STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2011AP2548-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS ROCHA-MAYO,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION MOTION ENTERED IN THE CIRCUIT COURT OF KENOSHA COUNTY, THE HONORABLE WILBUR W. WARREN, III, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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C O U R T O F A P P E A L S

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the briefs of the parties are adequate to present the issues which can be resolved by application of established legal principles to the facts of record.

ARGUMENT

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

A. Wis. Stat. § 343.303[1] Does Not Apply To The Results Of A Breath Alcohol Test Administered By Hospital Emergency Room Staff For Purposes Of Treatment And Diagnosis, And Therefore The Statute Does Not Bar The Admission Of The Results Of The Breath Alcohol Test In This Case.

Prior to trial, Rocha Mayo moved to suppress the results of the 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 results of such a test are unreliable (35:1-2; 124:4-12; 126:16-25).

After hearing extensive evidence on the matter,[2] 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-

[1] All references to the Wisconsin State Statutes are to the 2009-10 edition, unless otherwise indicated.

[2] Evidence was taken on the motion on several different days (*See* 124; 125; 126).

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 because they needed 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 there were not even any law enforcement officers 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 purpose 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.

Rocha-Mayo claims the trial court committed an error of law by admitting the breath alcohol test result in his case because § 343.303 specifically bars the admission of the evidence. This 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. *Id.*;

Robin K. v. Lamanda M., 2006 WI 68, ¶ 13, 291 Wis. 2d 333, 718 N.W.2d 38.

Wis. 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 results of the hospital emergency room breath alcohol test are 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 . . . ." "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.

In *State v. Beaver*, 181 Wis. 2d 959, 969-70, 512 N.W.2d 254 (Ct. App. 1994), and *State v. Doerr*, 229 Wis. 2d 616, 622, 599 N.W.2d 897 (Ct. App. 1999), this court held that a law enforcement preliminary breath alcohol screening test result performed pursuant to § 343.303, is admissible in a trial for offenses other than motor vehicle intoxication offenses, because the context of the statute made it clear the legislature intended the statutory bar to apply only in proceedings involving the motor vehicle intoxication offenses that are the subject of the statute. Similarly, here, 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 his breath alcohol test result in his case.

This court must also reject Rocha-Mayo's assertion that the Wisconsin Legislature declared preliminary breath alcohol tests inadmissible at trial under § 343.303 because they lack sufficient reliability to be considered by the jury in determining guilt or innocence. The Wisconsin Supreme Court specifically rejected this proposition in *State v. Fischer*, 2010 WI 6, ¶ 34, 322 Wis. 2d 265, 778 N.W.2d 629. The supreme court explained that if the test were unreliable, it would not have been held admissible in prosecutions for non-vehicular offenses. Moreover, if it were unreliable, it 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. *Id.* The supreme court further stated "In fact, a review of the legislative history of Wis. Stats. § 343.303 gives no indication whatsoever that the prohibition on the use of PBT results is rooted in concerns about reliability of the test" *Id*. (footnote omitted).

In the instant case, 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 Rankine 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. It is on the evidentiary test list for the federal Department of Transportation (DOT) and other states use it that way. It is the primary device used for work-place testing.

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). 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 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 § 343.303 prohibited the admission of the result of his breath alcohol test, administered by the hospital emergency room staff for treatment and diagnostic purposes.

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

Under Wisconsin's implied consent statute, 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 admissible in evidence to prove vehicular alcohol offenses. 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).

The testing device and test administered to Rocha-Mayo by the hospital emergency room staff did not meet the statutory and administrative code requirements for admissibility under the implied consent statute. That does not render Rocha-Mayo's test result inadmissible, however. 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 purpose of diagnosis and treatment.

Moreover, in this case, the State did not seek the benefit of automatic admissibility without supporting expert testimony regarding the scientific reliability and accuracy of the testing methodology afforded by the implied consent law. Rather, the State did present extensive expert testimony both at the suppression hearing, as summarized in the previous argument, 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 jury had more than sufficient information upon which to assess the evidence.

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.

This court must also reject Rocha-Mayo's contention that the result of his test was inadmissible because his test was qualitative rather than quantitative because the facts of this case demonstrate the test administered to him was not qualitative rather than quantitative.

