STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2548-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS M. ROCHA-MAYO,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF KENOSHA COUNTY, THE HONORABLE WILBUR W. WARREN, III., PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This court has already scheduled oral argument in this case. The State assumes this court's opinion will be published, pursuant to customary practice.

SUPPLEMENTAL STATEMENT OF FACTS

The State will present facts relevant to the legal issues in the argument sections of its brief. Rocha-Mayo's statement of facts consists largely of facts about the criminal incident itself, from the viewpoint most favorable to him. Because the criminal incident facts are not directly pertinent to the legal issues, the State will not present a counter statement of criminal incident facts. By declining to do so, the State does not in any way intend to agree with Rocha-Mayo's partisan presentation of the facts. The evidence presented, viewed in the light most

favorable to the State as it must be after conviction, was sufficient to prove Rocha-Mayo guilty beyond a reasonable doubt, and he does not contend otherwise on appeal.

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED THE RESULT OF A BREATH ALCOHOL TEST ADMINISTERED BY HOSPITAL EMERGENCY ROOM STAFF FOR PURPOSES OF TREATMENT AND DIAGNOSIS.

A. The Result Of A Breath Alcohol Test Administered By Hospital Emergency Room Staff For Purposes Of Treatment And Diagnosis Was Admissible Under Wisconsin's General Evidentiary Rules.

Prior to trial, Rocha-Mayo moved to suppress the result of a breath alcohol test given to him by medical staff at the hospital emergency room where he had been taken by ambulance for treatment of the injuries he sustained in the collision between his car and a motorcycle, which resulted in the death of the motorcyclist (35). Rocha-Mayo argued the admission of the result of the test given to him is prohibited by specific language in Wis. Stat. § 343.303, and because the result of such a test is unreliable (35:1-2; 124:4-12; 126:16-26).

After hearing extensive evidence on the matter, the trial court denied the motion to suppress (126:28-38). At the evidentiary hearing, the State presented uncontradicted and undisputed evidence that after the fatal crash, Rocha-Mayo arrived at the hospital emergency room by ambulance, strapped to a backboard, with swollen lips and blood on his face; he was confused and emitted an

obvious odor of alcohol (125:8-10, 16). The emergency room doctor, Dr. Falco, ordered the emergency room nurse, Steven Edwards, to do a breath alcohol test to try to determine whether Rocha-Mayo's confusion was caused by a head injury or alcohol (125:10). It was undisputed that the breath alcohol test was not done at the request of law enforcement. Indeed no law enforcement officers were present at the emergency room when the test was done (125:26). It was undisputed that the breath alcohol test was administered by medical staff in this case solely for the purposes of treatment and diagnosis (125:22-26).

Generally, a trial court's decision to admit or exclude evidence at trial is within the discretion of the trial court. The trial court's decision will be upheld on appeal unless there is a clear showing of an erroneous exercise of discretion. *State v. Doss*, 2008 WI 93, ¶ 19, 312 Wis. 2d 570, 754 N.W.2d 150. An erroneous exercise of discretion occurs if the trial court's decision was based on an error of law. *State v. Davis*, 2001 WI 136, ¶ 28, 248 Wis. 2d 986, 637 N.W.2d 62.

In Wisconsin, the admissibility of scientific evidence is not conditioned on its reliability. Rather, scientific evidence is admissible if it is relevant, the witness is qualified as an expert and the evidence will assist the trier of fact in determining an issue of fact. *State v. Peters*, 192 Wis. 2d 674, 687-88, 534 N.W.2d 867 (Ct. App. 1995). Questions of weight and reliability of relevant evidence are matters for the trier of fact. *State v. Fischer*, 2010 WI 6, ¶ 7, 322 Wis. 2d 265, 778 N.W.2d 629.[1]

[1] Rocha-Mayo's crimes occurred on June 12, 2008; he was charged by criminal complaint on June 23, 2008, and was tried beginning on July 26, 2010 (1; 131). Wisconsin Stat. § 907.02 was amended in 2011 to create a *Daubert* type of admissibility standard. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The amendment applies to actions commenced on or after February 1, 2011, and thus it does not apply to the evidence presented in Rocha-Mayo's case. Even if it did, given the extensive expert testimony presented by the State, that standard would have been met.

Rocha-Mayo does not claim, and has never claimed, that the medical breath alcohol test result presented in his case was inadmissible under the Wisconsin relevancy standard applicable to his case.

Rather, his contention is that even though the medical breath alcohol test result would otherwise be admissible under Wisconsin's general evidentiary rules, it was rendered inadmissible solely because it would not have been admissible if the breath alcohol test had been administered by a law enforcement officer for the purpose of determining probable cause to arrest under Wis. Stat. § 343.303 and it would not have been admissible under Wisconsin's implied consent law if it had been administered by or at the direction of a law enforcement officer for law enforcement purposes. In the following sections of this brief, the State will demonstrate why this court must reject Rocha-Mayo's view that otherwise relevant, admissible evidence was rendered inadmissible by statutory provisions that do not apply to the medical breath alcohol test result in his case.

B. Wisconsin Stat. § 343.303 Does Not Apply To The Result Of A Breath Alcohol Test Administered By Hospital Emergency Room Staff For Purposes Of Treatment And Diagnosis.

In the court of appeals, Rocha-Mayo argued that the trial court committed an error of law by admitting the breath alcohol test result in his case because Wis. Stat. § 343.303 specifically bars the admission of the evidence. The court of appeals rejected this argument. Pet-Ap. B2-B6. Rocha-Mayo does not directly contend that the court of appeals erred in finding the statute inapplicable to the breath test administered by the hospital emergency room staff for purposes of treatment and diagnosis.

