STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2011AP002548-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS ROCHA MAYO,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED NOVEMBER 5, 2010 IN THE CIRCUIT COURT OF KENOSHA COUNTY
The Honorable Wilbur W. Warren, III, Presiding
Trial Court Case Nos. 2008CF000660

Respectfully submitted:

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ISSUES PRESENTED

I. WHETHER IT WAS ERROR TO ALLOW THE STATE TO PRESENT EVIDENCE OF A PBT RESULT IN THIS MOTOR VEHICLE PROSECUTION.

The trial court answered: No.

II. WHETHER IT WAS ERROR TO INSTRUCT THE JURY IT COULD FIND, BASED SOLELY ON A *QUALITATIVE* PBT RESULT, THAT ROCHA MAYO WAS INTOXICATED AT THE TIME OF THE ACCIDENT.

The trial court answered: No.

III. WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED A STATE EXPERT WITNESS TO TESTIFY AS TO AN ULTIMATE FACT THAT EMBRACED A LEGAL CONCEPT FOR WHICH A DEFINITIONAL INSTRUCTION WAS REQUIRED.

The trial court answered: No.

IV. WHETHER IT WAS ERROR TO ALLOW THE JURY TO HEAR ROCHA MAYO HAD NOT OBTAINED THE LEGAL DRINKING AGE.

The trial court answered: No.

V. WHETHER IT WAS ERROR TO BAR THE JURY FROM HEARING THAT THE VICTIM DID NOT HAVE A MOTORCYCLE ENDORSEMENT.

The trial court answered: No.

VI. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO AN EXPERT ACCIDENT RECONSTRUCTIONIST'S TESTIMONY AND OPINIONS REGARDING THE ACCIDENT AND WHO WAS AT FAULT WHEN SAID TESTIMONY AND OPINIONS WERE BASED ON REPORTS OF OTHERS WHO DID NOT TESTIFY.

The trial court answered: No.

STATEMENT ON PUBLICATION

The appellant believes this Court's opinion will meet the criteria for publication, insofar as the first two issues present legal questions of first impression.

STATEMENT ON ORAL ARGUMENT

The appellant does not believe oral argument will be necessary in this appeal as the briefs should sufficiently explicate the facts and law necessary for this Court to reach a decision.

STATEMENT OF THE CASE

On June 12, 2008, the defendant-appellant, Luis Rocha Mayo, was involved in an automobile accident when the Ford Taurus he was driving rear-ended a suddenly-braking motorcycle in front of him. (R136-25). The motorcyclist died as a result of the accident. (R133-5). Thus, on June 23, 2008, the plaintiff-respondent, State of Wisconsin, filed a criminal complaint charging Rocha Mayo with: (1) first degree reckless homicide; (2) first degree recklessly endangering safety; and (3) operating a motor vehicle without a valid license and causing the death of another person. (R1). Rocha Mayo made his initial appearance and bond was set at $100,000 cash. (R113-4). On July 2, 2008, following a preliminary hearing, Rocha Mayo was bound over for trial. (R114-62). On July 22, 2008, he pled "not guilty." (R114-62; R115).

On February 11, 2009, the State requested leave to amend the Information to add a count of Homicide by Intoxicated Use of a Motor Vehicle. (R29). This prompted Rocha Mayo, on February 23, 2009, to request that Judge Schroeder recuse himself. (R30). The basis for the motion was that at a previous hearing, the judge had asked the district attorney why the State had not charged Rocha Mayo with Homicide by Intoxicated Use of a Motor Vehicle. (R31; R141-10-14). Judge Schroeder apparently had gone so far as to opine that a Preliminary Breath Test (PBT) taken from Rocha Mayo at the hospital would be admissible at trial because it had been administered by medical personnel, not police. (*Id*.). On February 24, 2009, conceding he had made the remarks, Judge Schroeder recused himself.

(*Id*.). Thereafter, Rocha Mayo filed a motion to suppress the PBT results. (R35).

On April 23, 2009, the court heard the State's motion to amend the information. (R123). The court granted the motion, conditioned on the State presenting expert testimony as to the state of intoxication, whether with or without a PBT result. (R123-80-82). The State filed an amended information adding a fourth count against Rocha Mayo: Homicide by Intoxicated Use Of A Motor Vehicle. (R37).

On June 29, August 4, and August 12, 2009, the court conducted hearings on whether the State would be permitted to introduce evidence of the PBT result. (R124; R125; R126). At the conclusion of the hearings, the court ruled that evidence of the PBT result would be allowed at trial. (R126-35). On August 28, 2009, the trial court entered an order denying Rocha Mayo's motion to suppress the results of the PBT.[1] (R42).

On July 26, 2010, the jury trial began. (R131). At the outset, Rocha Mayo pled guilty to operating without a valid driver's license, causing the death of another person, resolving that charge. (R131-3-9). The evidentiary portion of the trial lasted approximately four days. (R132-R135). So did the jury deliberations. (R136-R139). On August 5, 2010, following four

[1]An interlocutory appeal by Rocha Mayo was denied as was a subsequent motion for reconsideration filed with the trial court in the wake of *State v. Fischer*, 2010 WI 6, 322 Wis. 2d 265, 778 N.W.2d 629. (R53; R130-5).

days of arduous deliberations nearly resulting in a hung jury, guilty verdicts were returned on the remaining three counts. (R139-5-6).

On November 4, 2010, the court sentenced Rocha Mayo to concurrent sentences, with the controlling sentence consisting of ten years of initial confinement. (R140-68-69). On August 19, 2011, Rocha Mayo filed a post-conviction motion alleging ineffective assistance of counsel. (R108). On October 20, 2011, the court conducted a *Machner* hearing and denied the motion. (R142-25-28). This appeal followed. (R112).

STATEMENT OF THE FACTS

A. The Events Leading To A Fatal Accident.

On June 12, 2008, at approximately 7:00 p.m., Rocha Mayo and two cousins were relaxing in his home and enjoying a few beers. (R136-10-11). They remained there until about 9:00 p.m. during which time Rocha Mayo consumed a total of two to three beers. (R136-10-11). At 9:00 p.m., the three cousins headed over to El Rodeo Bar. (R136-11-12). Rocha Mayo drove himself to the bar and arrived just after 9:00 p.m. (R136-11-12, 32). His cousins went in a separate vehicle and arrived shortly thereafter. (R136-11-12, 32). El Rodeo was located at the corner of 14th Avenue and 52nd Street in Kenosha. (R136-14).

Rocha Mayo remained at El Rodeo until shortly after 2:00 a.m., and over those five hours consumed five beers and ordered a sixth. (R136-13). At 2:00 a.m., Rocha bought two six packs of beer at the bar to take home with him and left. (R136-14, 32). He put the packaged beer in the back seat of his green Ford Taurus which was parked in the bar's parking lot. (R136-14). Rocha Mayo still had the sixth beer in his hand and put it in a cup holder in the console of his car. (R136-14).

Rocha Mayo exited the parking lot and turned westbound onto 52nd Street, a main Kenosha thoroughfare running from Lake Michigan to I-94 and which, at all times material, had two lanes of travel in each direction. (R136-15). Rocha Mayo first entered the left lane of westbound 52nd Street before changing into the right lane. (R136-40). He did not feel intoxicated and Rosie Finley, who operated El Rodeo and knew Rocha Mayo,

testified she did not detect any signs of intoxication when she saw him leave near bar time. (R134-189-200; R136-26).

