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**CLERK OF COURT OF APPEALS
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 13-1166-CR

MARK K. SCHRICK,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND JURY
TRIAL VERDICT, BOTH ENTERED IN THE JACKSON
COUNTY CIRCUIT COURT, THE HONORABLE TODD
ZIEGLER, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

- 1. DID THE TRIAL COURT ERRONEOUSLY DENY THE DEFENDANT'S MOTION TO DISMISS COUNT 2 WHEN THE JURY WAS NOT PRESENTED WITH COMPETENT, RELIABLE EVIDENCE OF THE DEFENDANT'S BLOOD ALCOHOL CONCENTRATION?**

The trial court answered: No.

- 2. DID THE TRIAL COURT ERR BY INSTRUCTING THE JURY ON THE STATUTORY PRESUMPTION OF RELIABILITY FOR THE BREATH TEST WHEN THE OFFICER WHO ADMINISTERED THE TEST COMMITTED NUMEROUS**

ERRORS IN THE TESTING PROCESS?

The trial court answered: No.

STATEMENT ON ORAL ARGUMENT

Appellant anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, appellant is not requesting oral argument.

STATEMENT ON PUBLICATION

Since this appeal is being decided by one judge, it will not be eligible for publication.

STATEMENT OF THE CASE

This appeal raises two interrelated questions regarding the remedies available when an officer fails to comply with statutorily mandated procedures for a valid test of a driver's breath for determining blood alcohol concentration. Based on the officer's noncompliance with appropriate testing procedures, the defense moved for a directed verdict on the prohibited alcohol concentration charge because the jury instruction requires evidence that the testing device was "correctly operated by a qualified person," and also objected to the jury instruction regarding the statutory presumptions of scientific reliability of the test result. The trial court overruled both requests, and the appellant asserts those requests were improperly denied.

The criminal complaint charged Mark Schrick with operating a motor vehicle while intoxicated (3th offense), in violation of Wis. Stat. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration 0.08 or more (3th offense), in violation of Wis. Stat. § 346.63(1)(b), for an incident occurring on October 10, 2010, in the town of Adams (3: 1-4). The defense moved to suppress, alleging Jackson County Sheriff's Deputy Karie Gillett lacked probable cause to arrest (10: 1-2). After holding an evidentiary hearing on November 23, 2011, the court found sufficient evidence for probable cause to arrest, and the case

proceeded to trial (21: 51).¹

Deputy Gillett was only witness called to testify by the State at trial. Gillett testified that at 12:30 am on October 10, 2010, she was operating her patrol vehicle and observed an oncoming vehicle traveling 65 mph in a 55 mph zone (22: 79-80). After turning around to follow the vehicle, Gillett observed the vehicle's side tires driving on the solid yellow line (22: 80). Eventually Gillett activated her emergency lights and executed a traffic stop (22: 81). Gillett identified Mark Schrick as the driver of the vehicle (22: 81-82).

In speaking with Schrick, Gillett observed an odor of intoxicants, and noticed that his eyes were red and glossy (22: 82). Schrick also admitted he had consumed a couple drinks (22: 82). Gillett asked Schrick to step out of the vehicle to perform field sobriety tests (22: 83). After having Schrick perform the horizontal gaze nystagmus (HGN) test, the walk and turn test, the alphabet test, and a counting test, Gillett believed that Schrick was under the influence of an intoxicant and decided to place him under arrest² (22: 84-93). Deputy Gillett transported Schrick to the sheriff's department to obtain an evidentiary chemical test of his breath (22: 95). Schrick consented to the test (22: 95-96).

Gillett testified that she was trained to operate the Intox EC/IR II Breathalyzer machine used by the sheriff's department, and that the machine was in proper working order on October 10, 2010 (22: 101). The State had previously offered copies of certified maintenance records for the Intox EC/IR II machine to show the machine was in proper working order, and those records were received by the court (22: 77-78). When asked if she was an expert on of how the Intoxilyzer machine measures the alcohol content in someone's breath, Gillett indicated she was not (22: 101-02).

Deputy Gillett testified that before administering the

¹ The suppression ruling is not being contested on appeal.

² Since the jury acquitted Schrick of operating while under the influence of an intoxicant (count 1) but convicted on the prohibited alcohol concentration charge (count 2), the appellant will only briefly summarize the evidence on count 1 and focus on the evidence relevant to the issues on appeal.

breath test, Gillett observed Schrick for 20 minutes, during which Schrick did not smoke, drink, or vomit (22: 103-04). Further, she did not observe anything that suggested Schrick regurgitated during that 20 minute period (22: 104).