To the extent Rocha-Mayo is still claiming that the test result was inadmissible based on the language of § 343.303, this court must reject that claim. This claim involves an issue of statutory interpretation. Issues of statutory interpretation are reviewed de novo by this court. *Doss*, 312 Wis. 2d 570, ¶ 20; *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 44-51, 271 Wis. 2d 633, 681 N.W.2d 110.

Interpretation of a statute begins with the language of the statute, because the legislature expresses its intent in the words it uses. The language of the statute is interpreted in the context in which it is used, rather than in isolation. When the meaning is plain from the language of the statute, the court generally inquires no further. *Robin K. v. Lamanda M.*, 2006 WI 68, ¶ 13, 291 Wis. 2d 333, 718 N.W.2d 38.

Wisconsin Stat. § 343.303, in its entirety, as it must be read, provides:

> Preliminary breath screening test. If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63(7) or a local ordinance in conformity therewith, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63(2) or (6), 940.09(1) or 940.25 and

> whether or not to require or request chemical tests as authorized under s. 343.305(3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove, that a chemical test was properly required or requested of a person under s. 343.305(3). Following the screening test, additional tests may be required or requested of the driver under s. 343.305(3). The general penalty provision under s. 939.61(1) does not apply to a refusal to take a preliminary breath screening test.

Wis. Stat. § 343.303.

The entire statute, from the beginning words "If a law enforcement officer has probable cause" through the end, deals exclusively with preliminary breath alcohol screening tests performed by law enforcement officers for the purpose of establishing whether probable cause to arrest an individual for a motor vehicle intoxication offense exists, and whether to require or request chemical tests under the implied consent law, Wis. Stat. § 343.305. On its face and plain words, Wis. Stat. § 343.303 has no applicability to any breath alcohol test except a preliminary breath alcohol screening test performed by a law enforcement officer for those purposes.

As his basis for arguing the result of the hospital emergency room breath alcohol test is inadmissible under the language of the statute, Rocha-Mayo relies solely on one sentence in the statute: "The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3)." Wis. Stat. § 343.303.

Rocha-Mayo reads this sentence in isolation from the rest of the statute, which is an invalid method of statutory interpretation. *Doss*, 312 Wis. 2d 570, ¶ 30; *Robin K.*, 291 Wis. 2d 333, ¶ 13. Moreover, even the words of his selective sentence do not support his

argument. The sentence does not say that the results of a "portable breath alcohol test," which was the type of test administered to Rocha-Mayo, are inadmissible at the trial of a motor vehicle intoxication offense. The sentence does not say that all "preliminary breath alcohol tests" are inadmissible at the trial of a motor vehicle alcohol offense. Rather, the sentence says, "The result of the preliminary breath screening test shall not be admissible . . . ." Wis. Stat. § 343.303. "The preliminary breath screening test" is obviously the preliminary breath screening test referred to in the previous sentences of the statute: the preliminary breath screening test administered by a law enforcement officer for the purpose of determining whether probable cause to arrest for a motor vehicle intoxication offense exists and whether to invoke the implied consent statute. Neither the sentence nor the statute applies to any other breath alcohol test except law enforcement preliminary breath screening tests.

The context and subject matter of the entire statute, as well as the express language of the statute, make it clear the legislature intended the statutory bar to apply only to preliminary breath alcohol screening tests administered by, or at the request of, law enforcement officers for law enforcement purposes relating to motor vehicle intoxication offenses.

The result of the breath alcohol test administered to Rocha-Mayo by hospital emergency room staff for purposes of treatment and diagnosis simply does not fall within the purview of § 343.303. The plain language of the statute requires this court to hold that the statute does not apply to bar the result of the treatment and diagnostic breath alcohol test administered to Rocha-Mayo by the hospital emergency room staff. Accordingly, this court must reject Rocha-Mayo's assertion that the language of § 343.303 prohibited the admission of the breath alcohol test result in his case.

C. The Result Of A Breath Alcohol Test Performed By Hospital Emergency Room Staff For Purposes Of Treatment And Diagnosis Is Not Inadmissible On The Ground That It Would Not Qualify For Admissibility Under The Implied Consent Law.

Under Wisconsin's implied consent law, Wis. Stat. § 343.305, and related Department of Transportation Administrative Code provisions, only the results of breath alcohol tests performed by certain devices and administered pursuant to certain requirements are automatically admissible in evidence to prove vehicular alcohol offenses. If the provisions of the statute are followed, the results of such tests are admissible without expert testimony regarding the scientific accuracy and reliability of the testing device. *State v. Dwinell*, 119 Wis. 2d 305, 310, 349 N.W.2d 739 (Ct. App. 1984).

Even in the implied consent law context, however, the failure to comply with statutory mandates does not render the result of a test inadmissible. It merely deprives the State of the benefit of automatic admissibility, and requires the State to present expert testimony as a prerequisite to admissibility. *See State v. Zielke*, 137 Wis. 2d 39, 51, 54, 403 N.W.2d 427 (1987). The purpose of the administrative code provisions on breath alcohol tests is to assure the results have sufficient accuracy to warrant admitting them into evidence without requiring the State to present expert testimony on the accuracy of the testing device. *County of Dane v. Winsand*, 2004 WI App 86, ¶ 7, 271 Wis. 2d 786, 679 N.W.2d 885. Even in the implied consent context, however, failure to fully comply with the administrative requirements goes only to the weight, not the admissibility, of the test results. *City of Berlin v. Wertz*, 105 Wis. 2d 670, 677, 314 N.W.2d 911 (Ct. App. 1981).

If failure to fully comply with the implied consent law and administrative code provisions is not fatal to admissibility even when a test is administered under the implied consent law, then such failure is surely not fatal when the test is not administered under the implied consent law.