Rocha Mayo traveled just six blocks before, as they say, the trouble began. Three motorcycles emerged from a parking lot by Coins Tavern on the north side of 52nd Street (i.e., to Rocha Mayo's right), around 20th Avenue. (R114-6, 23; R132-153; R136-16). The first motorcycle out of the lot was a 2008 Harley Street Glide carrying two individuals, a man and a woman, and it merged into the right westbound lane directly *in front of* Rocha Mayo. (R132-147-148; R136-16). The male, who was operating the cycle, was Curtis Martin. (R114-8). The woman seated behind Martin was Shaunna Bestwick (hereinafter, "Shaunna"). (*Id*.).

Two other motorcycles then emerged from the bar *behind* Rocha Mayo. (R136-16). One of these individuals was Shaunna's brother, Travis Bestwick (hereinafter, Bestwick). (R132-145). Bestwick was on a Harley Road King, a cycle that actually belonging to Martin. (R132-205). Bestwick was riding Martin's Road King because he had allowed Martin to drive his 2008 Harley Street Glide. (R132-148). The swap was made because Martin was carrying Bestwick's sister and the Street Glide had a backrest and was better suited for two riders. (R132-148).

The third cyclist, who also came out *behind* Rocha Mayo alongside Bestwick, was Jason Walters. (R132-147-149, 202). Walters was riding a Suzuki Hayabusa 1300, a kind of cycle referred to as "a crotch rocket." (R132-147-149, 202). Walters, the dark figure in this story, was proud of his cycle's speed, and

made sure the jury knew it had been recognized in the *Guinness Book of World Records* as the fastest production bike in history. (R132-237). Tucked into Walter's waistband, so it would always be, in his words, "accessible," was an expandable metal baton. (R132-238). Officer Dusty Nichols testified the black collapsible baton was classified as a weapon, and was a "friction" baton, meaning it opened with a flick of the wrist. (R134-96-97).

The three motorcycles had been riding as a group and Rocha Mayo apparently happened by at precisely the wrong moment, breaking the group into two, and Walters apparently perceived this as an unpardonable slight. Whatever his motive, Walters quickly came up alongside the driver's window of Rocha Mayo's westbound car and began yelling at him and furtively gesturing for him to pull over. (R136-16-17). Walter's shouting must have been loud because it caused Martin and Shaunna, who were still westbound in front of Rocha Mayo, to look back and see Walters yelling at Rocha Mayo. (R136-19).

Shaunna conceded she heard someone from their group yell something like "what the F-U-C-K . . . is [your] problem" at Rocha Mayo. (R132-172). Rocha Mayo also noticed that Martin and Shaunna turned their heads to look back. (*Id.*). Rocha Mayo further noticed that Martin then reacted by turning off onto 25th Avenue, and then using the width of that intersection to maneuver his Harley Street Glide *behind* Rocha Mayo. (R136-19). Indeed, Martin testified he moved to the right and used the width of 25th Avenue to slow/stop his cycle so Rocha Mayo would pass him, whereupon he renegotiated his

cycle back onto 52nd Street *behind* Rocha Mayo. (R132-183; R136-109-111).

At this point, Rocha Mayo testified, he sensed Walters and the other cycles were looking for trouble and the situation felt threatening. (R136-18). Realizing he now had three cycles around him, and believing them all in a mood to harm him, Rocha Mayo did not pull over as demanded by Walters. (R136-18-19). Instead, Rocha Mayo resolved to continue on to his house, which would require him to remain on 52nd Street until turning right onto 40th Avenue. (R136-19). He therefore continued westbound at the approximate speed limit, simply hoping to get home for the evening. (R136-19-21).

Walters, however, had other plans. First, he reached into his jacket with his right hand, pulled out his collapsible baton, and flicked it open with his wrist. (R132-233-234). Walters then accelerated his "world record" speed bike toward Rocha Mayo's car to pass him on the left hand side. (R132-233-234; R136-19). As he came up on Rocha Mayo's vehicle, Walters launched the metal baton at the car's rear window while traveling at a high rate of speed. (*Id*.). The baton was thrown with such force that it passed through and shattered the rear window and ended up on the floorboard of the front passenger seat. (R134-86, 93). A hail of glass fragments blew throughout the front and back of the car. (R134-93).Walters and Bestwick continued accelerating and simultaneously flew past Rocha Mayo's vehicle on the left hand side. (136-19, 79).

From Rocha Mayo's perspective, his premonition of danger became a rude reality when his rear window suddenly

exploded while two motorcycles flew by him on the left. (R136-19). The explosion caused Rocha Mayo to momentarily duck and he was convinced he was going to get hit. (R123-56; R136-20). When Rocha Mayo regained his wits, he instinctively sped up his car, because there was another cycle behind him, in addition to the two cycles now in front of him, and he was scared. (R136-20). Although he was still in the right lane and somewhere in the vicinity of 30th and 33rd Avenues at the time, he decided not to turn off on 40th Avenue to go home because he did not want the cyclists to learn where he lived. (R136-22, 42, 45).

At approximately 2:06 a.m., City of Kenosha Police Officer Shaun Morton happened to be in the parking lot of Felicia's Restaurant, on the south side of 52nd Street near 43rd Avenue, when he saw two motorcycles and a green Ford pass westbound at an estimated speed of 70-80 MPH. (R133-46-50, 62). The cycles were traveling in single file and the Ford was 3-4 car lengths behind them, traveling at the same speed. (R133-49-53). Traffic was light to medium. (*Id*.). Officer Morton notified dispatch, turned on his lights and siren, and took off after the vehicles. (R133-51-52).

As the cycles and the Ford continued westbound at a high rate of speed, Rocha Mayo, in all the confusion, believed the Harley Street Glide, with Martin at the helm, was still behind him on 52nd Street. (R136-20). In fact, Martin and Shaunna had turned off at 39th Avenue, likely after witnessing Walters shatter the rear window of Rocha Mayo's vehicle. At trial, Shaunna conceded they turned off at 39th Avenue, after stopping there for a red light, but denied it had anything to do with what was

transpiring between the other vehicles. (R132-168-169). On the contrary, Shaunna claimed, from their vantage point at the red light, they could see Bestwick's taillight and hear his loud tail pipes and decided everything was fine. (R132-168-169). They then turned north on 39th Avenue and went home, which would account for why Officer Morton did not see *a third* motorcycle pass by Felicia's restaurant, although this was not known to Rocha Mayo. (*Id*.).

As the other three vehicles continued speeding westbound on 52nd Street, some disaster, at some point, was bound to occur. That point turned out to be the intersection with North Green Bay Road. As the vehicles approached that intersection, the stop light for westbound traffic was red, although fortunately, no cross traffic was immediately coming. (R133-170). Also free of any traffic were the westbound lanes, which widened from two to four westbound lanes, first with a longer dedicated left turn lane, and later with a shorter dedicated right turn lane. (*Id*.; R135-20). Again, Rocha Mayo believed he still had a third cycle behind him. (R136-224).

As the vehicles neared the intersection, Bestwick and Walters, via hand signals, but unbeknownst to Rocha Mayo, had decided to attempt a right turn onto North Green Bay Road, a maneuver the State's accident investigator agreed would have been impossible. (R132-218-219; R134-79). Rocha Mayo was still in the right hand lane and from his perspective, Walters and Bestwick were in front of him, but off to the left. (R136-22). Suddenly, Walters braked, but then decided the turn would be impossible, and would up sliding/stopping into the intersection. (R136-23). Bestwick, however, suddenly turned to the right in

front of Rocha Mayo's vehicle and braked. (R136-22-24). Rocha Mayo could not react quickly enough to avoid striking Bestwick from behind. (R136-25). Trooper Michael Smith, the State's accident reconstruction expert, testified that if Rocha Mayo was between 75 and 125 feet behind the motorcycles, at 70 MPH he would have had somewhere between .75 and 1.25 *seconds* to react to this unexpected development.[2] (R135-66-68).