However, Gillett also admitted she was not watching Schrick for the entire 20 minutes, but was instead performing other tasks, including reading Schrick the “Informing the Accused” form and performing data entry (22: 104). Specifically, Gillett testified that her data entry consisted of using a machine with a keyboard and “transferring the information about Mr. Schrick, the date and time, and the citation,” (22: 104). Gillett stated she subsequently verified all the information that she entered and then continued her observation period “if it is not complete,” (22: 105). According to Gillett, Schrick did not have anything in his mouth during that observation period (22: 106-07). During that observation period, Gillett was 4-5 feet from Schrick (22: 107).

Regarding mouth alcohol, Gillett testified that the two breath samples must be “fairly close” in terms of alcohol concentration, and that she was trained that this was a “safeguard against mouth alcohol” (22: 109). Gillett also testified that the machine alerts her when it detects mouth alcohol, and it did not do so in this case (22: 109). The deputy did not observe anything about the test that would lead her to conclude the result was not accurate (22: 109). The result of Schrick’s breath sample was reported as 0.17 grams of alcohol per 210 liters of blood (22: 110). As a result, Gillett cited Schrick for operating with a prohibited alcohol concentration (22: 110).

On cross exam, Gillett admitted she read the Informing the Accused form to Schrick during the observation period (22: 152). Gillett testified that she was trained to use the protocol of the Wisconsin Department of Transportation regarding the administration of the Intoximeter (22: 154-55). Gillett agreed that the TRANS regulation requires that the test operator observe the test subject for 20 minutes for the purpose of eliminating the possibility of residual mouth alcohol (22: 155-56).

Gillett also testified she was trained to remove foreign objects from a subject's mouth before the test to prevent the possibility of residual mouth alcohol affecting the test (22: 156). Gillett agreed that dentures were considered a foreign object (22: 157). Although Gillett believed there was nothing in Schrick's mouth prior to the test, she did not recall looking in his mouth and did not document anything about it in her report (22: 157).

Gillett acknowledged that the manual for breath testing procedure says the test administrator must be "close and attentive" during the 20 minute observation period (22: 158). When asked if the manual required that the test administrator read the Informing the Accused form and perform all data entry prior to the 20 minute observation period, Gillett seemed unfamiliar with the procedures from the manual, stating, "I would have to reference it. I have been taught that minimal paper work, minimal paper work data entries is acceptable," (22: 158)

However, Gillett agreed that the purpose of the protocol of entering data and reading the Informing the Accused prior to starting the 20 minute observation period is to give the test subject close attention during that 20 minute period (22: 159-60). When asked if she failed to do that in this case, Gillett testified "I was doing based on my training that I was taught," (22: 160). Further, she acknowledged that if she was trained incorrectly according to the manual, that can be problematic (22: 160).

Defense counsel then had Deputy Gillett review page 7 of the manual, and she agreed that, according to the manual, the purpose of requiring the 20 minute observation period was regarding residual mouth alcohol (22: 160). Gillett was then asked to review Wisconsin Transportation regulation 311.06, which she confirmed required a minimum of 20 minute observation period before obtaining the test sample (22: 160-61). Although Gillett maintained that she did as she was trained in administering the breath test, she admitted that she did not do what was required by the manual (22: 161).

After the State rested, the defense presented testimony from Schrick's ex-girlfriend, Stephanie Heller, and Mark

Schrick regarding his alcohol consumption and timing of his drinks. Heller was present with Schrick for most of the day, and testified that they attended a benefit for a friend with cancer (22: 191). Heller testified they were at that benefit until 5 pm, and then went to a family function, before heading back to the benefit around 9:30 pm (22: 193, 196). Heller testified that Schrick didn't consume any alcohol during that 4-4 ½ hour period (22: 207-08). Further, Heller testified that although Schrick was drinking when they returned to the benefit, he did not appear to have trouble with his balance or fine motor skills (22: 196-98, 206-07).

Schrick testified that earlier in the day, he had "four and probably five" alcoholic drinks at the benefit between noon and 5 pm (22: 221). Schrick confirmed Heller's testimony that he did not consume any alcohol at the family event between 5:30-9:30 pm (22: 225). Schrick admitted to consuming alcohol upon returning to the benefit, specifically 3 or 4 alcoholic beverages over approximately 3 hours (22: 225). Schrick's last drink occurred between 11:30 and midnight (22: 227).

Regarding his dentures, Schrick testified that he wore dentures on both his top and bottom rows of teeth, and demonstrated by removing them to show the jury (22: 219). Schrick testified that the top dentures were a full set, and the bottom wasn't quite full because he had three partial teeth left (22: 219). The dentures helped hold the remaining teeth in place, and although they fit together, pockets remained (22: 219). Schrick used Fixodent dental adhesive to keep the dentures in place (22: 219, 238). However, Schrick testified his dentures would loosen toward the end of the day, resulting in getting "food particles stuck in there," (22: 219).