The requirements of the implied consent law are simply irrelevant in this case, because the implied consent law does not apply to a breath alcohol test that is not given by law enforcement or at the request of law enforcement for law enforcement purposes in the investigation and prosecution of a motor vehicle intoxication offense. It is undisputed that the breath alcohol test administered to Rocha-Mayo by the hospital emergency room staff was administered solely for diagnostic and treatment purposes, and was not administered at the request of law enforcement or for law enforcement purposes.

The testing device and test administered to Rocha-Mayo by the hospital emergency room staff for diagnostic and treatment purposes did not meet the statutory and administrative code requirements under the implied consent statute. However, that does not render Rocha-Mayo's test result inadmissible. The breath alcohol test was not administered to Rocha-Mayo by the police or at the request of the police under the implied consent statute. It was administered by a non-law enforcement entity, the hospital emergency room staff, for the non-law enforcement purposes of diagnosis and treatment.

Significantly, in this case, the State did not seek the benefit of automatic admissibility that is afforded to tests given under the implied consent law. Rather, the State presented extensive expert testimony both at the suppression hearing and at trial, regarding the scientific reliability and accuracy of the testing device and test performed in this case (124; 125; 134:101-86, 204-09). The defense countered with its own expert at trial who criticized the test performed by the hospital staff and the testing device used (135:103-46).

The trial court had more than sufficient information upon which to determine the testing device and procedures used by the emergency room staff were sufficiently accurate and reliable to make the test result relevant, and therefore, admissible as evidence. The jury had more than sufficient evidence to determine how much weight, if any, to give to the test result.

The requirements for a test under the implied consent statute are simply not applicable here. This court must reject Rocha-Mayo's contention that because his test result would not have been admissible under the implied consent statute, it was not admissible at all. Other jurisdictions that have considered similar claims have rejected them.

In *State v. Hunter*, 410 S.E.2d 242 (S.C. 1991), the South Carolina Supreme Court held that a blood alcohol test taken at the hospital for the purposes of diagnosis and treatment at the direction of the defendant's treating physician was properly admitted even though the requirements of the implied consent law were not met. The court explained that the test, which was conducted for diagnosis and treatment purposes, was not based on the implied consent law, and the requirements of the implied consent law were irrelevant.

In *State v. Newill*, 946 P.2d 134, 136-37 (Mont. 1997), the court held that the requirements of the implied consent law do not apply to a blood alcohol test taken at the hospital for diagnostic and treatment purposes. The court held that the result of a blood alcohol test taken for diagnostic and treatment purposes, which is otherwise admissible, is not rendered inadmissible because the provisions of the implied consent law were not met. The court specifically held that the fact that the state "legislature has imposed specific requirements for the taking of blood samples at the request of law enforcement, does not mean blood samples drawn for medical reasons must comply with the same criteria or be excluded as evidence." *Newill*, 946 P.2d at 136.

In *State ex rel. Allen v. Bedell*, 454 S.E.2d 77 (W. Va. 1994), the court held that the requirements of the implied consent law do not apply to a blood alcohol test taken for treatment and diagnostic purposes. The court concluded that the legislature's specific provisions for tests taken at the direction of law enforcement does not indicate the legislature intended to disallow blood test results obtained by medical personnel in the course of medical treatment and diagnosis. *Allen*, 454 S.E.2d at 79.

Even though these cases involved blood alcohol tests, their logic and rationale are equally applicable to breath alcohol tests taken by medical personnel for the purposes of diagnosis and treatment.

The legislature enacted specific statutory provisions, and granted authority for promulgation of administrative code procedures and requirements, regulating the procurement, testing and use of breath alcohol tests under the implied consent law, so that test results obtained in compliance therewith would be automatically admissible without the prosecution having to present expert testimony to establish the reliability of the testing device in each and every motor vehicle intoxication offense prosecution. Rocha-Mayo's reliance on the statutory and administrative code provisions of the implied consent law is misplaced because his breath alcohol test was not procured under the implied consent statute. His test was given by emergency room staff, for medical diagnosis and treatment purposes. Ample expert testimony was presented regarding the reliability of the testing device used, and the accuracy and reliability of the specific test administered by the emergency room nurse, to permit the result of the test to be admitted as relevant evidence.

There is no basis to believe that by enacting the implied consent provisions, the legislature intended to prohibit the result of a test administered by medical personnel for diagnostic and treatment purposes, that is admissible as relevant scientific evidence.

Rocha-Mayo's argument is analogous to an argument that the result of a blood alcohol test administered by hospital staff solely for the purposes of diagnosis and treatment, which is admissible under evidentiary law, is rendered inadmissible on the ground that if it had been administered by or at the direction of law enforcement, it would have been inadmissible under the Fourth Amendment because the defendant was not under arrest and probable cause was not established. This court rejected such an argument in *State v. Jenkins*, 80 Wis. 2d 426, 259 N.W.2d 109 (1977). Similarly, here, a breath alcohol test administered for medical diagnosis and treatment purposes is not inadmissible on the ground that the same test conducted by law enforcement for law enforcement purposes in investigating and prosecuting a motor vehicle intoxication offense would be inadmissible. Moreover, the fact that the emergency room doctor later testified to the test result at trial for homicide by intoxicated use of a motor vehicle does not convert the test taken for diagnostic and treatment purposes into a test taken by or at the direction of law enforcement under the implied consent law. *See Jenkins*, 80 Wis. 2d at 433-34 (the fact a doctor later testifies to test results at homicide trial does not convert test taken for diagnostic and treatment purposes into a government search and seizure).

