STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2012AP2782-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

ANDRE M. CHAMBLIS,

Defendant-Respondent-Cross-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR LA CROSSE COUNTY, THE HONORABLE ELLIOTT M. LEVINE PRESIDING

COMBINED BRIEF OF APPELLANT AND CROSS-RESPONDENT

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

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COMBINED BRIEF OF APPELLANT AND CROSS-RESPONDENT

ARGUMENT

I. THIS APPEAL IS PROPERLY BEFORE THE COURT.

A. The State could not appeal an order denying its motion to amend the information, because the circuit court granted the motion.

Chamblis asserts that at the hearing on September 12, 2012, the circuit court denied the State's motion to amend the information, and that the State should have petitioned for leave to appeal the circuit court's non-final order denying the State's motion (Chamblis Br. at 2-13). He argues that because the State did not petition for leave to appeal, "it abandoned its proper remedy" (Chamblis Br. at 12).

However, the court granted the State's motion to amend the information on January 23, 2012 (58). The hearing on September 12 was not on the State's motion, but on Chamblis's "motion for order to amend the amended complaint" (30).[1]

In January 2012, the State filed a motion to amend the information (17), and an amended information, alleging two additional convictions from Illinois, with conviction dates of July 20, 2002 (14). At a January 23 hearing, the court asked Chamblis's counsel if he objected to the State's motion amending the information (58:5). Counsel said, "Your Honor, with the opportunity to file a Baker motion, I don't object" (58:5). The court said, "And obviously, if you want to go ahead and file that, given that we have enough time between now and then to have that filed." Counsel said, "OK," and the court said, "All right. Then it will be amended" (58:5).

[1] Chamblis later clarified that he sought to amend the amended information (Chamblis Br. at 5 n.1; (47:4)).

On August 6, Chamblis moved to amend the amended complaint (30). He asserted that the two Illinois convictions alleged in the amended complaint arose from the same incident, and should be counted as one conviction (30:3). He also asserted that the State had not properly proved the conviction (30:3-6).

The court addressed Chamblis's motion at the September 12 hearing (47, A-Ap. 127-56), and concluded that it would not count the Illinois conviction, and would treat the case as a sixth offense, rather than a seventh offense (47:28, A-Ap. 154).

At the plea hearing, the State attempted to provide additional evidence of the conviction (49:7-11, A-Ap. 163-67), but the court declined to consider it (49:21, A-Ap. 177). The State then filed a second amended information (36), but objected to the court's finding that it had not proved the Illinois conviction, and not accepting the additional proof (49:22-23, A-Ap. 178-79). The court accepted Chamblis's guilty plea to PAC (49:35-37, A-Ap. 191-93), and entered judgment of conviction (42).

The State did not abandon its remedy by not petitioning for leave to appeal an order denying its motion to amend the information, because the court did not deny the State's motion. The State properly appealed under a final judgment adverse to the State under Wis. Stat. § 974.05.

B. This appeal is not prohibited by Wis. Stat. § 971.08, *State v. Bangert*, or the Double Jeopardy Clause of the Constitution.

Chamblis asserts that the State's appeal is prohibited by *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986), and Wis. Stat. § 971.08, and that the remedy the State seeks would violate his constitutional

protection against double jeopardy (Chamblis Br. at 13-19).

Chamblis argues that in accepting his guilty plea, the trial court was required under Wis. Stat. § 971.08 and *Bangert* to inform him of the potential penalties he faced (Chamblis Br. at 13-14). The State agrees. The court should have counted the Illinois conviction and informed Chamblis that the maximum penalty was 10 years of imprisonment, under Wis. Stat. §§ 346.65(2)(am)6 and 939.50(3)(g). However, Chamblis does not explain how this prohibits the State from appealing.[2]

Chamblis argues that when a defendant pleads guilty to OWI or PAC, rather than being found guilty at trial, the number of priors must be proved before the guilty plea (Chamblis Br. at 13). However, he does not dispute that under *State v. McAllister*, 107 Wis.2d 532, 319 N.W.2d 865 (1982), and *State v. Matke*, 2005 WI App 4, 278 Wis.2d 403, 692 N.W.2d 265, the time for determining the number of priors in an OWI or PAC case is at sentencing. Chamblis points to authority holding that although the number of priors can be proved after a person is found guilty at trial, it must be proved before a person pleads guilty. He does not explain why a person who exercises the constitutional right to a jury trial could receive an enhanced sentence if the State presents evidence of a prior conviction after trial, but a person who pleads guilty could not receive an enhanced sentence.