Mr. Forrester testified at the suppression hearing 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). Both devices quantify the result. There was no evidence whatsoever that the Alco-Sensor IV identifies only the presence or non-presence of alcohol in the sample provided. 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).

Furthermore, 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).

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

II. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON A PERMISSIBLE 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 as follows on a permissible inference the jury was entitled, but not required, to draw:

> 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.

(136:168-69).

Rocha-Mayo challenges the instruction based solely on his claim that the test he took was qualitative rather than quantitative and that it did not meet the requirements for admissibility set forth in the implied consent statute and related administrative rules. As the State has demonstrated in its arguments 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 statute because it was not administered pursuant to the implied consent statute. 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 permissible inference that the jury was entitled, but not required, to draw from the evidence presented. The instruction was in no way mandatory.

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 permissible inference instruction given in his case 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 level of alcohol (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).

During his thirteen years as an emergency room doctor, Dr. Falco had several times diagnosed whether a patient was under the influence; indeed, in the emergency room he saw intoxicated patients pretty much on a daily basis (133:118).

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

> 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).

Wis. 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 Br. at 40 (capitalization omitted). Rocha-Mayo's complaint is without merit.

Dr. Falco never offered an opinion that Rocha-Mayo was under the influence of alcohol or under the influence of an intoxicant. Rather, he opined that when he saw Rocha-Mayo in the emergency room, Rocha-Mayo was intoxicated (133:119).

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 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.

Even if it was error for the trial court to allow Dr. Falco to testify to his opinion that Rocha-Mayo was intoxicated when he saw him in the emergency room after the crash, the error was harmless. 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. Dr. Falco did not purport to and expressly refused to make any attempt to extrapolate whether Rocha-Mayo was intoxicated when he was driving his car and crashed it into the motorcycle. The relatively slight impact of the label, which was limited to Rocha-Mayo's condition in the emergency room after the crash, must be balanced against the other ample, unchallenged evidence from which the jury could conclude 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). He 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).

This court must consider the limited nature of Dr. Falco's opinion of Rocha-Mayo's condition in the emergency room following the crash. In light of all of the 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 left the bar after purchasing more beer to go; 3) he continued to drink as he was driving away from the tavern; and 4) his nearly incomprehensible driving choices immediately before the fatal crash. In light of the entire record it appears beyond a reasonable doubt that Dr. Falco's opinion that Rocha-Mayo was intoxicated in the emergency room after the crash did not contribute to the verdict. This court can conclude beyond a reasonable doubt that a rational jury would have convicted Rocha-Mayo absent the alleged error. *State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis. 2d 434, 666 N.W.2d 485.

IV. THE TRIAL COURT'S EVIDENTIARY RULINGS DID NOT CONSTITUTE AN ERRONEOUS EXERCISE OF DISCRETION.

A. During Cross-Examination, The Trial Court Properly Allowed The State To Ask Rocha-Mayo His Age.

In Wisconsin, any witness who testifies at trial, including a criminal defendant, may be cross-examined on any matter relevant to any issue in the case, including credibility. Wis. Stat. § 906.11(2). Rocha-Mayo chose to testify at trial. By doing so, he subjected himself to cross-examination on all facets of the crimes charged, under

Wisconsin's "wide open" cross-examination rule. *Neely v. State*, 97 Wis. 2d 38, 43, 292 N.W.2d 859 (1980).

On cross-examination, the State asked Rocha-Mayo his age; the defense objected, asserting his age was irrelevant. The trial court properly overruled the objection and Rocha-Mayo was allowed to answer that he was nineteen (136:27-28). The State did not produce any evidence, or request any type of instruction, or make any reference in opening or closing argument, to the "legal drinking age" or the "legal limit" for a person of any particular age "on the roadway." Rocha-Mayo Br. at 42.

In addition to the vehicular intoxication homicide, Rocha-Mayo was charged with first-degree reckless homicide of the motorcycle rider who was killed, and first-degree endangering safety of a different motorcycle rider (37). At trial, Rocha-Mayo testified to a version of events in which the driving and behavior of the motorcyclists was aggressive and frightening to him, the motorcyclist who was killed caused the crash, and Rocha-Mayo himself was not at fault or responsible for the crash (136:9-86).

The standard for testing relevance of questions on cross-examination is not whether the answer sought will illuminate any of the main issues in the case, but, rather, whether it will be useful to the trier-of-fact in assessing the credibility of the witness and appraising the probative value of his testimony. *Rogers v. State*, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980).