For all of these reasons, this court must reject Rocha-Mayo's argument that the result of the breath alcohol test performed by the hospital emergency room staff for treatment and diagnostic purposes is not admissible because it would not qualify for admissibility under the implied consent law.

This court must also reject Rocha-Mayo's contention that the result of his test is inadmissible because his test was qualitative rather than quantitative. His argument is based on the characterization of certain types of test instruments as qualitative or quantitative in the administrative code provisions applicable to tests taken under the implied consent law. As demonstrated above, however, the implied consent law has no

applicability to a test administered by medical personnel for diagnostic and treatment purposes, and not at the direction or request of law enforcement. The facts in this case demonstrate that the breath alcohol test administered to Rocha-Mayo by the emergency room nurse was not qualitative rather than quantitative.

Macquorn Rankin Forrester, the CEO of Intoximeters, Inc., which designs and manufactures breath alcohol testing equipment, testified at the suppression hearing and at trial. He testified about the Alco-Sensor IV (the device used in the instant case) and the EC/IR (the device approved by the Wisconsin DOT for evidential purposes under the implied consent statute) (124:19-35). Both testing devices quantify the result (124:29). Forrester explained that the part of the device that does the quantification of the results is identical in the Alco-Sensor IV and the EC/IR (124:29). The primary difference between the devices is the difference in how they monitor breath flow. The EC/IR has the capacity to monitor the breath sample as it is blown into the machine, whereas the Alco-Sensor IV depends on a flow and volume measurement (124:30). He further explained that if the same sample was provided to both machines they would give the same result within an acceptable margin because they both use the same analysis technique (124:31).

The emergency room nurse who administered the test to Rocha-Mayo testified that for diagnostic and treatment purposes, the medical staff does not rely on their alcohol breath test device only to show the presence or absence of alcohol. Rather, the quantity of alcohol revealed by the test is important because the quantity produced in the test result would determine what the medical staff would do in terms of treatment (125:23-25). The level of alcohol content revealed by the breath alcohol test does make a difference in diagnosis and treatment (125:26).

Significantly, there is no evidence in this record that the breath alcohol test device used by the emergency

room nurse is incapable of giving a quantitative result. There is no evidence in this record that the breath alcohol test device used in this case tests only for the presence of alcohol, rather than the quantity of alcohol.

For all of these reasons, this court must reject Rocha-Mayo's unsupported assertion that the result of his breath alcohol test is inadmissible because it was a qualitative rather than a quantitative test.

D. The Result Of A Breath Alcohol Test Performed By The Hospital Emergency Room Staff For Purposes Of Treatment And Diagnosis Is Not Inadmissible On The Ground That The Test Lacks Sufficient Reliability To Be Considered By A Jury In Determining Guilt Or Innocence In A Motor Vehicle Intoxication Offense Prosecution.

This court must also reject Rocha-Mayo's assertion that the breath alcohol test administered in his case lacks sufficient reliability to be considered by the jury in determining guilt or innocence in a motor vehicle intoxication offense prosecution.

The Wisconsin Supreme Court specifically rejected such a proposition in *State v. Fischer*, 2010 WI 6, ¶ 34, 322 Wis. 2d 265, 778 N.W.2d 629, which involved a preliminary breath alcohol test administered by law enforcement under § 343.303. Although Rocha-Mayo's breath alcohol test was not given by law enforcement under § 343.303, the emergency room staff used the same type of testing device used by law enforcement in giving preliminary breath alcohol tests in Wisconsin. The *Fischer* court's rejection of the notion that such test results are unreliable as a matter of law is applicable here.

In *State v. Doerr*, 229 Wis. 2d 616, 622, 599 N.W.2d 897 (Ct. App. 1999), and *State v. Beaver*, 181 Wis. 2d 959, 970 & n.5, 512 N.W.2d 254 (Ct. App. 1994), preliminary breath alcohol test results were held admissible in non-motor vehicle intoxication cases. This court recognized in *Fischer* that if this type of test were unreliable, it would not have been held admissible in prosecutions for non-vehicular offenses, and yet such test results have been held admissible. *Fischer*, 322 Wis. 2d 265, ¶ 7. Moreover, the court explained that if such test results were unreliable, they would not be a reliable basis for establishing probable cause to arrest, and yet it is used for that purpose hundreds of times every day in Wisconsin. *Fischer*, 322 Wis. 2d 265, ¶ 34.

This court further stated: "In fact, a review of the legislative history of Wis. Stat. § 343.303 gives no indication whatsoever that the prohibition on the use of PBT results is rooted in concerns about reliability of the test." *Fischer*, 322 Wis. 2d 265, ¶ 34 (footnote omitted). Rocha-Mayo downplays this, asserting that this court did not actually reject the argument that PBT results are unreliable. His constricted reading of this court's decision in *Fischer* must be rejected.

In *Fischer v. Ozaukee County Circuit Court*, 741 F. Supp. 2d 944 (E.D. Wis. 2010), the federal habeas court recognized that in *Fischer*, this court squarely rejected the argument that preliminary breath alcohol test results are too unreliable to be admissible on the issue of guilt or innocence in a motor vehicle intoxication offense prosecution. The federal court stated that the majority decision of this court in *Fischer* expressly rejected the argument that concerns about reliability render preliminary breath test results inadmissible in all circumstances in motor vehicle intoxication offense cases. *Fischer*, 741 F. Supp. 2d at 953. The federal court further stated that "the Wisconsin Supreme Court has expressly rejected the suggestion that PBT results are inherently unreliable." *Fischer*, 741 F. Supp. 2d at 957. A lower federal court decision is not binding precedent on

Wisconsin courts.[2] The lower federal court decision in *Fischer*, however, persuasively demonstrates that this court's decision in *Fischer* rejected the argument that the type of breath alcohol test administered here is inherently unreliable such that it cannot be admitted on the issue of guilt or innocence in a motor vehicle intoxication offense case.