Officer Morton did not witness the collision, but upon arrival at Green Bay Road, having traversed the 20 blocks from Felicia's Restaurant, immediately realized one had occurred. (R133-53, 75). He saw the Ford in a ditch off the northwest corner of the intersection with Rocha Mayo lying in the grass nearby, and then saw Bestwick prone in the street. (R133-54-55). Rocha Mayo was conscious and breathing, but unable to respond to questions. (R133-56-57). Bestwick, however, was completely unresponsive; both motorists were transported to the hospital. (R133-56-58). Officer Morton was instructed to get a blood sample from Bestwick to determine his level of intoxication, but was unable to do so. (R133-68-69).

Motorist Matthew Schultz had witnessed the accident, albeit from roughly two blocks back. (R133-157-187). Schultz had just turned onto westbound 52nd Street when he noticed, in his rearview mirror, the vehicles approaching at a high rate of speed. (R133-157-160). Two cycles then passed him in the right

[2]There was some dispute over whether Bestwick suddenly turned in front of Rocha Mayo, or was already there, when he suddenly braked. (R133-171-173; R136-25).

lane, driving erratically at about 70-80 MPH as they moved about within their lanes, followed by a car at roughly the same speed. (R133-161-162, 165-166, 184). Schultz confirmed Bestwick tried to turn right onto Green Bay Road (though not from the dedicated right turn lane, but instead, the right lane in front of the car), when he was struck. (R133-171-173). Schultz further testified that after the accident, Walters came to a complete stop in the intersection, and then proceeded to look around from a vantage point where he could see both vehicles at a complete rest, and Bestwick lying in the street. (R133-183, 190-192). Schultz testified Bestwick then took off and fled southbound on Green Bay Road. (R133-183, 190-192).

Sadly, the accident proved fatal for Bestwick. Forensic pathologist Dr. Mary Mainland testified that Bestwick, who had not been wearing a helmet, died of blunt force trauma to the head, and was pronounced dead at 8:08 a.m. (R133-5, 15, 20). While *post mortem* toxicology reports revealed no alcohol in Bestwick's system, Dr. Mainland agreed that since Bestwick had received a massive blood transfusion (completely replacing all his blood), it was impossible to say whether any alcohol had been in his system at the time of the accident. (R133-26-39). Because of the blood transfusion, the only controlled substance found in Bestwick's system was midazolam, a sedative administered by hospital personnel.[3] (R133-26-27).

Rocha Mayo was transported to St. Catherine's Hospital and brought into the emergency room on a backboard and

[3]The paramedic who attended to Bestwick at the accident scene agreed there could have been an odor of intoxicants on Bestwick, but said he would not have noticed it because he was busy attending to his injuries. (R133-75-76, 92).

wearing a cervical collar, with blood on his face due to facial injuries and bruising of his chest wall. (R133-107,138). Dr. William Falco suspected Rocha Mayo had possibly suffered a head injury, noting some memory loss and an inability to remember details of the accident. (R133-115). Rocha Mayo advised Dr. Falco he had consumed alcohol and, based on this statement and an odor of alcohol about Rocha Mayo's breath, the doctor directed Nurse Steven Edwards to take a Preliminary Breath Test (PBT). (R133-108-110). Nurse Edwards took a single sample which registered 0.086. (R133-111). Rocha Mayo was eventually discharged at 5:00 a.m. and, later that day, waived his *Miranda* rights and provided a full statement to Officer Gloria Gonzalez that largely was a synopsis of his trial testimony, consistent with the facts set forth above. (R133-116, 226-239).

B. Delayed And Flawed Reporting By The Cyclists.

In the wake of the accident, not one of the three surviving cyclists advised police they had witnessed the accident, or the events leading up to the accident. Walters, as previously noted, fled the scene of the accident. Martin and Shaunna, on the accident scene within five minutes, also both left without telling police what they had observed moments before the accident. (R132-172-173, 188). Whether it was because they were all intoxicated or had been the aggressors in the situation and first wanted to get their story straight (an opportunity they had at the hospital), they waited nearly 20 hours before deciding to talk to police. (R132-176-189). By that time, of course, they told much

different versions of the encounter with Rocha Mayo, and versions fraught with omissions and implausibilities.[4]

The cyclists' trial testimony also materially differed from the statements they eventually gave police. In general terms, their trial testimony had Rocha Mayo lying in wait and then suddenly springing out to engage Shaunna and Martin in a game of "cat and mouse," blocking them from getting into the right lane to turn right, and then trying to run Bestwick off the road. (*See, e.g.*,R132-159). In her statement to police, however, Shaunna had said nothing about Rocha Mayo engaging her and Martin in a game of "cat-and-mouse." (R132-192). And while she testified at trial that Walters and Bestwick were *behind* her and Martin during this "cat-and-mouse" game, she had told police Walters and Bestwick were *ahead of them* during the encounter with Rocha Mayo. (R132-194). Nor, of course, had they been coming from Coins Bar or otherwise been drinking on the night in question. (R132-151-158). Instead, they had simply been riding around Kenosha for about five hours doing something on which the record remains silent. (*Id*.). One can reasonably infer the jury, given its protracted deliberations, numerous questions, reports of deadlocks, and the need for the

[4]Shaunna and Walters denied they ever discussed what had happened prior to talking to police because incredibly, Shaunna had no interest in learning from Walters how the accident that killed her brother had transpired. (R132-189-190, 244-245).

Allen instruction, had serious reservations about the cyclists' trial testimony.[5]

1. Flight from the accident scene.

There was good reason for the jury to doubt the veracity of the cyclists' stories. Contradicting the citizen witness who saw Walters come to a complete stop, survey the scene, and then leave, Walters testified he never completely stopped, just slowed way down and turned left. (R132-241). Walters testified that after turning left he heard the crash and saw, in his rearview

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[5]The jury deliberated for two hours on August 2nd and all day August 3rd. (R136-248; R137-2-7). On the third day - August 4th - it announced it was deadlocked. (R138-2-3). The court read the *Allen* instruction and advised the parties it would allow 45 more minutes of deliberations and likely declare a mistrial if no verdict was returned. (R138-3-5). Forty-five minutes later the foreperson advised the jury was at a very firm standstill. (R138-7). However, when another juror opined the jury was working hard and making progress, the court sent it back to continue deliberating, which led to more questions, followed by more deliberations, followed by more questions, and then more deliberations for the remainder of the day, until it was sent home for the evening.(R138-7-33). On August 5th, the court again advised the parties that if any member of the jury indicated there would not be a consensus, it would declare a mistrial. (R139-2). After further deliberations, during which one juror complained she was drained, the jury finally returned guilty verdicts. (R139-5-6). Approximately half the jurors cried as the verdicts were read, (R139-9), and at least one juror later questioned why Walters had not been charged with some offense. (R140-56).

mirror, the car going over the median. (R132-221). In the next breath, however, he also claimed he kept going because he did not know there had been a collision. (R132-222). He then testified he heard from Shaunna on a cell phone call that there had been a collision, but did not return because he was scared, neglecting to say what scared him. (R132-222). He later testified, however, that after driving south on Green Bay Road, he stopped and *he* called *Shaunna*. (R132-242). This strongly suggested he knew *something* had happened, although he claimed he merely asked Shaunna if she had heard from Bestwick. (R132-243).

Shaunna arrived on the scene five minutes after the accident, saw the cycle her brother had been riding lying in a ditch, and learned he was in an ambulance. (R132-172-173). She also saw the vehicle Rocha Mayo had been driving in the ditch. (R132-174). Nevertheless, neither Shaunna nor Martin stayed to give the police a statement and when asked why, Shaunna stated "I don't know why" and tried to pass it off as the failure of the police to ask them any questions. (R132-174).