Rocha-Mayo's relatively tender and inexperienced age was relevant to the jury's assessment of the credibility and probative value of his version of events. It was also relevant as the jury considered his exercise of judgment, his conduct and his reactions throughout the events that culminated in the fatal crash as they related to the charge of first-degree reckless homicide of the deceased motorcyclist and first-degree recklessly endangering safety of another motorcyclist.

Moreover, any possible error was harmless beyond a reasonable doubt because Rocha-Mayo's age alone was not highly prejudicial and the jury did not hear any evidence or argument about the legal drinking age or various vehicle laws regarding minors.

B. The Trial Court Did Not Err When It Refused To Admit Evidence That The Motorcyclist Who Was Killed In The Crash Did Not Have A Motorcycle Endorsement.

The trial court properly exercised its discretion in determining that neither Rocha-Mayo's failure to have a valid driver's license nor the victim's failure to have a motorcycle endorsement was relevant to the issues in this case.

The trial court properly ruled that neither the fact that an individual operating a car does not have a valid driver's license nor the fact that an individual operating a motorcycle does not have a valid motorcycle endorsement sheds light on how the individual is operating his vehicle at the particular time of the accident (131:9-11).

Rocha-Mayo's defense theory was that the manner in which the victim operated his motorcycle caused the crash and therefore his death would have occurred even if Rocha-Mayo had not been under the influence of an intoxicant. However, he did not demonstrate to the trial court and does not demonstrate on appeal that an individual's lack of a motorcycle endorsement makes it more likely than it would otherwise be that on a specific occasion — the occasion of the accident — the motorcycle operator was not properly operating the motorcycle. Moreover, Rocha-Mayo did not demonstrate to the trial court and does not demonstrate in his brief that an individual who does not have a motorcycle

endorsement does not know how to operate a motorcycle correctly and safely.

The trial court did not unfairly exclude defense evidence and admit State evidence. Rocha-Mayo has failed to demonstrate that the trial court issued "uneven evidentiary rulings" or that he was prejudiced by the trial court's evidentiary rulings. Rocha-Mayo Br. at 42. The trial court properly excluded the lack of motorcycle endorsement evidence because it was not relevant. The exclusion of irrelevant evidence does not prejudice the proffering party.

V. ROCHA-MAYO WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A. Controlling Legal Principles And Standard of Appellate Review.

A criminal defendant alleging ineffective assistance of trial counsel bears the burden of proving that trial counsel's performance was constitutionally deficient and that, as a result, he suffered actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985); *State v. Koller*, 2001 WI App 253, ¶ 7, 248 Wis. 2d 259, 635 N.W.2d 838.

There is a strong presumption that the defendant received adequate assistance and that all of counsel's decisions could be justified in the exercise of reasonable professional judgment. *See State v. Kimbrough*, 2001 WI App 138, ¶¶ 31-35, 246 Wis. 2d 648, 630 N.W.2d 752. An attorney's performance is not deficient unless the defendant proves the attorney's challenged acts or omissions were objectively unreasonable under all of the circumstances of the case. *State v. Oswald*, 2000 WI App 2, ¶ 49, 232 Wis. 2d 62, 606 N.W.2d 207; *Koller*,

248 Wis. 2d 259, ¶ 8; *Kimbrough*, 246 Wis. 2d 648, ¶¶ 31-35.

The question is whether under the circumstances of the case as they existed at the time of trial, the challenged conduct or failure to act could have been justified by an attorney exercising reasonable professional judgment. If so, there is no deficient performance. *See Koller*, 248 Wis. 2d 259, ¶ 8; *Kimbrough*, 246 Wis. 2d 648, ¶¶ 31-35. The test for deficient performance is whether counsel's conduct was objectively reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. *Pitsch*, 124 Wis. 2d at 636-37. Judicial review of counsel's performance is highly deferential and may not be based on hindsight; *Strickland*, 466 U.S. at 687; *State v. Robinson*, 177 Wis. 2d 46, 55-56, 501 N.W.2d 831 (Ct. App. 1993). The fact that the defendant was convicted does not render a reasonable strategic decision by counsel unreasonable. *See State v. Maloney*, 2005 WI 74, ¶¶ 43-44, 281 Wis. 2d 595, 698 N.W.2d 583. Trial counsel's strategic choices that were made after thorough consideration of the options in light of the relevant facts and law are virtually unchallengeable. *See Strickland*, 466 U.S. at 690-91. The reviewing court will second-guess counsel's strategic or tactical decision only if it is shown to be an irrational trial tactic or if it was based upon caprice rather than upon judgment. *State v. Felton*, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983).