It is well established that a defendant may plead guilty to OWI or PAC, and then challenge the number of prior convictions, and the range of sentences, before sentencing. *See e.g.*, *State v. Carter*, 2010 WI 132, ¶ 8, 330 Wis.2d 1, 794 N.W.2d 213 ("Carter entered a guilty plea to the OWI charge and filed a motion challenging,

[2] If this court remands this case and the circuit court imposes sentence for a seventh offense, Chamblis may seek to withdraw his guilty plea on the ground that the court failed to inform him of the potential penalties he faced pleading guilty.

under Wis. Stat. § 343.307(1), the State's counting for sentence enhancement purposes his two prior Illinois suspensions.")

A defendant also may plead guilty to OWI or PAC, and then collaterally attack a prior conviction, so that it may not be used for sentence enhancement. *See e.g.*, *State v. Krause*, 2006 WI App 43, 289 Wis.2d 573, 712 N.W.2d 67.

When a court grants a motion to not count a prior conviction before the defendant enters a guilty or no contest plea, the State may appeal, challenging the court's decision not to count the conviction. For instance, in *State v. Machgan*, 2007 WI App 263, 306 Wis.2d 752, 743 N.W.2d 832 (overruled on other grounds by *Carter*, 330 Wis.2d 1), the defendant moved to dismiss an OWI fourth, asserting that one prior conviction should not be counted. *Id.* ¶ 2. The court agreed, and the defendant pled guilty to OWI. At sentencing, the State asked the court to count the conviction. The court denied the request. The State appealed, and the court of appeals affirmed. *Id.* ¶¶ 5, 16. However, the court did not even hint that the procedure followed in the circuit court, including the State's appeal after the guilty plea, was improper.

In each of these circumstances, a defendant convicted of OWI or PAC would not know for certain how many prior convictions the court would count at sentencing, or the maximum sentence.

Chamblis asserts that if this court remands the case to the circuit court, and the circuit court imposes sentence for a seventh offense, his right to be free from double jeopardy would be violated because he would face a second prosecution for the same offense (Chamblis Br. at 18).

However, the State does not seek a second prosecution. Chamblis pled guilty to PAC, admitting that he operated a motor vehicle, with a prohibited alcohol

concentration, and that he had two or more prior OWI-related convictions. *See* Wis. JI—Criminal 2660C (2007). He does not dispute any of these elements. He challenged only one of the six convictions the State alleged for sentence enhancement purposes. Whether the Illinois conviction is counted has no bearing on Chamblis's guilt. The State seeks remand for sentencing for a seventh offense, not a second prosecution. Double jeopardy protections are not implicated.

"The double jeopardy clauses embod[y] three protections: 'protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense.'" *State v. Lechner*, 217 Wis.2d 392, 401, 576 N.W.2d 912 (1998) (citation omitted). The double jeopardy clauses do not apply to sentencing decisions. As the Supreme Court explained "Historically, we have found double jeopardy protections inapplicable to sentencing proceedings, *see* [*Bullington v. Missouri*, 451 U.S. 430, 438 (1981)], because the determinations at issue do not place a defendant in jeopardy for an 'offense.'" *Monge v. California*, 524 U.S. 721, 728 (1998) (citation omitted).

The prosecution may appeal a sentencing determination, because "[t]he Double Jeopardy Clause 'does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.'" *Id.* at 730 (citation omitted). "Consequently, it is a 'well-established part of our constitutional jurisprudence' that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal." *Id.* (citations omitted). "The Double Jeopardy Clause does not prohibit the government from appealing a sentencing ruling that does not result in acquittal." *United States v. Rosales*, 516 F.3d 749, 757-58 (9th Cir. 2008) (citing *United States v. Booker*, 543 U.S. 220, 267 (2005)).

This appeal, seeking remand for imposition of an enhanced sentence, does not violate double jeopardy protections.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE STATE DID NOT PROVE CHAMBLIS'S ILLINOIS CONVICTIONS.

As the State explained in its initial brief, the circuit court erred in concluding that Chamblis's certified driving record, from the Illinois Department of Transportation, was not competent evidence proving his Illinois conviction (State's Br. at 3-10).