Rocha-Mayo largely ignores this court's decision in *Fischer*, and relies instead on the court of appeals decision, and the concurring opinion in this court, which did view PBT results as unreliable as a matter of law. The majority in this court, however, specifically declined to endorse the view that preliminary breath alcohol tests are inadmissible because they are unreliable as a matter of law. The majority explained:

> We have taken a different approach than the one taken by both the circuit court and the court of appeals in their decisions to exclude the evidence. The question of whether PBT results are adequately reliable figured in the analysis of each of those courts in several respects, and the question of reliability was also raised by the State as a reason to exclude expert evidence based on PBT results. The accuracy of this type of test may be subject to dispute, but Wisconsin courts have nevertheless upheld its admission for purposes other than those prohibited by Wis. Stat. § 343.303. There is no basis for speculating that the reason the legislature prohibited the evidentiary use of a test that is used hundreds of times every day in Wisconsin is that it is "of dubious reliability even under the best testing conditions," as the State argued in its brief. In fact, a review of the legislative history of Wis. Stat. § 343.303 gives no indication whatsoever that the prohibition on the use of PBT results is rooted in concerns about reliability of the test. If the PBT's reliability were of such concern, it would be a small thing for any competent defense attorney to attack the reliability of PBT results and thereby limit the

[2] *State v. Webster*, 114 Wis. 2d 418, 426 n.4, 338 N.W.2d 474 (1983).

> value to the prosecution of such evidence. Saying that PBT results are not admissible is not the same thing as saying they are not reliable. Wisconsin's tradition of leaving the weight and credibility of the evidence to the trier of fact, which continues to be the law, cannot be squared with an analysis that excludes evidence on the basis of its lack of reliability.

Fischer, 322 Wis. 2d 265, ¶ 34 (footnotes omitted).

After this court's decision in *Fischer*, the rationale of the court of appeals decision should not be viewed as having any persuasive or precedential value. The concurring opinion in *Fischer* is not controlling.

In any event, the court of appeals decision and concurrence in *Fischer* are understandable based on the record in that case. In that case, the State argued the PBT result was unreliable. The defense offered no expert testimony to establish reliability of the testing device. In Rocha-Mayo's case, in contrast, extensive expert testimony on reliability was provided at both the suppression hearing as a prerequisite to admissibility, and at trial, to enable the jury to determine what weight, if any, to give to the result of the breath alcohol test given by hospital emergency room staff for purposes of diagnosis and treatment.

The trial court heard extensive expert testimony regarding the reliability of the particular breath alcohol test administered to Rocha-Mayo by the hospital emergency room staff for diagnostic and treatment purposes. At the suppression hearing, Macquorn Rankin Forrester, the Chief Executive Officer (CEO) of the company that designs and manufactures the alcohol breath testing equipment at issue, testified. The Alco-Sensor IV, the alcohol breath testing device used in the instant case, is used in Wisconsin by law enforcement as a preliminary breath test device (124:23). It is on the approved test list for the federal Department of Transportation and other states use it that way (124:23). It is the primary device used for work-place testing (124:25).

The Alco-Sensor IV is the analytical part of the device; when combined with a printer it is called the RBT IV, which stores the information and produces a hard copy of the test result (124:22-25). In Wisconsin, the EC/IR is the device that is approved by the State DOT for evidential use pursuant to the implied consent law (124:20-21). The fuel cell sampling system, which is the part that does the quantification of the results and the math used to interpret the output of the sensor, is identical in both devices and the test results of both devices shows good consistency between them (124:29). If one provided the same sample to both machines, it would give the same result within an acceptable margin because both use the same analysis technique (124:31). The accuracy check log for the particular device the hospital emergency room staff used in this case showed that successful accuracy checks on the device had been conducted. Based on the accuracy check logs, Forrester opined that the machine was operating very consistently so that the results obtained between the relevant accuracy check dates would be expected to be accurate and reliable (124:41).

The primary difference between the EC/IR and the Alco-Sensor IV is that the EC/IR has an infrared sensor that is capable of doing a real time monitor of the breath sample as it is blown into the instrument, to indicate whether you are getting a deep lung sample. The Alco-Sensor IV uses just a flow and volume measurement (124:30-31). However, the Alco-Sensor IV does have a minimum volume requirement that is sufficient to get most people to a concentration near the end of their deep lung capacity (124:46). If the Alco-Sensor IV is attached to a printer, it will force the operator to do a two-test sequence. A two-test sequence can be done on the Alco-Sensor IV, but the device will not require it (124:52-53). A one-test or two-test sequence will not change the result and a one-test sequence does not mean the result is inaccurate (124:57).

Susan Hackworthy, the chief of the chemical test section of the Wisconsin Department of Transportation,

also testified at the suppression hearing. The Alco-Sensor IV is approved for preliminary breath testing but not for evidential use under Wisconsin's implied consent law (124:61-67). The EC/IR that is approved for evidential law enforcement traffic use requires a two-test protocol and has a mouth alcohol detector (124:69). Hackworthy further testified that the lack of approval of the Alco-Sensor IV as an evidentiary test is not based on concerns about accuracy (124:77). To the contrary, the Alco-Sensor IV is accurate and very stable and holds its calibration well (124:63, 83).

The hospital emergency room nurse who administered the breath alcohol test to Rocha-Mayo had been trained on how to administer the test and was experienced in administering the test (125:11-12).

The defense presented no evidence at the suppression hearing. At trial, the defense presented the testimony of Mary McMurray, a former State employee, who opined that the particular breath alcohol test given to Rocha-Mayo was not reliable because the nurse relied on only one breath sample, and he did not perform a contemporaneous calibration check or do a waiting/ observation period prior to testing (135:108-09).

