STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2011AP002548-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS ROCHA MAYO,

Defendant-Appellant.

REPLY BRIEF 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:

ANDEREGG & ASSOCIATES
Post Office Box 170258
Milwaukee, WI 53217-8021
(414) 963-4590

By: Rex R. Anderegg
State Bar No. 1016560
Attorney for Defendant-Appellant

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ARGUMENT

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

It is worth noting the State does not include a Statement of the Facts in its brief, from which one can infer it does not dispute the facts set forth by Rocha Mayo. Thus, the State does not contest that the motorcyclists: (1) provoked the confrontation that led to the accident; (2) then fled the accident scene without giving any statements to the police; (3) then subsequently lied to police, and later under oath, as to the events surrounding the accident by making false claims of erratic driving by Rocha Mayo to cover up the fact that they, not he, were the aggressors on the evening in question.

While the issues on appeal are not factual in nature, these underlying facts are nevertheless relevant precisely to this extent: Rocha Mayo's guilt, *vel non*, of the crimes charged was an extremely close call. This is further evidenced by the jury's protracted struggles in reaching a verdict. It therefore follows that even a small error in the trial process would be magnified as to its effect on the outcome. Moreover, any error in the handling of the PBT result would be particularly troublesome given the 0.08 result was barely above the legal limit.

Whenever this state's higher courts have considered whether the results of a PBT are admissible at trial, they have uniformly answered this question negatively when it comes to motor vehicle prosecutions. *State v. Beaver*, 181 Wis.2d 959,

970, 512 N.W.2d 254 (Ct. App. 1994); *State v. Doerr*, 229 Wis.2d 616, 622, 599 N.W.2d 897 (Ct. App. 1999); *State v. Fischer*, 2008 WI App 152, 314 Wis.2d 324, 761 N.W.2d 7; *State v. Fischer*, 2010 WI 6, 322 Wis.2d 265, 778 N.W.2d 629. It is interesting that despite the fact this case would break new ground by allowing the introduction of a PBT result in a motor vehicle prosecution, the State does not believe this Court's decision will merit publication.[1]

The State argues PBT results are very accurate based largely on testimony from the most self-serving source imaginable: the CEO of the manufacturer of the instruments. (State's Brief, p. 7). Piggy-backing on the CEO's agenda, the State maintains there is no meaningful difference between the Alco-Sensor IV and the Intoximeter 5000 when it comes to accuracy. (*Id*. at 11). Anyone who prosecutes or defends OWI cases, however, and thus frequently compares results from the two instruments in the context of the same case, knows better. There is much to commend in this Court's observation that:

> The testing mechanism for the PBT is simply not designed so the result obtained during the investigation of a possibly intoxicated driver is

[1]To clarify a point of nomenclature, Rocha Mayo refers to the breath test as a Preliminary Breath Test while the State refers to it as a "Portable Breath Alcohol Test." (State's Brief, p. 5). Insofar as the instrument in question - the Alco-Sensor IV - is commonly used by law enforcement in this state to administer PBTs, the terminology is irrelevant to the issues on appeal.

> accurate enough that it can be used to help a jury determine the driver's guilt or innocence.

Fischer, 2008 WI App 152 at ¶¶13-17.

The State ignores this Court's decision in *Fischer*, citing only the Wisconsin Supreme Court's *Fischer* decision. That might be appropriate had the Wisconsin Supreme Court addressed the issues presented here or otherwise ruled the PBT to be the functional equivalent of the Intoximeter in terms of accuracy. The Wisconsin Supreme Court, however, never addressed whether a PBT administered by hospital personnel can be used in a motor vehicle prosecution. Nor did it rule the PBT a reliable device for that purpose. Instead, it simply reasoned the legislature, when barring PBT results from motor vehicle prosecutions in section 343.303, Stats., did so to maximize the likelihood OWI suspects would submit to them, rather than because of concerns about their reliability. This does *not* proclaim a legislative endorsement of the reliability of PBTs. Nor, most importantly, did *Fischer* reject the dichotomy between evidentiary and non-evidentiary breath tests.[2]

[2]It defies logic to equate the accuracy of the PBT with the accuracy of the Intoximeter when the quality controls associated with the latter far exceed the former. For example, this Court has noted the PBT, unlike the Intoximeter, is not tested for accuracy either immediately before or after a test. *Fischer*, 2008 WI App 152 at ¶14.