The court rejected the records because it concluded that they have "no date of arrest indicated," and "they also don't have any place that it happened, like Minnesota does, and like Wisconsin does" (47:27, A-Ap. 153). The court added that "it creates a very unjust situation, with basically an assertion that there's some conviction in the State of Illinois, somewhere in the State of Illinois, but we don't know where it is. That's fundamentally unjust. There has to be more identification than that" (47:28, A-Ap. 154).

However, the records *do* identify the date and locations of the offense (State's Br. at 10; 33, A-Ap. 106-17). The records establish that Andre M. Chamblis, a male born 01-07-83, who resided in Chicago, was arrested on 12-26-01, and that he received three tickets in Cook County: (1) ticket number 25153 for "DUI/Alcohol concentration above legal limit"; (2) ticket number 25152 for "DUI/Alcohol"; and (3) ticket number 25151 for "Driving without a valid license or permit." The records establish that Chamblis's operating privilege was revoked, effective 07-20-02, in the 1st district of Cook County (33, A-Ap. 106-117).

On appeal, Chamblis does not dispute that his Illinois driving record documents both the date and location of the offense. He instead argues that the circuit court correctly concluded that the Illinois Department of Transportation certified driving record is not competent evidence of his Illinois convictions because it was not issued by the Wisconsin DOT (Chamblis Br. at 20-21 (citing 47:26-28)). Chamblis argues that *State v. Spaeth*, 206 Wis.2d 135, 556 N.W.2d 728 (1996), and *State v. Van Riper*, 2003 WI App 237, 267 Wis.2d 759, 672 N.W.2d 156, "read together, stand for the proposition that the 'driving record' has to be a State of Wisconsin Department of Transportation driving record" (Chamblis Br. at 20-21).

However, the circuit court did not reject the certified driving records because they are not from Wisconsin. The court rejected the records because it concluded that they have "no date of arrest indicated," and "they also don't have any place that it happened" (47:27). The court could not reasonably have found the records insufficient because they are not from the Wisconsin DOT, since it found Chamblis's Minnesota driving record, issued by the Minnesota Department of Public Safety, sufficient to prove his Minnesota convictions (33, A-Ap. 106-17; 47:27, A-Ap. 153).

Moreover, *Spaeth* and *Van Riper* do not hold that an out-of-state certified driving record is insufficient to prove an out-of-state conviction.

In *Spaeth*, the supreme court concluded that the criminal complaint was not competent evidence of prior convictions, and held that the State provides "competent proof" of prior violations of Wisconsin's operating after revocation law when it presents the court with "(1) an admission; (2) copies of prior judgments of conviction for OAR; or (3) a teletype of the defendant's Department of Transportation (DOT) driving record." *Spaeth*, 206 Wis.2d at 153-54.

In *Van Riper*, the supreme court concluded that the defendant's Wisconsin DOT certified driving record, which included his Minnesota convictions, was sufficient to prove the prior convictions as an element of a PAC charge. 267 Wis.2d 759, ¶¶ 1, 5. The court concluded that since, under *Spaeth*, "a teletype of a defendant's DOT driving record is admissible and sufficient evidence of prior offenses for purposes of penalty enhancement in a sentencing proceeding, then certainly a *certified* DOT driving record is admissible and sufficient to prove the status of an alleged repeat offender in a PAC prosecution." *Id.* ¶ 16.

Neither *Spaeth* nor *Van Riper* holds that an out-of-state certified driving record is not competent evidence proving an out-of-state conviction.

Chamblis argues that like the criminal complaint in *Spaeth*, the Illinois driving record in this case is of "'diminished reliability'" because it is not the "'source document,'" but instead "contained only information interpreted and transcribed from the "'source document'" (Chamblis Br. at 20).

However, in *Spaeth*, the supreme court explicitly did not require a source document. It concluded that the State could prove the conviction with "a teletype of the defendant's Department of Transportation (DOT) driving record." *Spaeth*, 206 Wis.2d at 153.

Chamblis argues that the Illinois driving record is of "'diminished reliability'" because it was "not accompanied by supplemental corroborating documentation which would allow the sentencing court to verify the information in it" (Chamblis Br. at 20).