The expert testimony presented at the suppression hearing and trial regarding the reliability of the breath alcohol testing device used in this case was more than sufficient to support the trial court's decision to admit the test result, to allow the jury to hear all of the expert testimony at trial on both sides, and to allow the jury to determine how much weight, if any, to give the test result.

For all of these reasons, this court must reject Rocha-Mayo's argument that the result of his breath alcohol test, administered by the hospital emergency room staff for treatment and diagnostic purposes, was too unreliable to be admitted on the issue of guilt or innocence in his prosecution for a motor vehicle intoxication offense.

II. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON A PERMISSIVE INFERENCE THAT IT WAS ENTITLED, BUT NOT REQUIRED, TO DRAW UNDER THE FACTS OF THIS CASE.

At trial, the jury heard the result of the breath alcohol test administered by the hospital emergency room staff, as well as extensive expert testimony from both the State and the defense on the testing device used and the procedures used by the nurse in administering the test (133:110-11, 139-50; 134:101-86; 135:103-46).

Based on the evidence presented, the jury could find beyond a reasonable doubt that at the time the test was taken, there was .08 grams or more of alcohol in 210 liters of the defendant's breath (133:111). Rocha-Mayo does not challenge the sufficiency of the evidence. Based on the evidence presented, the trial court properly instructed the jury on a permissive inference the jury was entitled, but not required, to draw.

In the jury instructions on the elements of the offense of homicide by intoxicated use of a motor vehicle, the trial court instructed the jury as follows:

> The third element is the defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.
>
> "Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.
>
> Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially impaired.
>
> The law states that the alcohol concentration in a defendant's breath sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.
>
> If you are satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 210 liters of the defendant's breath at the time the test was taken, you may find that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You, the jury, are here to decide this question on the basis of all the evidence in this case, and you should not find the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.

(136:167-69).

Rocha-Mayo claims the instruction should not have been given because the test device and procedure used by the emergency room nurse did not meet the requirements of the implied consent law and the test was qualitative rather than quantitative. This is essentially a rehash of his argument that the test result should not have been admitted. As the State has demonstrated in the argument sections above, the test result in this case was not qualitative rather than quantitative and it was not necessary for it to meet the requirements of the implied consent law because it was not administered pursuant to the implied consent law. Accordingly, Rocha-Mayo's challenge to the instruction fails for the same reasons that his challenge to the admissibility of the test result fails. The State will not unnecessarily repeat the arguments made above here.

The instruction properly stated only a permissive inference that the jury was entitled, but not required, to

draw from the evidence presented. The instruction was in no way mandatory.

The limited instruction given did not imbue the breath alcohol test given to Rocha-Mayo with a presumption of accuracy at all. Consistent with Wis. Stat. § 885.235, the instruction simply told the jury that if it was satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 210 liters of Rocha-Mayo's breath at the time the test was taken, then it could draw inference that he was under the influence of an intoxicant at the time of the alleged operating. The specific instruction in this case did not inform the jury that it could draw this inference based on the test result alone.

The instruction given in this case did not inform the jury that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration in an individual and that the State is not required to prove the underlying scientific reliability of the method used by the testing device. In this case, the jury did hear abundant expert testimony about the scientific reliability of the testing device used, and the protocol used by the emergency nurse, and counter-evidence presented by the defense.

The instruction left it entirely to the jury to decide whether it was satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 210 liters of Rocha-Mayo's breath at the time of the test, based on all of the expert testimony it heard regarding the accuracy and reliability (or lack thereof) of the test device and procedures used in this particular case.

Rocha-Mayo asserts that under § 885.235, the permissive inference the jury was instructed on in this case can only be given when the test was qualitative as viewed by the administrative rules, and the test device and procedures used met all the requirements of the implied consent law. Rocha-Mayo cites no authority for his

assertion, nor is the State aware of any. The language of the statute does not contain that limitation.

Rocha-Mayo complains because the emergency room nurse who administered the breath alcohol test did not employ a twenty-minute waiting period to observe whether he vomited, belched, or drank alcohol during that time, which could introduce mouth alcohol into his sample. The jury was well informed by the testimony that a twenty-minute waiting period is required for law enforcement, the reasons for the waiting period and that there was no such waiting period observed here. There was also no evidence presented that, in fact, Rocha-Mayo did belch, vomit or drink alcohol between the time of the fatal crash and the time he took the breath alcohol test in the emergency room.

Rocha-Mayo complains that the emergency room nurse did not use a test sequence of two breaths as required for an admissible test under the implied consent law. However, the jury heard sufficient expert testimony on both sides to enable it to determine what weight, if any, to give to the result of the breath alcohol test administered to him at the hospital. Rocha-Mayo's complaints are not sufficient to render the limited permissive inference instruction given in his case improper.

The instruction given in this case was entirely permissive. It followed the definition of under the influence, and it concluded by specifically informing the jury that it was tasked with deciding whether Rocha-Mayo was under the influence of an intoxicant at the time of the operation of the vehicle based on all the evidence in the case and that it must not so find unless it was satisfied of that fact beyond a reasonable doubt. No reasonable juror could have believed that as a matter of law he must find defendant was operating his vehicle while under the influence of an intoxicant if the juror found defendant had a certain breath alcohol level at the time of testing.

The instruction left it entirely to the jury to accept or reject the inference, and it did not shift the burden of proof to the defendant. Such a permissive inference is infirm only if under the facts of the case, there is no rational way a trier of fact could make the connection permitted by the inference. *State v. Vick*, 104 Wis. 2d 678, 695, 312 N.W.2d 489 (1981). There is a rational connection between the basic fact that the prosecution proved and the ultimate fact presumed if it can be said with substantial assurance that the ultimate fact is more likely than not to flow from the basic fact. *Vick*, 104 Wis. 2d at 695.