2. Walters never told police he had launched a metal baton through Rocha Mayo's rear window.

Walters also pointed the finger at the police for an important omission from his statement to police. When he finally gave a statement to Detective Riesselman, he never mentioned that he had launched a metal baton through the rear window of Rocha Mayo's vehicle. (R132-250). When asked why he left out that detail, Walters insisted he *had* reported that

fact, and blamed Detective Riesselman for omitting that fact from his statement. (R132-253-254). Walters also testified he simply tossed the baton "underhand" at Rocha Mayo's car, and claimed he could not even remember at what part of the vehicle he aimed the baton.[6] (R132-216, 238).

3. The myth of Rocha Mayo trying to run Bestwick off the road.

No motive was ever offered for why Rocha Mayo, who had no criminal record, would decide to pursue, with his car, motorcyclists he did not know, and then try to run one of them off the road. Strongly suggesting the State offered no such motive because Rocha Mayo never engaged in such conduct is the fact Walters never reported such conduct to Detective Riesselman, when he finally got around to giving a statement. (R132-255). The claim of such conduct did not first emerge until the preliminary hearing, and was later repeated, in yet a different incarnation, at trial.

At trial, Walters incredibly claimed Rocha Mayo had merged Bestwick so far to the left that both motorcycle and car actually passed all the way through the two lanes of oncoming traffic and into the curb. (R132-214). According to Walters, with Bestwick up against the curb, Rocha Mayo suddenly

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[6]Walters was also a reluctant trial witness who did not agree to appear until threatened with the issuance of a warrant. (R132-248-249). He later hung up the phone on the PSI preparer and refused to take her call thereafter. (R140-56).

slammed on his brakes causing Walters to nearly rear-end the car (suggesting Walters was pursuing the car). (R132-216). Walters further claimed that when the car suddenly braked, he tried to pass the car *on the left* (which would have been on the sidewalk), but that Rocha Mayo then swerved *to the left* (again, presumably up on the sidewalk) and so he (Walters) went around the car to the right and accelerated. (R132-216). It was this egregious driving, Walters claimed, that prompted him to throw the metal baton "underhand" at Rocha Mayo's car. (*Id*.).

According to Shaunna, however, Rocha Mayo's car remained in the right hand curb lane of 52nd Street the entire time. (R132-164). Since Shaunna also testified she and Martin stopped for the light at 39th Avenue, gazed west and saw nothing alarming, Walters' storied ordeal over in the oncoming traffic lanes would have had to have occurred somewhere west of 40th Avenue. The fact Officer Morton saw nothing of this sort at 43rd Avenue makes Walters' account entirely implausible.

4. The claim Rocha Mayo was "parked" when the cyclists passed him.

The effort to demonize Rocha Mayo included the claim he was "parked" on 52nd Street and *the cyclists passed him* when, for reasons unknown, he decided to pull out and target them. Shaunna claimed Rocha Mayo was parked on the right side just past Coins Tavern and pulled out just as the cyclists, then in the left hand, passed him. (R132-153-159). Walters offered several versions, the strangest of which was his trial testimony that Rocha Mayo's vehicle was "parked" *in the middle of the road*, straddling the two westbound lanes. (R132-206, 208). At the

preliminary hearing, Walters had testified Rocha Mayo was parked along the curb, while in his statement to police, he did not say Rocha Mayo's vehicle had been parked at all. (R132-226-227).[7]

5. The phantom red stop lights.

The putative presence of red stop lights on westbound 52nd Street was essential to hold all the cyclists' story together. There was one small problem with this testimony, however. According to City of Kenosha Traffic Engineer Randall LeClaire, by 2:00 a.m. all of the westbound traffic lights were in a "flashing yellow" program, and at 35th and 42nd Avenues, the traffic lights actually began flashing yellow by 9:00 p.m. (R135-88-91). In other words, none of the vehicles would have encountered a red stop light anywhere along westbound 52nd Street. (*Id.*). Nevertheless, as previously noted, Shaunna maintained she and Martin had stopped at a red stoplight at 39th Avenue (from which they supposedly saw that everything was fine). (R132-164-168, 186).

At the preliminary hearing, Walters testified that before Rocha Mayo tried to run Bestwick off the road, they had pulled to the side and let Rocha Mayo pass them, because he had been tailgating them. (R114-28). When it was pointed out to Walters that this placed the two cyclists *behind* Rocha Mayo, which

[7]The "parking"claim was also contrary to the testimony of Rosie Finley, who operated El Rodeo tavern, knew Rocha Mayo as a regular, and recalled him leaving near closing time. (R134-189-195).

meant they must have thereafter pursued Rocha Mayo to end up in a position where Rocha Mayo could have run Bestwick off the road, Walters suddenly interjected a red stoplight into his story. (R114-29)("we actually hit a light"). The red stop light was an integral part of Walters' story at which he and Bestwick remained behind Rocha Mayo's car. (R114-29-30). Walters then claimed that when the light turned green:

> We proceeded forward and the vehicle merged over. So we just kept going straight and that is when he made the first initial swipe at the light.

(R114-31). This required Walters to characterize Rocha Mayo's putative initial swerve at Bestwick as happening at a fairly slow speed (having just pulled away from the stoplight). (R114-33). While maintaining he already knew there was a problem, and conceding they had an opportunity to get away from the car, he explained he did not do so because he "wasn't fearing for [his] life." (R114-33-34).[8]

Also problematic was Walters' testimony that they encountered the red light *after* Shaunna and Martin turned off to go home, (R114-30), which would therefore have been *after* 39th Avenue. (R132-164-168, 186). The next stop light after 39th Avenue, however, was at 42nd Avenue, and it had gone into a

[8]On direct examination at trial, Walters did not mention a stoplight at all. On cross-examination, he admitted the red light had been part of his preliminary hearing testimony, but curiously denied any inconsistency between the two accounts. (R132–229-230).

flashing yellow program at 9:00 p.m. (R135-88-91). And had they encountered a red light farther *west* of 42nd Avenue, they would have done so Officer Morton's territory, (R133-46-62), and Officer Morton would surely have witnessed this and, in fact, caught up with the vehicles.[9]

6. Shaunna and Martin's disengagement from Walter's road rage.

If it were true Rocha Mayo engaged in aggressive driving in the area of Coins Tavern at 20th Avenue, such would beg the question of why Martin and Shaunna would simply turn off at 39th Avenue and go home. Rocha Mayo rather plausibly suggested Martin and Shaunna left because they witnessed Walters launch the metal baton through Rocha Mayo's window, and wanted no part of that trouble. (R136-225). Shaunna, however, rather implausibly claimed that after witnessing Rocha Mayo swerve at her brother at 29th Avenue, they did not see any further abnormal driving from the other vehicles for the next ten blocks, at which point they turned off on 39th Avenue to go home. (R132-164-168, 186).

[9]Indeed, since Walters testified he threw the metal baton two blocks west of the red light, and because of the harrowing encounter in oncoming traffic, (R114-34), that alleged encounter would have happened right in front of Officer Morton's eyes.

ARGUMENT

I. IT WAS ERROR TO ALLOW THE STATE TO PRESENT EVIDENCE OF A PBT RESULT IN THIS MOTOR VEHICLE PROSECUTION.

On June 22, 2008, Rocha Mayo was brought into St. Catherine's Hospital on a backboard, semi-conscious and with facial injuries. (R125-7-9). Dr. Falco ordered a Preliminary Breath Test. (R125-10, 13). Consequently, Nurse Steven Edwards, one of several emergency room personnel (none of whom were regulated by the DOT) complied and administered a PBT to Rocha Mayo, which yielded a result of 0.086. (R133-134-143; R134-218). The PBT device Nurse Edwards used was the Alco-Sensor IV, one of two components that make up the RBT IV ("Roadside Breath Tester" IV). (R124-15-22). The second component Edwards did *not* use was the printer microprocessor that attaches to the Alco-Sensor IV by a cable and drives the protocol. (*Id*.). The Alco-Sensor IV is approved for law enforcement use in Wisconsin. (R124-23, 62). It is not, however, certified by the DOT for evidentiary use in Wisconsin courts. (R124-58-66).