However, in *Spaeth*, the court concluded that a criminal complaint, in which an officer recounted what he had seen in the driving record, was insufficient to prove the prior conviction, because it was not accompanied by the driving record. *Spaeth*, 206 Wis.2d at 154. Here, the

State submitted an Illinois Department of Transportation driving record, certified by Illinois' secretary of State. The record is self-authenticated under Wis. Stat. § 909.02(1), and is "reliable and competent evidence" of his prior conviction. *See Van Riper*, 267 Wis.2d 759, ¶ 17 (quoting *State v. Leis*, 134 Wis.2d 441, 443, 445-46, 397 N.W.2d 498 (Ct. App. 1986)). This record was the evidence corroborating the allegations in the amended information.

Out-of-state driving records are routinely used to prove out-of-state convictions. *See e.g.*, *State v. Puchacz*, 2010 WI App 30, ¶ 6, 323 Wis.2d 741, 780 N.W.2d 536 ("Puchacz was convicted after a court trial at which the parties stipulated to the court's review of police reports, transcripts of motion hearings, hygiene lab reports, and Puchacz's Michigan driving record."). In this case, the State proved Chamblis's Minnesota convictions with his Minnesota driving record (33; 47:7). Chamblis does not argue that this was somehow improper.

As the prosecutor attempted to explain, a person gets a Wisconsin driving record only when he or she applies for a drivers license in Wisconsin (47:19). DOT then imports information from the other state's driving record to the person's Wisconsin driving record. Chamblis does not explain why the Illinois certified driving record is of diminished reliability, but if he applied for a Wisconsin drivers license and the Wisconsin DOT interpreted and transcribed his Illinois driving record and imported it into his Wisconsin driving record, the Wisconsin driving record would be reliable.

For all of these reasons, the circuit court erred in concluding that Chamblis's Illinois certified driving record was insufficient to prove his Illinois conviction.

III. THE CIRCUIT COURT ERRED IN NOT ACCEPTING ADDITIONAL EVIDENCE OF CHAMBLIS'S ILLINOIS CONVICTION BEFORE SENTENCING.

The State attempted to present additional evidence of Chamblis's Illinois conviction at the plea hearing (49:6, A-Ap. 162). The court did not accept the evidence (49:15, A-Ap. 171). Chamblis asserts that the additional information was discovery that the State did not timely disclose to him, and the court properly excluded it (Chamblis Br. at 22-24).

Chamblis is incorrect. Wisconsin Stat. § 971.23 "Discovery and inspection," provides, in relevant part that:

> **(1) WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT.** Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> . . . .
>
> (c) A copy of the defendant's criminal record.

The prosecutor informed Chamblis of his prior convictions in January, 2012, in the amended information (14), and provided Chamblis's Minnesota and Illinois driving records before the September 12, 2012 hearing (33).

The State attempted to provide the additional information once it was in the State's possession. As the prosecutor stated at the Wednesday, September 19, 2012 plea hearing, "I just received it this last Friday," September 14 (49:9, A-Ap. 165).

Moreover, the information that the State wanted to submit was not discovery required to be disclosed to the defendant before trial. The information was relevant only at sentencing. "[T]he number of a defendant's prior OMVWI convictions to be counted for penalty enhancement purposes is *not* an element of the offense of OMVWI." *Matke*, 278 Wis.2d 403, ¶ 6 (quoting *McAllister*, 107 Wis.2d at 535). Evidence proving the number of prior convictions for penalty enhancement purposes need be "introduce[d]s into the record at any time prior to the imposition of sentence." *Spaeth*, 206 Wis.2d at 153.

Proof of Chamblis's Illinois conviction was required at sentencing, not at trial. The State submitted the additional information well before sentencing, and the court erred in not accepting it and counting the conviction.

CONCLUSION

For the foregoing reasons, this court should remand the case to the circuit court with instructions to sentence Chamblis for PAC as a seventh offense.

Dated this 9th day of December, 2013.

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 2,983 words.

Dated this 9th day of December, 2013.

_____

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SUPPLEMENTAL STATEMENT OF THE CASE

The defendant-respondent-cross-appellant, Andre M. Chamblis, appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration (PAC) (42). Chamblis was charged with PAC after he was stopped by police, for operating a motor vehicle that had a cracked windshield (57:9-11). Chamblis moved to suppress evidence gathered after the traffic stop, asserting that the police officer did not have reasonable suspicion to stop him (12). The circuit court denied the motion after a hearing (57:35-38). Chamblis subsequently pled guilty to PAC (49:27). He has now filed a cross-appeal, challenging the judgment convicting him of PAC (65). His appeal is focused solely on the circuit court's denial of his motion to suppress evidence.