Here, the question is whether the presumed fact that the defendant was under the influence of an intoxicant at the time of the driving more likely than not flows from the proven fact that at the time of testing he had a breath alcohol level of .08. The presumed fact does more likely than not flow from the proven fact here. No evidence in the record, and no argument offered by Rocha-Mayo, suggests otherwise.

The trial court has wide discretion in issuing jury instructions based on the facts and circumstances of the particular case. *Vick*, 104 Wis. 2d at 690. The trial court did not erroneously exercise its discretion in giving the instruction in this case. The trial court here properly informed the jury of the law applicable to the case, and left the decision of which evidence to credit, and which inferences to draw, entirely to the jury.

For all of these reasons, this court must reject Rocha-Mayo's argument that the instruction given in this case was improper.

III. THE TRIAL COURT PROPERLY ALLOWED THE EMERGENCY ROOM DOCTOR TO TESTIFY THAT IN HIS EXPERT OPINION, WHEN HE OBSERVED AND TREATED ROCHA-MAYO IN THE HOSPITAL EMERGENCY ROOM, ROCHA-MAYO WAS INTOXICATED.

At trial the State presented the expert testimony of Dr. William Falco, the hospital emergency room doctor who examined and treated Rocha-Mayo and who ordered the breath alcohol test administered to Rocha-Mayo. Dr. Falco had been an emergency room doctor for thirteen years during which time he had frequently treated patients suffering injuries from automobile accidents in which alcohol was involved (133:101). Alcohol can mask other injuries and make patients' verbal responses less reliable (133:102). Dr. Falco was on duty in the emergency room when Rocha-Mayo was brought in and he began to examine and ask Rocha-Mayo questions immediately upon his arrival (133:105). Rocha-Mayo spoke rapidly at first and was also talking on his cell phone to someone else very rapidly (133:106-07). Dr. Falco had difficulty getting Rocha-Mayo's attention and getting him to focus on the questions (133:107).

Dr. Falco and the emergency room nurse smelled alcohol on Rocha-Mayo's breath, and Rocha-Mayo told them he had been drinking at a bar, he came out of the bar and the accident happened shortly after he left the bar (133:108-09). The smell of alcohol was sufficiently strong combined with the information Rocha-Mayo provided about his drinking, that Dr. Falco felt compelled to order a check of Rocha-Mayo's alcohol level (133:109-10). Rocha-Mayo was also confused and could not remember many details of the accident (133:115). The result of the breath alcohol test was .086 (133:111).

Over defense objection, the State was allowed to ask and Dr. Falco was allowed to answer:

> Q. Doctor, over the 13 years where you had occasion to treat accident patients that have consumed alcohol, were you able to make a diagnosis of whether or not they were under the influence of alcohol?
>
> A. Yes, several times.
>
> Q. Do you believe you're qualified to in this case render that opinion?
>
> A. I do. I mean, I see intoxicated patients not in accidents pretty much on a daily basis that I'm --
>
> Q. And when you're looking at those patients, what are those things that you are looking at? What are the factors? What are the symptoms of alcohol intoxication?
>
> A. Well, their behavior; their -- you know, the -- obviously the smell of alcohol on their breath; their speech, the clarity of their speech; you know, if they had redness to their eyes; their ability to ambulate or, you know, walk with the steady gait, things like that.
>
> Q. And based upon your treatment, based on your experience and medical practice as an emergency room physician, and your contact and examination and assessment of this patient, Mr. Luis Rocha-Mayo, do you have an opinion as to his state of sobriety?
>
> A. I do.
>
> Q. And what is your opinion?
>
> . . . .
>
> THE WITNESS: I believe he was intoxicated at the time.
>
> BY MR. ZAPF:

Q. And do you hold that opinion to a reasonable degree of scientific and medical certainty?

A. I do.

(133:118-19).

Wisconsin Stat. § 907.04 provides: "Opinion on ultimate issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Wis. Stat. § 907.04.

Rocha-Mayo concedes, as he must, that Dr. Falco's testimony was permissible under this statute. He nonetheless complains that Dr. Falco was allowed to improperly testify to an opinion that "embraced a legal concept for which a definitional instruction was required." Rocha-Mayo's brief at 44 (capitalization omitted). Rocha-Mayo's complaint is without merit.[3]

Dr. Falco never offered an opinion that at the time of operating Rocha-Mayo was under the influence of alcohol or under the influence of an intoxicant. He never offered an opinion that Rocha-Mayo had consumed a sufficient amount of alcohol to cause him to be less able to exercise the clear judgment and steady hand necessary to handle and control the vehicle. He never offered an opinion that Rocha-Mayo's ability to safely control the vehicle was materially impaired. Rather, he opined only that when he saw Rocha-Mayo in the emergency room, Rocha-Mayo was intoxicated (133:119; Pet-Ap. B6, ¶ 15).