A. The Language Of Section 343.303, Stats., Should Bar The Admission Of PBT Results In A Motor Vehicle Prosecution.

As this Court well knows, the use of preliminary breath tests is governed by section 343.303, Stats., which states, in pertinent part:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63 (1) . . . 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) . . . . 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).

(Emphasis added). On more than one occasion, this section has been interpreted to mean PBT results are not admissible in motor vehicle prosecutions, though still admissible in other criminal prosecutions. The interpretation of section 343.303, Stats., presents a question of law this Court reviews de novo. *Rechsteiner v. Hazelden*, 2008 WI 97, ¶ 26, 313 Wis. 2d 542, 753 N.W.2d 496.

This Court first examined use of PBT results in criminal prosecutions in *State v. Beaver*, 181 Wis.2d 959, 970, 512 N.W.2d 254 (Ct. App. 1994). Beaver was tried and convicted of four counts of sexual assault contrary to section 940.225(2)(a),

Stats. On appeal, Beaver contended the trial court erred by precluding evidence of the results of a PBT administered at the Walworth County jail following an interrogation, arguing it was relevant to the trustworthiness of the statement he gave police. The trial court had held the PBT result barred by section 343.303. This Court disagreed:

> The PBT result was not barred by § 343.303, STATS. That statute provides that a PBT is not admissible in any action or proceeding subject to certain stated exceptions. While this language, viewed in isolation, is broad enough to support the trial court's ruling, we must bear in mind that the statute is part of the motor vehicle code governing the administration of the PBT and the results of such a test. . . . Considering the entire subject matter of § 343.303, STATS., we conclude that **the legislature intended the statutory bar against PBT evidence to apply only in proceedings relating to arrests for the offenses contemplated under that statute.**

Beaver at 969. (Emphasis added).[10]

This Court subsequently affirmed that holding when rejecting an argument that it had been dicta. In *State v. Doerr*, 229 Wis.2d 616, 622, 599 N.W.2d 897 (Ct. App. 1999), this Court deemed the use of PBT results at trial proper because the

[10]*Beaver* went on to hold the evidence properly barred on other grounds. *Id* at 970-71.

defendant was being tried for two counts of battery and one count of resisting an officer, and not a motor vehicle offense. *Id.* at 620-21. This Court rejected the contention that the language in *Beaver* pertinent to the issue had been dicta. Finding the determination had been germane to the controversy in *Beaver*, this Court reaffirmed that the use of PBT results was barred in motor vehicle prosecutions, but not other criminal prosecutions. *Doerr*, 229 Wis. 2d at 622, fn1.

Beaver and *Doerr* would suggest Rocha Mayo's PBT result should have been barred in this case - a motor vehicle prosecution. The trial court, however, reasoned the PBT result was admissible because the test had not been administered by law enforcement, but instead, by medical personnel. (R126-31-35; App. B-5-9). This, the court reasoned, took it out of the purview of section 343.303, Stats., because that section ostensibly applies only to PBTs administered by law enforcement officials.[11] (*See* Appendix B).

Further instructive on the issue are recent decisions by both this Court and the Wisconsin Supreme Court in *State v. Fischer*, 2008 WI App 152, 314 Wis.2d 324, 761 N.W.2d 7, and *State v.*

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[11]The trial court denied the motion for reconsideration, in part, on the basis that *State v. Jenkins*, 80 Wis. 2d 426, 259 N.W.2d 109 (1977), had approved use, in an OWI case, of a chemical test (blood) taken by hospital personnel. (R130-5-8). The issue in *Jenkins*, however, was whether the blood draw was an unlawful search and seizure under the fourth amendment, which was not an issue in this case.

Fischer, 2010 WI 6, 322 Wis.2d 265, 778 N.W.2d 629, respectively. The issues in *Fischer* were: (1) whether section 343.303, Stats., creates an absolute bar on the admission of PBT results in OWI prosecutions, even when used as the basis for an expert's opinion offered under section 907.03; and (2) if so, whether such a bar violated a defendant's constitutional right to present a defense. This Court upheld the bar on PBT results in OWI prosecutions. In so doing, this Court stated:

> Inherent in . . . § 343.303 . . . is the legislature's decision that PBT results are sufficient information to determine only whether an officer has probable cause to arrest. But, it appears that the legislature has also determined that **the results are not sufficiently reliable for jury consideration in determining guilt or innocence.** Unlike the Intoximeter, the PBT is not tested for accuracy either immediately before or after a test. The intoximeter is a "quantitative" test and the PBT is a "qualitative" test. These words alone suggest a world of difference between the two. WISCONSIN ADMIN. CODE § TRANS 311.03(13) defines a *quantitative* breath alcohol analysis as "a chemical test of a person's breath which yields a specific result in grams of alcohol per 210 liters of breath." In contrast, § TRANS 311.03(12), defines a *qualitative* breath alcohol analysis as "a test of a person's breath, the results of which indicate the presence or absence of alcohol."Clearly, the former test calls for an accurate "measurement;" that is, after all, the definition of the word "quantitative" — something "involving the measurement of quantity or amount."

> WEBSTER'S THIRD NEW INT'L DICTIONARY 1859 (3d ed. 1993). A qualitative analysis, as any chemistry major would know, merely determines the constituents of a substance without any regard to the quantity of each. *Id.* at 1858. Thus, as succinctly defined in the administrative code, the qualitative breath test is for the purpose of determining only whether alcohol is present or not. . . . Therefore, **the testing mechanism for the PBT is simply not designed so the result obtained during the investigation of a possibly intoxicated driver is accurate enough that it can be used to help a jury determine the driver's guilt or innocence.** The legislature did not want the PBT admitted as evidence for that reason. The reason applies whether it is the State that wants to use the PBT results or the defendant who wants to use it.

Fischer, 2008 WI App 152 at ¶¶13-17. (Emphasis added).

This Court analyzed the issues under the two-prong test in *State v. St. George*, 2002 WI 50, ¶ 52, 252 Wis. 2d 499, 643 N.W.2d 777, which asks: (1) whether the defendant can establish a right to the evidence through an adequate offer of proof addressing the standards, relevance, necessity and probative value of the evidence; and (2) whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence. While signaling the State had a compelling interest to exclude PBT results as unreliable, this Court ultimately based its decision on the first prong of *St. George*:

> That brings us back to . . . whether the expert witness met the standards of WIS. STAT. § 907.02 and whether the probative value of the testimony of the defendant's expert witness outweighs its prejudicial effect. Section 907.02 asks whether the scientific or specialized knowledge of the proposed expert will assist the trier of fact to understand the evidence of a fact in issue. We are convinced that if the underlying basis for the opinion is a result that cannot be tested for accuracy at the time of the test, then it cannot assist the trier of fact. Similarly, such an opinion has no probative value, but is an opinion built much like a house of cards. If the foundation breaks down, the house breaks down.

Fischer, 2008 WI App 152 at ¶24. Thus, once again, PBT results were ruled inadmissible in OWI prosecutions, even when subjected to a constitutional attack.

The Wisconsin Supreme Court affirmed the result, albeit under a different rationale. In confirming PBT results are inadmissible in OWI trials, the Wisconsin Supreme Court stated:

> Fortunately . . . the legislature's policy decision regarding the absolute inadmissibility of the PBT results under these circumstances simply could not be clearer. Reading the statutes together to create an exception to Wis. Stat. § 907.03 by excluding expert evidence to the extent that it is based on prohibited PBT results comports with our obligation to give

> effect to the legislature's intent. The alternative would likely nullify Wis. Stat. § 343.303 whenever a party attached the opinion or report of an expert to the PBT result it wished to get before the jury.