SUPPLEMENTAL STATEMENT OF THE FACTS

As respondent, the State will present facts as appropriate in the argument section of this brief.

ARGUMENT

A. Applicable legal principles and standard of review.

"'Whether evidence should be suppressed is a question of constitutional fact.'" *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899). Constitutional facts consist of "the circuit court's findings of historical fact, and its application of these historical facts to constitutional principles." *Id.* (citing *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987)). The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. *Id.* The court's application of constitutional principles to those historical facts is reviewed de novo. *Id.*

To show reasonable suspicion to stop a vehicle, an officer "'must be able to point to specific and articulable facts which, taken together with rational inferences from

those facts, reasonably warrant' the intrusion of the stop." *State v. Popke*, 2009 WI 37, ¶ 23, 317 Wis. 2d 118, 765 N.W.2d 569 (quoting *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634) (internal quotation marks omitted). "The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." *Id.* ¶ 23 (quoting *Post*, 301 Wis. 2d 1, ¶ 13) (internal quotation marks omitted).

To determine whether a stop is reasonable, a court must review the totality of the circumstances. *State v. Griffin*, 183 Wis. 2d 327, 331, 515 N.W.2d 535 (Ct. App. 1994). "Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact." *Popke*, 317 Wis. 2d 118, ¶ 10.

B. The circuit court found the police officer to be credible, and properly concluded that he had reasonable suspicion to stop the vehicle Chamblis was operating.

The circuit court held a hearing on Chamblis's motion to suppress evidence (57). At the hearing, the officer who stopped the vehicle and arrested Chamblis, Officer Jeremy Rindfleisch of the City of La Cross Police Department, testified about the stop (57:6-20).

Officer Rindfleisch testified that he observed the vehicle at around 12:54 a.m., on November 22, 2011 (57:6-7). He said he was on routine patrol when he observed a red Ford Escort travel past him (57:7, 9). He said he recognized the vehicle from stopping it a few weeks earlier, for operating while under the influence of an intoxicant (57:9, 14-15). He said he recalled that he had stopped the vehicle a few weeks before, and that it had a cracked windshield (57:9). He said he pulled out behind the vehicle and ran the license plate, and

determined it was the same vehicle, and that it was registered to a woman named Terry Johnson (57:9, 18).

Officer Rindfleisch testified that when he saw the vehicle again, on November 22 he did not initially see whether the windshield was still cracked (57:14). He said he followed the vehicle to determine if the windshield was still cracked (57:10, 14, 15-16). He said he followed the vehicle for a few blocks, and when the Escort was under a street lamp, and his vehicle was a few car lengths back, he saw a "little glimmer from a crack" in the windshield (57:16). Officer Rindfleisch stopped the vehicle, and confirmed that the crack was in the "windshield critical" area, the part of the windshield that is swept by the windshield wipers (57:11).

The defense presented the testimony of Phillip Mergen, an investigator who took two photographs of the Escort on December 8 or 9, from the front of the vehicle (57:21-26). The photographs were admitted into evidence (57:22).

Chamblis testified that he had consumed one big can of beer about two or three hours before he was stopped (57:29). He said he had been driving the car for about five hours, but that he had not noticed the crack in the windshield (57:29). Chamblis said that when Officer Rindfleisch pulled him over the officer pointed his flashlight into the car and then said "oh, I pulled you over for that cracked windshield" (57:27).

The prosecutor asked the circuit court to deny the suppression motion because Officer Rindfleisch had reasonable suspicion for the stop (57:31). The prosecutor pointed out that the officer knew that the vehicle had a cracked windshield a few weeks before, that he observed a glimmer from the crack, and that he then pulled the vehicle over (57:31). The prosecutor also pointed out that the photographs that Chamblis submitted confirmed that the windshield had a crack in the windshield critical area, in violation of Wis. Admin. §§ Trans 305.34(3)(a) and

305.05(43) (57:32-33). Section Trans 305.34(3)(a) provides:

> **(3)** The windshield may not be excessively cracked or damaged. A windshield is excessively cracked or damaged if:
>
> (a) The windshield has a crack inside, or which extends inside, the windshield critical area.

Section Trans 305.05(43) provides:

> **(43)** "Windshield critical area" means that portion of a motor vehicle windshield normally used by the driver for necessary observations to the front of the vehicle. This includes the areas normally swept by a factory installed windshield wiper system.