The State at least acknowledges the qualitative/quantitative paradigm, but then endeavors to cloud it. After promoting a strict statutory reading regarding *who* administers a PBT, the State shifts gears and favors a relaxed reading of statutory and administrative provisions establishing *what kind of test* a PBT constitutes. The State, for example, insists a PBT is a "quantitative" breath test instrument (certainly it was used "quantitatively" in this case). (State's Brief, p. 11). And yet, pursuant to an express legislative grant of authority to develop protocols for the designation, testing and use of breath test instruments, section 343.305(6), Stats., the Department of Transportation has designated the PBT a *qualitative* breath test, and the Intoximeter a *quantitative* breath test. The State simply ignores this point.

However, were one to accept the State's premise that a PBT is a *quantitative* test, then the PBT, under Department guidelines, would be subject to much more rigorous quality control standards. The Department has ordained that:

> Only methods approved by the department may be used to perform quantitative breath alcohol analysis.

Wis. Admin. Code Trans. 311.06(1). Interestingly, this provision makes no distinction with regard to *who* performs the test.

The Department, to ensure quantitative breath alcohol analyses are accurate and detect malfunctions, *Id*. at 311.06(2), has mandated specific techniques:

> (1) Observation . . . 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;
>
> (2) Instrument blank analysis;
>
> (3) 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;
>
> (4) 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; and

Id. at 311.06(3). The PBT here did not satisfy any of these requirements.

The Department has further stated that "[a]ll quantitative breath alcohol test instruments approved for use in this state shall be tested and certified for accuracy in accordance with [certain] standards." *Id*. at 311.10(1). Again, this mandate is without reference to *whom* uses the instrument. The standards promulgated by the Department include:

> (1) Each instrument shall be tested and certified for accuracy before regular use and periodically thereafter pursuant to s. 343.305(6)(b)3., Stats.;
>
> (2) Each test for accuracy shall include, but not be limited to, an instrument blank analysis and an analysis utilizing a calibrating unit. The result of the calibrating unit analysis shall fall within 0.01 grams of alcohol per 210 liters of the established reference value; and
>
> (3) The original reports of instrument maintenance and certifications shall be forwarded to and retained by the department.

Id. at 311.10(1).

While the PBT in this case was apparently tested periodically for accuracy, it was never concomitantly certified nor tested *pursuant to section 343.305(6)(b)3., Stats.* Under section 343.305(6)(b)3., such testing and certifying of the accuracy of the equipment would have to be conducted by "trained technicians, approved by the secretary . . . before regular use of the equipment and periodically thereafter at intervals of not more than 120 days." *Id*. In short, the PBT used in this case was never governmentally approved for use in motor vehicle prosecutions because it was never State-certified or

checked for accuracy by a secretary-approved trained technician.

Finally, the State argues that whether there is a one-test or two-test sequence is irrelevant because it will not change the test result. (State's Brief, p. 8). This argument suffers from ignorance of a two-sample protocol, where *the lesser* of the two test results is "the reported value," and the value admissible in court. Had a second test been administered to Rocha Mayo and yielded, for example, a result of 0.079, such would indeed have "changed the result" and made a world of difference. In that event, the reported value would have been 0.07 and there would have been no factual basis for Jury Instruction 1185. It is remarkable to contemplate that, given the absence of a two-sample protocol, the PBT result in this case would not be sufficient to even take state action against an employee in the workplace, and yet it was instrumental in convicting Rocha Mayo of homicide and sending him to prison for 10 years.[3] (R124-51).