Fischer, 2010 WI 6 at ¶25.

The Wisconsin Supreme Court, however, disagreed the bar on PBT results in OWI cases arises from the unreliability of PBT results. *See id.* at ¶¶7, 16, 31. While still expressing concern with the reliability of such tests - "[t]he accuracy of this type of test may be subject to dispute" - *id.*, at ¶34, the Wisconsin Supreme Court instead went directly to the second prong of the *St. George* test without deciding the first prong. *Id*. at ¶29. It then determined state interest in excluding the evidence outweighed the defendant's interest in presenting it. *Id*. That state interest, *Fischer* declared, was the promotion of efficient OWI investigations, and therefore public safety, by increasing the likelihood suspected drunk drivers would submit to a PBT, ostensibly knowing it's not admissible in court, thereby securing cooperation when an officer has reasonable basis to stop, but not probable cause to arrest.[12]

[12] A concurring opinion authored by Justice Ziegler, and joined by Justices Roggensack and Gableman, concluded, as a matter of law, that PBT results are neither reliable nor admissible for the purpose of confirming or dispelling a defendant's specific alcohol concentration in an OWI or PAC trial. *Fischer*, 2010 WI 6 at ¶37.

Applying this jumble of opinions to the issue now before this Court presents a challenge. Whenever the question of admitting PBT results during motor vehicle prosecutions has come before the higher courts of this state, the courts have ruled such results inadmissible. Now before the Court is the novel question of whether PBT results might slip in the back door if the test was administered by someone other than law enforcement which, ironically, means by someone the State does not train, using a device the State does not certify for evidentiary purposes. And still looming as the backdrop against which the issue is to be decided is the questionable reliability of the PBT, in spite of the Wisconsin Supreme Court's remarks in *Fischer*, and regardless of whether the issue is examined within or without the framework of section 343.303, Stats.

The unreliability of the PBT remains an issue because even the majority opinion in *Fischer* recognized the accuracy of the PBT may be subject to dispute. It remains an issue because the concurring opinion in that case deemed the results neither reliable, "as a matter of law," nor admissible at an OWI trial, "as a matter of law." It remains because in *Fischer*, this Court set forth a compelling rationale for why the PBT is not a reliable instrument for evidentiary purposes. And it remains an issue because the Wisconsin Supreme Court's rationale in *Fischer* did not turn on the reliability, *vel non*, of the PBT. On the contrary, according to the Wisconsin Supreme Court, regardless of whether a PBT result is reliable or unreliable, it will not be admitted into evidence for a different reason: to avoid a chilling effect on OWI suspects' willingness to submit to it. The Wisconsin Supreme Court's discussion of the reliability of the

PBT can therefore fairly be described as dicta.[13] *See State ex rel. Schultz v. Bruendl*,168 Wis.2d 101, 112, 483 N.W.2d 238, 241 (Ct. App. 1992)(dicta is language broader than necessary to determine an issue).

For these reasons, this Court should apply the proscription of section 343.303, Stats., to this case. There is no meaningful distinction between a PBT administered by a law enforcement officer and a PBT administered by medical personnel such that the results from the latter, but not the former, should be allowed to be presented as compelling evidence in an OWI prosecution. While it is true the legislature used the phrase "law enforcement officer" in section 343.303, there is a larger legislative intent embodied in that section, with frequent references to section 346.63, to prohibit the use of PBTs in OWI prosecutions. The legislature simply did not contemplate the administration of PBTs by any other group of individuals.[14]

Finally, construing section 343.303, Stats., to allow into evidence any PBTs administered by anyone other than law

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[13]Conspicuously absent in the Wisconsin Supreme Court's rationale is any recognition of the strong indicia of probable cause that attaches to a "refusal" to take a PBT.

[14]This is particularly true given other statutory schemes whereby the PBT is used for qualitative rather than quantitative purposes. (R125-21). The State of Wisconsin never approved the instrument used in this case for evidential purposes. (R124-24-25, 42-43). State witness conceded the PBT instrument in this case was not certified by the State of Wisconsin. (R126-17-18).

enforcement would lead to some unintended and potentially absurd results. Presumably PBTs administered by a bartender before a patron leaves would be admissible, and could also form the basis for a blood alcohol curve defense. Indeed, an accused could self-administer a PBT and expect the results to be admitted at trial because it was not administered by a "law enforcement officer." A statute should not be interpreted to lead to absurd results. *State v. Grunke*, 2008 WI 82, ¶31, 311 Wis.2d 439, 752 N.W.2d 769 (absurd result follows when interpretation would be contrary to the clearly stated purpose of the statute).

B. Alternatively, This Court Should Hold The PBT Result Inadmissible Because It Is Not A Test Approved By The State Of Wisconsin For Evidentiary Purposes.

An alternate reason why the PBT results should have been declared inadmissible in this case is that the legislature never intended *qualitative* breath test results to be used for evidentiary purposes in a trial such as this one. The State in this case presented the PBT as a *quantitative* instrument, capable of measuring the *quantity* of alcohol in Rocha Mayo's breath. Indeed, as discussed in Section II of this brief, the State further sought, and obtained, a statutory presumption of reliability and accuracy that attached to the PBT due to the putative *quantity* in Rocha Mayo's breath: 0.087.

The legislature created a breath test protocol for quantitative breath tests to be used for evidentiary purposes. Susan Hackworthy, Chief of the DOT Chemical Test Section, testified that there are devices approved for evidentiary use in

Wisconsin and devices not approved for evidentiary use. (R124-58-66). Thus, further instructive on the issue is Wis. Admin. Code Trans 311.06 which establishes approved techniques and methods for performing chemical analyses of the breath. That provision states, in pertinent part:

> (1) Only methods approved by the department may be used to perform quantitative breath alcohol analysis.
>
> (2) Techniques used in performing quantitative breath alcohol analysis shall be those which are designed to assure accuracy,detect malfunctions and to safeguard personnel and equipment.
>
> (3) Procedures for quantitative breath alcohol analysis shall include the following controls in conjunction with the testing of each subject:
>
> (a) Observation by a law enforcement person or combination of law enforcement persons, of the test subject for a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject did not ingest alcohol, regurgitate, vomit or smoke.
>
> (b) Instrument blank analysis.
>
> (c) An analysis utilizing a calibrating unit, the results of which analysis shall fall within

0.01 grams of alcohol per 210 liters of gas of the established reference value.

(d) Consecutive breath alcohol analysis results in a test sequence within .02 grams of alcohol per 210 liters of breath shall be deemed to be an acceptable agreement. Breath sample analysis failing to meet this criteria shall be deemed deficient.

(e) If the first test sequence is deficient, a second test sequence shall be administered.

(4) The results of an analysis of breath for alcohol shall be expressed in grams of alcohol per 210 liters of breath.

Chief Hackworthy testified the two-test protocol is a safeguard again mouth alcohol because a 0.02 correlation between two tests assures the test was not affected by mouth alcohol. (R124-67-68). This is just one of several safeguards built into the Intoximeter, but not the PBT. (*Id*.). Others include the sampling requirement for flow and volume, which ensures the accuracy of the test by ensuring a deep (rather than shallow) lung air sample

is obtained, and infrared monitors for mouth alcohol.[15] (R124-45-46, 68-69).