The defense argued that the officer had fabricated his story about seeing the crack in the windshield (57:33-35). He argued that the officer could not have seen the crack before he stopped the vehicle, and that the officer had not recognized the vehicle, or realized it had a cracked windshield a few weeks before (57:35).

The circuit court rejected Chamblis's arguments (57:35-38). The court found as fact that Officer Rindfleisch observed the vehicle drive by, recognized it as a vehicle he had stopped before, and checked the license plate to confirm that it was the same vehicle (57:36-37). The court found that Officer Rindfleisch looked to see if the windshield was fixed (57:37).

The court found that the crack in the windshield, as reflected in one of the photographs of the vehicle Chamblis presented, "does go across predominantly horizontally across the entire windshield and it is a place where the windshield wipers do wipe" (57:37). The court found that Officer Rindfleisch could have observed the crack when he was behind the vehicle (57:37-38). The court noted that the officer "specifically was looking for a crack at that point," and that "[w]hen he said he caught a glimmer, what he was doing was seeing the light bands off

the refraction of the crack coming up back, back through the back of the light" (57:37-38). The court noted that when the officer approached the vehicle and made contact with the driver, he mentioned the crack in the windshield (57:38).

The court explicitly stated that it believed Officer Rindfleisch, and found him "very credible in this situation" (57:38). The court concluded that the officer "was trying to actually not arrest Mr. Chamblis if he didn't have the information for sure it was cracked when he was doing what he was doing" (57:38). The court therefore denied the motion to suppress evidence (57:38).

On appeal, Chamblis argues that the court's findings and conclusions were incorrect (Chamblis Br. at 5). He asserts that the historical facts found by the court, and in particular its finding that Officer Rindfleisch observed a crack in the windshields critical area, were "'clearly erroneous'" (Chamblis Br. at 5).

Chamblis bases his argument on the photographs he submitted into evidence at the suppression hearing (Chamblis Br. at 5-7). He asserts, based on the photographs, that "the front seats, back seats and trunk compartment are all higher than the crack on the windshield," and that "[t]here would therefore be no way that such a crack would be able to be observed by a driver in another vehicle several car lengths behind" (Chamblis Br. at 5-6).

The State maintains that the photographs Chamblis points to do not show that it would be impossible for a person in a vehicle behind the Escort to see the crack in the windshield. Chamblis submitted two photographs. Neither photograph shows the view of the Escort that Officer Rindfleisch had, from a squad car behind the Escort. Exhibit 1 shows a view of the Escort from the front of the car. Exhibit 2 shows a view of the windshield, taken from above and in front of the car. Neither photograph proves that it would be impossible for a

person in a squad car a few car lengths behind the Escort to see the crack in the windshield. The circuit court's finding that the officer observed the crack from behind the vehicle (57:37-38), is not disproved by the photographs.

Chamblis also asserts that the officer's testimony, about seeing "'a little glimmer from a crack there,'" was insufficient to legally stop the vehicle. He argues that a "'little glimmer'" is not a crack within the windshield critical area (Chamblis Br. at 6).

However, as the circuit court recognized, Officer Rindfleisch had stopped the same vehicle a few weeks before, and observed that the car had a crack in the windshield critical area (57:36-37). After he verified that this was the same vehicle, he sought to determine whether the windshield was still cracked (57:37). His focus was specifically on the windshield. As the court stated "[h]e specifically was looking for a crack at that point to see if it was fixed or not" (57:37-38). When he saw a glimmer from the crack, he could reasonably assume that the crack he had previously observed, extending into the windshield critical area, had not been repaired.

In summary, Chamblis has presented nothing demonstrating that the officer fabricated his story of observing the crack in the windshield, or that it was impossible to see the crack from behind the vehicle. He has presented nothing showing that the circuit court was clearly erroneous in finding that the officer was credible, that he observed the crack, and that the crack was sufficient to stop the vehicle. The circuit properly denied Chamblis's suppression motion, and its decision, and the judgment of conviction, should be affirmed.

CONCLUSION

For the forgoing reasons, this court should affirm the circuit court's decision denying Chamblis's motion to suppress evidence, and affirm the judgment of conviction, and as explained in the appellant's brief, remand to the

circuit court with instructions to sentence Chamblis for operating with a prohibited alcohol concentration as a seventh offense.

Dated this 9th day of December, 2013.

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 1,874 words.

Dated this 9th day of December, 2013.

_____
Michael C. Sanders
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 9th day of December, 2013.

_____
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