The defendant must also prove counsel's challenged acts or omissions actually prejudiced the defense to the degree that defendant was deprived of a fair trial that yielded a reliable result. *Oswald*, 232 Wis. 2d 62, ¶ 50. To meet this burden, the defendant must prove there is a reasonable probability that the verdict would have been different, but for counsel's error. *Koller*, 248 Wis. 2d 259, ¶ 9.

On appellate review, the circumstances of the case, counsel's strategy choices, the acts counsel did or failed to do, and the reasons for counsel's decisions, acts and omissions are matters of historical and evidentiary fact. The appellate court is bound by the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. *State v. Leighton*, 2000 WI App 156, ¶ 33, 237 Wis. 2d 709, 616 N.W.2d 126; *State v. Jones*, 181 Wis. 2d 194, 199, 510 N.W.2d 784 (Ct. App. 1993).

The appellate court determines de novo whether, under those facts, the defendant has proven deficient performance and prejudice. *Koller*, 248 Wis. 2d 259, ¶ 10.

During his direct testimony, the State's accident reconstructionist, Trooper Smith, referred and placed reliance on the work and conclusions of other law enforcement officers who did not testify at trial. Rocha-Mayo complains that trial counsel rendered ineffective assistance of counsel because he did not object to such references during the testimony.

Rocha-Mayo's complaint is without merit. Based on his own investigation, training, experience, observations and analysis, as well as the information and conclusions provided by other law enforcement agents and professionals, Smith opined in his direct testimony that Rocha-Mayo slammed into the rear end of the motorcycle. There was no physical, mechanical, accident scene or trace evidence indicating the motorcycle was in the process of turning right when it was hit by the car, or that the car was braking or taking any evasive action to avoid striking the motorcycle. Further, at the time of the collision, the car was operating in a reckless manner (135:49-58).

At the postconviction evidentiary hearing, trial counsel cogently explained that he made a strategic choice not to object to Smith's references to and reliance on the work and conclusions of others in forming his opinions

because those references were not important to the defense theory and nothing the accident reconstructionist said was harmful to the defense (142:5-8). His theory of defense was that the victim motorcyclist entered the turn lane directly in front of Rocha-Mayo at too fast a speed to make the turn, deaccelerated suddenly right in front of Rocha-Mayo (who was going at a fairly high rate of speed), and that the conduct of the motorcyclist caused Rocha-Mayo to plow into the motorcycle (142:5-8).

Rocha-Mayo has utterly failed to prove that trial counsel's strategic choice was objectively unreasonable. Moreover, he has failed to show either deficient performance or prejudice because he has failed to show that an objection would have been successful.

Wis. Stats. §§ 907.03 and 907.05 respectively provide as follows:

> **Bases of opinion testimony by experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the experts at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Wis. Stat. § 907.03.

> **Disclosure of facts or data underlying expert opinion.** The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts, or data on cross-examination.

Wis. Stat. § 907.05.

The accident reconstructionist properly relied upon the mechanical inspections, measurements, work and conclusions of the mechanic and other investigating law enforcement officers because that is the type of

information reasonably relied upon by accident reconstructionists in forming their opinions and inferences. Wisely, Rocha-Mayo does not even contend otherwise. Thus, if he had objected, the trial court would have properly overruled the objection.

At most, Rocha-Mayo could have objected that Smith should have stated his opinions first and then explained the data and information he relied upon in forming his opinions. In the alternative, he should have asked the court's permission before referring to the underlying data. In any event, the underlying data and information would have come in under the sound discretion of the trial court, and Rocha-Mayo does not contend or demonstrate otherwise.

For all of these reasons, Rocha-Mayo's claim of ineffective assistance of trial counsel is utterly baseless and must be rejected.

CONCLUSION

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

Dated this 25th day of June, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,466 words.

Dated this 25th day of June, 2012.

_____
Sally L. Wellman
Assistant Attorney General

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 25th day of June, 2012.

_____
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