Here, there was no 20 minute observation of Rocha Mayo by law enforcement prior to collection of the breath specimen. There was no instrument blank analysis. Here, there was no analysis utilizing a calibrating unit, the results of which fell within 0.01 grams of alcohol per 210 liters of gas of the established reference value. There was no consecutive breath alcohol analysis resulting in a test sequence within .02 grams of alcohol per 210 liters of breath. Thus, the failure to meet this criteria rendered the PBT **"deficient"** as a quantitative breath instrument. *See* Trans 311.06(3)(d). Indeed, Chief Hackworthy testified she would not be comfortable with a single sample test with no air blank and no calibration check on a machine not approved for evidentiary testing. (R134-175-176). She further testified that a test without a 20-minute observation period, air blank or post-test calibration check "would not even come close" to the Wisconsin State Patrol guidelines for an evidentiary test.[16] (R134-178). The use of such a test, with the lack of an evidentiary protocol to ensure its reliability, was particularly prejudicial in a case where the test result was right

[15] Even the occupational medicine protocol established by DOT workplace requires a two test sequence, a screening test if positive, a 15 minute confirmation, and a confirmatory test. (R124-51).

[16]She also opined that the 20-minute observation period should be done by someone who is trained to do that. (R134-182-183).

at the legal limit - 0.08 - and barely invoked the statutory presumption, as discussed in the next section.

II. IT WAS ESPECIALLY ERRONEOUS TO INSTRUCT THE JURY IT COULD FIND, BASED SOLELY ON THE *QUALITATIVE* PBT RESULT, THAT ROCHA MAYO WAS INTOXICATED AT THE TIME OF THE ACCIDENT.

Whether a jury instruction is an accurate statement of the law presents a question of law this Court reviews de novo. *See State v. Neumann*, 179 Wis.2d 687, 699, 508 N.W.2d 54 (Ct.App. 1993). Here, the State requested Jury Instruction 1185 which is derived from the statutory presumptions associated with a chemical test under the Implied Consent Law. (R136-139). Rocha Mayo objected on the grounds that no statutory presumptions should attach to chemical tests taken from non-evidentiary breath instruments (e.g., PBT). (*Id.*). The trial court overruled the objection and thus instructed the jury as follows:

> 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 operation of an intoxicant at the time of the alleged operating**, but you are not required to do so.

(R136-168-169)(emphasis added).[17]

The jury instruction and the presumption attendant thereto stems from section 885.235(1g)(c), Stats., and is meant to apply to "quantitative" breath tests. The procedure for obtaining a quantitative breath test is found in section 343.305, Stats., which states, in pertinent part:

> At the trial of any . . . criminal action . . . arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant . . . to a degree which renders him or her incapable of safely driving . . . the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant . . . to a degree which renders him or her incapable of safely driving . . . . **Test results shall be given the effect required under s. 885.235.**

(Emphasis added). There is no statutory authorization for such a prima facie effect for results obtained from a PBT.

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[17]Rocha Mayo also requested modification of the instruction to include that the Alco-Sensor IV was not an approved evidentiary device in Wisconsin. (R136-158). The trial court denied that request as well, reasoning it had already concluded it was an approved evidentiary device. (R136-158-159).

It is not just this statutory reference, however, that binds sections 343.305 and 885.235, Stats. There are also significant parallels between the two sections. Section 343.305(3)(a) authorizes law enforcement to obtain samples of a motorist's breath, blood or urine. Not by coincidence, Section 885.235(1g) confers presumptions on tests of breath, blood or urine. Section 885.235(1) further defines "alcohol concentration" as "the number of grams of alcohol in 100 milliliters of a person's blood or the number of grams of alcohol in 210 liters of a person's breath," precisely how the Intoximeter referenced in section 343.305 measures alcohol concentration. Section 340.01(1v)(b).

The PBT result in this case was not entitled to a prima facie effect. It was not a test under section 343.305, Stats. It was not a device approved for evidentiary use in Wisconsin. It did not comport with a method approved by the department for quantitative breath alcohol analysis. It did not employ a technique designed to assure accuracy, detect malfunctions and to safeguard the equipment. There was no 20 minute observation by law enforcement prior to the test. There was no instrument blank analysis. There was no analysis using a calibrating unit. There was no two-test protocol with an agreement of 0.02 or less. Before a jury instruction should be permitted to confer a presumptive effect, based on *quantity*, of a breath test result, the instrument must adhere to the control standards of the DOT.

It is not just that the PBT does not satisfy the approved techniques and methods for performing chemical analyses of the breath as required by Wis. Admin. Code Trans 311.06. Section 343.305(6), Stats., also sets forth the requirements for breath tests under the Implied Consent Law which, by extension, are

the requirements that must be met before a breath test is entitled to any presumptions under section 885.235, Stats. A review of that section reveals that the Intoximeter 5000 meets those requirements, while a PBT does not, in the following respects:

> (1) State certification of the qualifications and competence of the individual conducting the breath test;
>
> (2) State certification of the accuracy of the breath instrument before initial use and periodically thereafter at intervals of not more than 120 days;
>
> (3) a test sequence of two breath tests with a calibration standard analysis in between.

Nurse Edwards was not State certified to administer breath tests. The State did not certify the accuracy of the PBT before its initial use or periodically thereafter. Most importantly, the PBT did not include a test sequence of *two* breath tests, and was devoid of any contemporaneous calibration standard analysis.[18]

Another meaningful difference between the two instruments emerged during the motion hearing on the issue.

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[18]Other reasons why the PBT given Rocha Mayo cannot be a test under the Implied Consent Law include: (1) he was not read the Informing the Accused Form; (2) he was not subjected to a refusal charge if he refused the test; and (3) the test was not requested by law enforcement.

The Intoximeter, for example, has an infrared sensor capable of real-time monitoring of the breath sample as it enters the instrument, examining the waveform and, at the end of the sample, acquiring the sample with the fuel cell and analyzing the gas sample. (R124-30-31). The Alco-Sensor IV, by contrast, uses only the flow and volume measurements to determine when deep lung air is present to actuate the sampler to take the sample, and therefore does not use any infrared technology to do that. (R124-31). The Wisconsin Supreme Court, when addressing the general "breath test" language in the implied consent statute, has held that chemical tests specified by the statute are reliable as a matter of law.[19] *In Matter of Suspension of Operating Privilege of Bardwell*, 83 Wis.2d 891, 900, 266 N.W.2d 618, 622 (1978). *See also State v. Grade*, 165 Wis.2d 143, 149, 477 N.W.2d 315 (Ct.App. 1991)(holding that breath test shall consist of two samples in a specified sequence to be statutorily adequate).

[19]The Alco-Sensor IV has some additional safeguards when it is attached to the RBT IV and the protocol is driven by that microprocessor. (R124-34-35). As previously noted, however, the Alco-Sensor IV used in this case was not so attached.

III. THE TRIAL COURT ERRED WHEN IT ALLOWED DR. FALCO TO TESTIFY AS TO AN ULTIMATE FACT THAT EMBRACED A LEGAL CONCEPT FOR WHICH A DEFINITIONAL INSTRUCTION WAS REQUIRED.

At the outset of trial, the court examined whether Dr. Falco would be allowed to testify that Rocha Mayo was "under the influence." Rocha Mayo objected to such testimony on the grounds it would be inappropriate to allow an expert to give an opinion on an ultimate issue of fact that is also a legal term of art. (R131-13). The trial court, however, overruled the objection and, citing 907.04, Stats., ruled Dr. Falco would be permitted to offer such testimony. (R131-14-15). Consequently, Dr. Falco was permitted to testify at trial that Rocha Mayo was intoxicated and under the influence of alcohol. (R133-117-118). Moreover, he purported to be an expert in this area based on his experience and said his conclusion was "to a reasonable degree of scientific and medical certainty. (*Id*.).