When asked if he had his dentures in when he blew into the Intoximeter, Schrick stated, "Yes, I did," (22: 230). Schrick did not recall anyone at the jail raising the issue of his dentures prior to the breath test, and concluded that he didn't think anyone asked (22: 230). When asked specifically if Deputy Gillett raised the issue of his dentures, Schrick stated, "Not that I recall, no," (22: 230).

On cross-exam, Schrick testified he was wearing

Fixodent dental adhesive on the night of his arrest, and agreed he could remove his dentures easily (22: 237-38). When asked if he removed his dentures at any point between consuming his last drink and taking the breath test, Schrick stated, “not that I recall, no,” (22: 238). Schrick testified that jail staff made him empty his pockets, but stated, “I don’t remember if they looked inside my mouth. I don’t remember that,” (22: 240).

When asked about the 20 minute observation period, Schrick admitted that he did not vomit, regurgitate, or chew tobacco during that period (22: 240). Schrick also agreed Deputy Gillett was facing him while reading him the Informing the Accused form (22: 241).

The defense also presented expert testimony from Dr. Dennis Fater, a UW-La Crosse professor in physical therapy with a Ph.D. in medical physiology, regarding the absorption and elimination of alcohol (22: 248-49). Fater testified that based on the alcohol consumption history provided and the average elimination rate, all the alcohol Schrick consumed earlier in the day would have been eliminated by 9:30 pm (22: 259-60). Fater further testified that, assuming Schrick had four additional alcoholic beverages between 9:30 pm – 12:30 am, and assuming the standard elimination rate, Schrick would have been left with 17.4 g of alcohol in his system by 12:30 am (22: 260). Fater testified that since Schrick weighed 175 lbs, that amount of alcohol would equate to a blood alcohol concentration of 0.032 (22: 260-61). Assuming the same facts, Fater testified Schrick’s BAC at 1:30 am would have been approximately 0.017 (22: 261-62).

Dr. Fater testified that one potential reason for the disparity between his calculations and the Intoxilyzer result could have been residual mouth alcohol (22: 262). Fater testified that having dentures and dental adhesive in during the breath test can elevate mouth alcohol to create an artificially high test result, unrepresentative of the subject’s actual blood alcohol concentration (22: 263-64). The test result would be representative of the alcohol content in the subject’s mouth rather than in the subject’s lungs (22: 264). Dr. Fater agreed that residual mouth alcohol is the main reason why the 20 minute observation period is important

(22: 264-65).

Dr. Fater acknowledged he did not perform a dosing study on Schrick, nor any testing on the Intoxilyzer EC/IR machine used to take Schrick's breath sample (22: 265-66). Fater agreed his information on Schrick's alcohol consumption came from Schrick (22: 267). Further, Fater admitted his belief that residual mouth alcohol caused a result 10 times greater than his estimate was a possibility, but he could not be certain of what happened (22: 271).

At the close of evidence, the defense moved for a directed verdict on the prohibited alcohol concentration charge, arguing that Deputy Gillett admitted she didn't follow the required testing procedures and that Schrick had a foreign object (dentures) in his mouth during the test (23: 289-90). Counsel read into the record the requirements for a proper breath test established by Trans. 311.06 and argued those requirements were not followed (23: 290). Counsel argued that count 2 must be dismissed because the jury instructions regarding the use of the test required that the testing device was "correctly operated by the qualified person," and that the uncontroverted evidence showed the test was not correctly operated, even when viewed in a light most favorable to the State (23: 290-91).

The State responded that the defense could argue the identified procedural complaints to the jury, and that taking the issue away from the jury would deprive the State of its right to a jury trial (23: 292-93). The State asserted that Gillett established the testing machine was working and "did what she was supposed to do in order to operate the test" (23: 292). The State argued Gillett complied with the 20 minute observation because she was sitting 4-5 feet away from Schrick and was "still in a position to observe" Schrick as required by the statutes, and because Schrick testified he did not eat, smoke, vomit or regurgitate during that period (23: 292-93).

The court assessed the evidence, noting that Gillett testified she performed the 20 minute observation period, but that she was reading the informing the accused and entering data into the Intoximeter during that 20 minute period (23:

295). The court acknowledged the transportation code's language requiring the reading of the informing the accused form to occur before the 20 minute observation period (23: 295-96). The court determined that based on the testimony of Deputy Gillett and Schrick regarding the underlying circumstances, it was a jury issue as to whether the Deputy complied with the 20 minute observation period (23: 296).