[3]That a second breath sample could have lowered Rocha Mayo's reported value to 0.07 is eminently plausible. Such an occurrence is not uncommon even with Wisconsin's most sophisticated breath test instrument (i.e., the Intoximeter 5000). Indeed, the difference between a result of 0.086 and 0.079 - 0.007 - is within the accepted margin of error for the Intoximeter.

II. A PERMISSIVE PRESUMPTION OF INTOXICATION SHOULD NOT ATTACH TO A PBT RESULT.

Rocha Mayo has posited it was erroneous to instruct the jury that it could find, based on the PBT result alone, that he was legally intoxicated at the time of operation. The State now seeks to reconstitute Rocha Mayo's position on this issue as based "solely" on the fact a PBT is a "qualitative" test. (State's Brief, p. 13). The State then argues that since it has already demonstrated a PBT is a "quantitative" test, it need not repeat that argument in the context of the jury instruction issue. (*Id*.).

By grossly oversimplifying Rocha Mayo's position, the State maneuvers to avoid the crux of this issue: Jury Instruction 1185 springs from section 885.235(1g)(c), Stats., which applies to chemical tests administered in accordance with section 343.305, Stats. In short, the flaw in allowing the instruction was not merely, nor even principally, that a PBT is a "qualitative" test. A more fundamental problem was that Rocha Mayo's PBT was neither a test contemplated by, nor administered in accordance with, section 343.305. Consequently, it was not a test entitled to the presumption accorded by section 885.235(1g)(c). The State simply ignores this point.

Instead, the State argues the instruction was somehow permissible because it did not constitute a mandatory presumption. (State's Brief, p. 13). This argument might be relevant were there any circumstances in which the instruction ever creates a mandatory presumption. The instruction, however, is *never* mandatory, but instead, *always* permissible.

Jurors are never told they are required to find intoxication based on a chemical test result. Indeed, a mandatory presumption would not be constitutional because it would relieve the State of its burden to prove every element of an offense beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 521-24 (1979). In other words, Rocha Mayo's position is statutory, not constitutional, and the instruction here created the same permissible presumption that by statute is accorded the Intoximeter, but not a PBT.[4]

[4]The State's argument that the jury was given an opportunity to decide what weight to give the evidence (e.g., the absence of a 20 minute observation period), (State's Brief, p. 14), pretends the jury was left unfettered to weigh the evidence when in fact, it was instructed it could conclude from the 0.08 PBT result alone that Rocha Mayo was intoxicated and impaired.

III. DR. FALCO SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY THAT ROCHA MAYO ARRIVED AT THE HOSPITAL INTOXICATED.

Section 907.04 permits the admission of opinion testimony, but not when it embraces an ultimate legal concept. *Lievrouw v. Roth*, 157 Wis. 2d 332, 352, 459 N.W.2d 850 (Ct. App. 1990). The State, however, argues Dr. Falco's testimony that Rocha Mayo was intoxicated when brought into the emergency room was permissible because he did not testify Rocha Mayo was intoxicated *at the time of the accident*. The State bases this argument largely on the cross-examination to which Rocha Mayo was relegated when the court denied his objection to such testimony in the first place. When that testimony was permitted, Rocha Mayo could only point out the doctor did not observe him minutes earlier when he was operating a motor vehicle.

The State attempts to disconnect Rocha Mayo's level of impairment in the emergency room from his level of impairment moments earlier when he was operating a motor vehicle. The accident happened at 2:07 a.m. (R133-62). Rocha Mayo arrived at the hospital at 2:30 a.m. (R125-7). The idea that Rocha Mayo was not prejudiced because Dr. Falco's testimony that he was intoxicated at 2:30 a.m. did not signify he was intoxicated at 2:07 a.m. rings hollow and, more importantly, ignores the jury instruction.

The PBT was administered via an order from Dr. Falco whose testimony that Rocha Mayo was intoxicated, especially given the absence of field sobriety tests, was based largely on

the 0.086 result. It is therefore difficult to meaningfully divorce the doctor's testimony from the test result upon which it was based. Given that the jury was instructed it could find Rocha Mayo intoxicated at the time of the accident based solely on the PBT administered in the emergency room, the jury would also logically connect Dr. Falco's opinion, based on the same test and observations in the same emergency room, to the time of the accident. His testimony, to a reasonable degree of medical certainty, that Rocha Mayo arrived at the hospital intoxicated, is tantamount to testimony that Rocha Mayo was intoxicated at the time of the accident, and further exacerbated the erroneous jury instruction.