While it is true section 907.04, Stats., permits the admission of opinion testimony, it does not authorize testimony on the ultimate fact when that testimony embraces "a legal concept for which a definitional instruction was required." *Lievrouw v. Roth*, 157 Wis. 2d 332, 352, 459 N.W.2d 850 (Ct. App. 1990). *See also State v. Nieto*, 2009 WI App 95, ¶22, 320 Wis.2d 484, 769 N.W.2d 877. As *Lievrouw* explained:

> [A] witness' opinion that there was an `emergency' (which is permissible under Rule 907.04) differs from a [witness'] conclusion that someone was `negligent'

> (which is not permissible under Rule 907.04) because, unlike `emergency,' which the law does not define for juries . . . `negligence' has prerequisite terms-of-art elements about which the jury must be instructed.

Lievrouw, 157 Wis. 2d at 352. *Lievrouw*'s interpretation of § 907.04 is consistent with the federal courts' interpretation of Federal Rule 704, the federal analogue to § 907.04. *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990); *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 685-86 (8th Cir. 1981); *U.S. Information Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, 313 F. Supp. 2d 213, 240-41 (S.D.N.Y. 2004).

Here, whether Rocha Mayo was "under the influence of an intoxicant" embraced a legal concept for which a definitional instruction was required. Indeed, a definitional instruction of that legal concept *was* given to the jury. (R136-167-168). It was therefore error to allow the doctor responsible for obtaining Rocha Mayo's breath test to testify that he was under the influence of an intoxicant. Said testimony greatly prejudiced Rocha Mayo by allowing an "expert" to assert the very ultimate fact (and the one contested element of the crime), *to a reasonable degree of scientific certainty*, that the jury was supposed to determine based on the definition set forth in the jury instruction.

IV. UNEVEN EVIDENTIARY RULINGS FURTHER PREJUDICED ROCHA MAYO.

A. The Trial Court Erred When It Allowed The Jury To Hear Rocha Mayo Had Not Obtained The Legal Drinking Age.

On cross-examination of Rocha Mayo, the State asked the defendant how old he was, whereupon Rocha Mayo objected to the question as irrelevant. (R136-27-28). The trial court overruled the objection and Rocha Mayo answered he was "nineteen." (R136-27-28). It was thus immediately established, in the eyes of the jury, that Rocha Mayo was not allowed to legally consume alcoholic beverages in any amount and that the legal limit for him on the roadway was 0.00. *See* sections 125.02(bm), 125.07, and 346.63(2m), Stats.

Evidence that is not relevant is inadmissible. Section 904.02, Stats. "Relevant evidence" means:

> Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

That Rocha Mayo was nineteen years old did not tend to make any fact of consequence in this case more or less probable. On the contrary, the only matter made more probable by the admission of this evidence is that the jury would tend to tend to hold against Rocha Mayo the irrelevant fact that he had not yet obtained the legal drinking age.

B. The Trial Court Erred When It Barred The Jury From Hearing That Bestwick Did Not Have A Motorcycle Endorsement.

Prior to trial, Rocha Mayo pled guilty to OAR whereupon the court agreed the fact he did not possess a valid Wisconsin driver's license was not relevant and therefore not admissible. (R131-3-9). The State then argued it would likewise be irrelevant that Bestwick did not have a motorcycle endorsement. (R131-9-10). Rocha Mayo objected, positing that since he was raising the affirmative defense, under section 940.09(2)(a), Stats., that the victim's death would have occurred even if he had not been under the influence of an intoxicant, Bestwick's knowledge, *vel non*, of how to operate a motorcycle would certainly be relevant to the issues to be tried. (R131-10). Rocha Mayo posited that such was especially true given that a cycle endorsement is a requirement above and beyond a standard driver's license. (R131-10). The trial court, however, disagreed and barred Rocha Mayo from eliciting such evidence. (R131-11).

The record reflects that as an important part of his defense, Rocha Mayo called into question the manner in which the motorcyclists, particularly Walters and Bestwick, operated their cycles on the night in question. With regard to Bestwick, Rocha Mayo testified that Bestwick suddenly came from the left and in front of his car and then braked. There was further testimony that the cyclists intended on trying to make a 90 degree turn at a relatively high rate of speed. It was Rocha Mayo's contention that even if it were assumed he was intoxicated, the accident would still have happened because the manner in which Bestwick operated the motorcycle (which incidentally, was not

his, but rather, belonged to Martin). Thus, whether Bestwick properly operated his motorcycle was a fact that was of consequence to the determination of this action.

It follows, then, that whether Bestwick had the skills to properly operate a motorcycle, whether he had demonstrated those skills to the State's satisfaction, and whether he had ever received the proper instruction to operate a motorcycle, were matters that tended to make more probable the existence of a fact of great consequence to this action. It made more probable that because of Bestwick's operation of the cycle, the accident would have occurred anyway, even if Rocha Mayo had been exercising due care and not under the influence of an intoxicant. The jury should have heard this evidence. It was relevant, and certainly more relevant than Rocha Mayo's age.[20]

[20]*See* Wis. Admin. Code Trans. 129.09 for basic motorcycle endorsement requirements: at least 15 hours of instruction in both classroom and range completed within 90 days and which, notably, includes instruction in turning and braking.

V. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO TROOPER SMITH'S OPINIONS REGARDING THE ACCIDENT WHICH, IN TURN, WERE BASED ON REPORTS OF OTHERS WHO DID NOT TESTIFY.

Trooper Smith was the State's accident reconstructionist and provided significant testimony favorable to the State regarding how the accident happened and who had been at fault and "reckless" (i.e., Rocha Mayo). (R135-4-83). His opinions and his testimony relied heavily on the work and conclusions of other law enforcement individuals who never testified at trial: (1) a mechanical inspector who closely examined Rocha Mayo's car; (2) Trooper Ryan Zukowski who surveyed the vehicles involved in the accident. (*Id*.). Trial counsel failed to challenge Trooper Smith's testimony and opinions on the grounds it improperly relied on the testimony and opinions of others who had not been subject to cross-examination.

On October 20, 2011, the court conducted a *Machner* hearing. (R142). Trial counsel explained that while he recalled Trooper Smith referencing other individuals involved in the investigation and basing his report and testimony on somebody else's examination, he did not object because he did not view the testimony as affecting his theory of defense. (R142-8-9). At the *Machner* hearing, Rocha Mayo begged to differ, noting the "lean" of the motorcycle at the time of impact was an important matter because it was germane to whether Bestwick had turned right and just in front of Rocha Mayo a split second before the accident.(R142-22-23).

To show ineffective assistance of counsel, a defendant must show (1) deficient performance; and (2) resultant prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). Here, it was deficient to fail to challenge Trooper Smith's testimony and opinions. The deficiency prejudiced Rocha Mayo by allowing in testimony that the motorcycle was oriented straight up-and-down at the time of impact, as opposed to a 45 degree lean, which would have been consistent with a sudden turn in front of Rocha Mayo's vehicle just before impact. Consequently, Trooper Smith was also allowed to testify that Rocha Mayo was operating his vehicle in a "reckless" manner at the time of impact. (R135-50). Said testimony also embraced a legal concept for which a definitional instruction was required and given. (R136-171). *Lievrouw*, 157 Wis. 2d at 352.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, the appellant respectfully requests that this Court vacate his conviction and remand the case for a new trial.

Dated this 2nd day of April, 2012.

/s/ Rex Anderegg
REX R. ANDEREGG
Attorney for the Defendant-Appellant

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 11,000 words.

Dated this 2nd day of April, 2012.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, and a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of April, 2012.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the brief-in-chief in *State of Wisconsin v. Luis Rocha Mayo.*, 2011AP002548-CR, which complies with the requirements of s. 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 2nd day of April, 2012.

/s/ Rex Anderegg
Rex Anderegg