Moreover, Rocha-Mayo omits the significant fact that Dr. Falco made it very clear in his testimony that he was not offering any opinion, and was not able to offer any opinion, regarding whether Rocha-Mayo was

[3] Dr. Falco's opinion that Rocha-Mayo was intoxicated when he saw him in the emergency room is not comparable to the expert opinion testimony discussed as improper in the cases cited in Rocha-Mayo's brief, such as the opinion that an individual was negligent.

intoxicated or what his alcohol level was when he was operating the motor vehicle and when the accident occurred. Dr. Falco testified as follows on this point on cross-examination:

> Q. . . . [Y]ou did not have an opportunity to see Mr. Rocha-Mayo operate a vehicle on that evening, correct?
>
> A. No, I did not.
>
> Q. So you have no independent basis for making a determination that he was intoxicated at the time that he operated the motor vehicle, correct?
>
> THE COURT: I don't think the doctor was asked that question.
>
> MR. CABRANES: Well, I'm asking him that question.
>
> THE COURT: Okay. All right.
>
> THE WITNESS: Well, that level is continuously fluctuating whether it's going up or going down as time was passing. So I can't say if that was coming down or going up at the time.
>
> Q. Right.
>
> A. So it could have been -- could it have been below at the time of the accident and it's going up from just recently drinking something and it's still metabolizing or could it have been coming down. I can't -- based on one result I can't make that determination.
>
> Q. Right, you can't -- there's something called a blood alcohol curve, are you familiar with that?
>
> A. Right.
>
> Q. And a blood alcohol curve, in order to plot a blood alcohol curve you need two points on the curve, correct?

A. Correct.

Q. And in this case we only have one, correct?

A. Correct.

Q. And so, as you just testified to, if he had recently been drinking alcohol he might still be metabolizing some of that alcohol, correct?

A. Correct.

Q. And so at the time that he was operating the motor vehicle, you can't state, because there's no way to state, what his blood alcohol level was when he was operating the motor vehicle.

A. I cannot.

(133:129-31).

For all of these reasons, this court must reject Rocha-Mayo's claim that the trial court erred in allowing Dr. Falco to offer his opinion that Rocha-Mayo was intoxicated when he saw him in the emergency room after the crash.

IV. ANY ERROR IN THE INSTANT CASE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Even if the trial court erred in allowing the jury to hear the result of the breath alcohol test given to Rocha-Mayo in the emergency room for purposes of treatment and diagnosis, in instructing the jury on the permissive inference that it could, but was not required to draw, and in allowing Dr. Falco to testify to his opinion that Rocha-Mayo was intoxicated when he saw him in the emergency room after the crash, the errors were harmless beyond a reasonable doubt.

Dr. Falco and the emergency room nurse were properly allowed to describe Rocha-Mayo's condition to the jury and the fact that he smelled of alcohol and

admitted drinking. Dr. Falco's opinion added no new information; it was merely a label for the condition he had described.

Even without the breath alcohol test result, instruction and opinion testimony, there was ample, properly admitted evidence from which the jury could conclude beyond a reasonable doubt that Rocha-Mayo was operating a motor vehicle under the influence of alcohol at the time of the fatal crash.

Rocha-Mayo admitted to the police that he drank at least nine beers in the evening hours before the crash, he bought two six-packs to take with him as he left the bar, and he was actually drinking from a bottle of beer while he was driving down the road after he left the bar near closing time (133:235-37). At trial, Rocha-Mayo said he drank two or three beers at home and five or six at the bar (136:10-14). He admitted that at the bar he and his cousin were both buying beer (136:30). When asked how he could recall how many beers he had at the bar, he answered because he was there (136:29). When asked whether it was possible he had had more than five or six beers at the bar, he answered "No" (136:31). He denied he was drunk and when asked how he knew he was not drunk, he said it was because he did not feel he was drunk (136:26).

Rocha-Mayo characterized the motorcyclists as the aggressors; one threw something at his rear window, shattering it; two of the motorcycles were then in front of him, travelling away from him at a high rate of speed. Instead of letting them just go on away from him, he sped up and was going 80-85 miles per hour because he was scared. He caught up with them and then one of the motorcyclists turned right into his lane and the crash occurred (136:16-25). He offered no explanation for why, after two of the motorcycles had gone in front of him and were travelling away from him at a high rate of speed, he then sped up so that he caught up with them if he was so afraid of the motorcyclists.

Shawna Bestwick, who was riding on the back of one of the motorcycles that encountered Rocha-Mayo in his car on the road near bar closing time, stated that Rocha-Mayo pulled his car behind the motorcycle so close that she could have reached out and touched the hood of his car (132:196). She saw the driver's face; he looked drunk or drugged out; he had bug eyes and was definitely not sober; he had his car window down and was yelling at the motorcyclists (132:196-97).

A citizen witness described seeing the car aggressively chasing the two motorcycles at high speed and crash into one of the motorcycles (133:154-75). When the police searched Rocha-Mayo's car after the crash, they found both empty and full bottles of beer in the car (134:85-90).

There was ample other evidence that Rocha-Mayo was driving while intoxicated, including: 1) that Rocha-Mayo was drinking at home between seven and nine p.m. and at a bar from around nine p.m. until around closing time; 2) he admitted he drank at least nine beers before the crash; 3) he left the bar after purchasing more beer to go; 4) he continued to drink as he was driving away from the tavern; and 5) his nearly incomprehensible and unsafe driving choices immediately before the fatal crash. In light of the entire record it appears beyond a reasonable doubt that the alleged errors did not contribute to the verdict. This court can conclude beyond a reasonable doubt that a rational jury would have convicted Rocha-Mayo of homicide by intoxicated use of a motor vehicle absent the alleged errors. *State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis. 2d 434, 666 N.W.2d 485.[4]

[4] The State notes that if this court disagrees, Rocha-Mayo would be entitled only to a new trial on the charge of homicide by intoxicated use of a motor vehicle. His convictions of first degree reckless homicide and first degree endangering safety are not impacted by the alleged errors and he would not be entitled to reversal of those convictions.

CONCLUSION

Based on the record and legal theories and authorities presented, the State asks this court to affirm the court of appeals decision, the judgment of conviction, sentence, and order denying postconviction relief entered below.

Dated this 13th day of January, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,373 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of January, 2014.

_____

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