IV. UNEVEN EVIDENTIARY RULINGS FURTHER PREJUDICED ROCHA MAYO.

It is true that by choosing to testify, Rocha Mayo subjected himself to cross-examination on all facets of the crime charged. (State's Brief, p. 20). This does not, however, include cross-examination on issues that are irrelevant. *State v. Barreau*, 2002 WI App 198, ¶ 47, 257 Wis. 2d 203,651 N.W.2d 12. As Rocha Mayo has observed, evidence that he was nineteen was not relevant and more prejudicial than probative because it signaled Rocha Mayo could neither legally consume alcohol in any amount nor legally be on the roadway with any breath alcohol concentration above 0.00. (Brief-in-Chief, p. 42)(citations omitted).

The State, however, argues that even if evidence of Rocha Mayo's age did not illuminate any issue in the case, it was still admissible in assessing his credibility and appraising

the probative value of his testimony. (State's Brief, p. 21), *citing Rogers v. State*, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980). The State does not, however, explain why a nineteen-year-old is inherently less credible than an older individual. Moreover, that the State did not specifically argue to the jury that Rocha Mayo was under the legal drinking age is of relatively little important when such knowledge lies within the jury's ken.

What is particularly troublesome is the court allowed this evidence while barring evidence that Bestwick lacked a motorcycle endorsement. The State at least concedes an important trial issue was whether Bestwick's manner of operating a cycle (that was not his) signified the accident would have happened regardless of Rocha Mayo's putative intoxication. (State's Brief, p. 22). It goes on, however, to maintain that Rocha Mayo's position must fail because he has not established "that an individual who does not have a motorcycle endorsement does not know how to operate a motorcycle correctly and safely." (State's Brief, pp. 22-23). With all due respect, Rocha Mayo need not make such a showing to establish the admissibility of that evidence. The State's argument is based on an erroneous and too-exacting standard. Rocha Mayo need only establish the evidence tended to make more probable the existence of a fact of consequence to the determination of the action. Section 904.02, Stats. In this case, the absence of a motorcycle endorsement tended to make it more probable that Bestwick did not operate his cycle properly at the time of the accident, which clearly was a fact of consequence in this action.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL.

The State notes a defense counsel's strategic decision is virtually unassailable unless an irrational trial tactic. (State's Brief, p. 24), *citing State v. Felton*, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983). The State then notes Trooper Smith testified there was no evidence to indicate the motorcycle was either turning right or braking at the time of the accident. (State's Brief, p. 25). The State next argues counsel's "strategic choice" not to object to Trooper Smith's reliance on the work of others was "cogent" because the Trooper's "references were not important to the defense theory and nothing the accident reconstructionist said was harmful to the defense." (State's Brief, pp. 25-26). Thus, the State's position is that Trooper Smith's testimony that there was no evidence of turning or braking before the accident was not harmful to the defense theory. However, in the next breath, the State remarks:

> [Rocha Mayo's] 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 (sic) suddenly right in front of Rocha Mayo . . . and that the condict of the motorcyclist caused Rocha Mayo to plow into the motorcycle.

(State's Brief, p. 26). The State's argument is therefore self-contradictory. If Rocha Mayo's defense depended upon the cycle turning and braking before the accident, and if Trooper Smith opined there was no evidence of turning or braking before

the accident, then Trooper Smith's testimony *was* harmful to the defense.

CONCLUSION AND RELIEF REQUESTED

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

Dated this 12th day of July, 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 3,000 words.

Dated this 12th day of July, 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 reply brief in *State of Wisconsin v. Luis Rocha Mayo*, Appeal No. 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 12th day of July, 2012.

/s/ Rex Anderegg
Rex Anderegg