with friends did not pan out, she asked a man she had been talking to if he would give her a ride home. She thought that his name was John; she said that if he would give her a ride home, he could stay at her house for the evening and she would make sure that he got home in the morning.

¶11 To explain the mess that Schrang saw on the passenger's seat, Brojanac testified that on the trip to Oconomowoc from Milwaukee, she spilled the contents of her purse, including two cell phones, onto the floor while looking for cigarettes. According to Brojanac, John pulled into Lorleberg's parking lot at her direction and after “making out,” she put a stop to anything else and he stormed off. She testified that she got out of the car, kicked and yelled some profanities in his direction. Brojanac said that she then got into the driver's seat and thought better of driving herself home and fell asleep. In response to a question on cross-examination, Brojanac stated that the temperature outside was about twenty degrees, not the zero to ten degrees that Schrang estimated.

¶12 After conviction, Brojanac filed a motion for a new trial based on newly discovered evidence. Brojanac submitted the National Oceanic and Atmospheric Administration's climatological observations from General Mitchell International Airport for November 5 and 6, 1997, which listed the low temperature on November 5 as thirty-seven degrees and on November 6 as forty-five degrees. In the trial court, Brojanac argued that the new evidence that it was actually warmer than the officers' testimony was material. She contended that “[t]he temperature testimony played a vital role in the state's attempt to discredit the defendant's version of the events. Aside from using the temperature to explain why the car hood was cold, they argued that Ms. Brojanac could not have fallen asleep for a lengthy period of time, as she testified to.”

¶13 The trial court denied the motion, reasoning that Brojanac failed to establish by clear and convincing evidence that the temperature evidence was newly discovered evidence. Specifically, the court held that the temperature evidence was not material because the key issue at trial was Brojanac's credibility and the evidence was not material to her credibility. The court also concluded that it was not convinced that the newly discovered evidence would have brought about a different result. Brojanac appeals from this decision.

¶14 Before this court, Brojanac takes issue with the trial court's conclusion that the newly discovered evidence was not material and that it would not bring about a different result. She contends that the decision is not supported by the evidence and is an erroneous exercise of discretion. Brojanac asserts that the temperature evidence was material in three respects. "The state used it to prove the defendant's version of the events were physically impossible. The state also used it to argue that the defendant lacked credibility. Finally, the newly discovered evidence cast a large doubt as to the credibility of the state's only two witnesses."

¶15 A motion for a new trial is usually addressed to the sound discretion of the trial court. *State v. Kaster*, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). However, as in this case, when a judge who decided the motion did not preside at the jury trial, we start from scratch and examine the record de novo. *State v. Coogan*, 154 Wis. 2d 387, 395 n.1, 453 N.W.2d 186 (Ct. App. 1990). We may only grant a new trial based on newly discovered evidence when all of the following requirements are met:

- (1) [T]he evidence came to the moving party's knowledge after the trial;
- (2) the moving party has not been negligent in seeking to discover it;
- (3) the evidence is material to the issue;
- (4) the evidence is not merely cumulative to that

which was introduced at trial; and (5) it is reasonably probable that a new trial will reach a different result.

Kaster, 148 Wis. 2d at 801 (citation omitted). The defendant bears the burden of proving by clear and convincing evidence that each of the requirements has been met. **State v. Brunton**, 203 Wis. 2d 195, 207, 552 N.W.2d 452 (Ct. App. 1996). If the newly discovered evidence fails to satisfy any one of the five requirements, it is not sufficient to warrant a new trial. **Kaster**, 148 Wis. 2d at 801.

¶16 Brojanac's entire argument is that the newly discovered temperature evidence is material to credibility. Either it debunks the State's attempt to attack her credibility or it creates a question of the officers' credibility. Evidence which would have an impact on the credibility of a witness is not by itself a basis for a new trial due to newly discovered evidence. **Simos v. State**, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972); **State v. Kimpel**, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989). The material issue is whether Brojanac was the driver of the car. The temperature evidence does not shed any light on whether John or Brojanac was the driver.

¶17 Brojanac is obligated to establish by clear and convincing evidence that the newly discovered evidence created a reasonable probability that the outcome would be different on retrial. **State v. Avery**, 213 Wis. 2d 228, 240-41, 570 N.W.2d 573 (Ct. App. 1997). In other words, if there is a reasonable probability that a jury would harbor a reasonable doubt as to guilt, it follows that there is a reasonable probability of a different result. **Id.** at n.1. Therefore, in assessing the question of a reasonable doubt as to whether Brojanac was operating the vehicle while intoxicated, we have to consider whether the newly discovered temperature evidence excludes Brojanac as the operator.

¶18 The overwhelming evidence, detailed above, does not lead to the conclusion that Brojanac was not the operator. In summary, she was found passed out in the driver's seat of a vehicle in an area free of vehicles just an hour earlier. She had no idea what time she left Milwaukee. She claims to have asked a stranger, whose name she thinks was John, to drive her from Milwaukee to Oconomowoc. But, at the time of her arrest, she admitted to being the driver and to having no one else with her in the car. At no time during her period in custody did she protest that she was not the driver. Although her version of events—she and John were “making out” in the car—might explain why her pantyhose were pulled down mid-thigh and her dress was pulled up, it does not explain why, when she attempted to get out of her car, she had her hand in her crotch holding a coffee cup filled with urine.

¶19 We affirm the trial court's denial of Brojanac's motion for a new trial. The evidence of the temperature at General Mitchell is not material to the issue of whether she was the operator. And, there is no reasonable probability that a new trial would reach a different result.

By the Court.—Order affirmed.

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