The court then inquired whether there was any caselaw on dentures as a "foreign body," (23: 296). The defense noted that Deputy Gillett acknowledged in her testimony that dentures were a foreign body and she was supposed to eliminate foreign bodies before testing, but that wasn't done in this case (23: 296-97). However, the court noted that the jury doesn't have to agree with what Deputy Gillett stated, and that it was ultimately an issue for the jury to decide, and therefore denied the defendant's motion (23: 298-99).

Defense counsel subsequently objected to the court giving the jury instruction regarding prohibitive alcohol concentration (23: 300). Over counsel's objection, the court read to the jury the instruction regarding a prohibited alcohol concentration, which incorporated the statutory presumptions language from sec. 885.235 (23: 304).

In summation, the defense argued the breath test result was unreliable because Gillett admitted she didn't observe Schrick properly, and that although Gillett was trained to eliminate foreign bodies from the mouth, she didn't eliminate Schrick's dentures (23: 331). The defense read aloud the portion of the jury instruction regarding the requirement that the testing device being in proper working order and being correctly operated by a qualified person, and asked the jury to find Schrick not guilty on count 2 (23: 333).

The jury found Schrick not guilty on count 1 (operating while intoxicated) and guilty on count 2 (operating with a prohibited alcohol concentration) (23: 345). The jury specifically found Schrick had an alcohol concentration of 0.17 or above (23: 346). The defense moved for judgment notwithstanding the verdict on count 2 based on the officer's noncompliance with proper testing procedure, and the court denied the motion (23: 349-50).

Sentencing occurred on November 16, 2012, and based on the stipulation of the parties, the court sentenced Schrick to 45 days jail, a \$1,424 fine and a 24 month license revocation (24: 9-10). Schrick filed a timely notice of intent to seek post-conviction relief (19) and a timely notice of appeal (20). Schrick appeals from the jury's verdict and from the judgment of conviction entered on count 2.

Additional facts will be provided where needed.

ARGUMENT

I. SINCE THE JURY WAS NOT PRESENTED WITH COMPETENT, RELIABLE EVIDENCE OF THE DEFENDANT'S BLOOD ALCOHOL CONCENTRATION, THE TRIAL COURT ERRONEOUSLY DENIED THE MOTION FOR A DIRECTED VERDICT ON COUNT 2

A. Summary of Arguments and Standard of Review

The results of breath tests are deemed automatically admissible and reliable in OWI prosecutions so long as the State can demonstrate compliance with statutorily mandated testing protocol. In this case, uncontroverted evidence demonstrated the officer failed to comply with required procedures, and therefore the test result was not entitled to the statutory presumptions. Since no test results were presented to the jury from a testing process that complied with the statutory requirements, and no expert testimony was presented by the State to show the probative value of the test despite non-compliance with necessary procedures, the defense moved to dismiss the PAC charge on the grounds of insufficient evidence. The trial court denied the defendant's motion and submitted the case to the jury. The defense submits this decision was erroneous, and the PAC conviction should be vacated and dismissed based on insufficient evidence.

The supreme court in *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), discussed the difference between a jury's obligation to acquit unless the State has proven a defendant guilty beyond a reasonable doubt, and our standard for reviewing the sufficiency of the evidence to support a jury's verdict of guilty:

“The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted....”

Id. at 503-04. However, whether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime constitutes a question of law, which the court of appeals reviews *de novo*. See *State v. Cavallari*, 214 Wis. 2d 42, 47, 571 N.W.2d 176 (Ct. App. 1997).

B. Jury Instructions on the Prohibited Alcohol Concentration Charge Require the State to Prove the Breath Test was Correctly Operated in Order to Use the Test Result as Evidence

To convict Schrick of operating with a prohibited alcohol concentration, the State was required to prove two elements beyond a reasonable doubt – (1) Schrick operated a motor vehicle on a highway, and (2) Schrick had a prohibited alcohol concentration at the time he operated a motor vehicle. Wis. Stat. sec. 346.63(1)(b). Regarding the prohibited alcohol concentration element, the jury instruction states, “Prohibited alcohol concentration means .08 grams or more of alcohol in 210 liters of the person’s breath.” Wis-JI Criminal 2669.

The only evidence presented by the State to establish Schrick's blood alcohol level was above 0.08g/ml at the time of driving was Deputy Gillett's testimony regarding the Intoxilyzer breath samples she obtained from Schrick, as well as the Intoxilyzer test record. Therefore, the PAC conviction rises and falls on whether that test, as administered by Deputy Gillett, had sufficient probative value upon which the jury could rely.

Significantly, the State did not present any expert testimony regarding the Intoxilyzer test procedure or result, instead relying upon the statutory presumptions of admissibility and reliability. Wisconsin law provides that such test results are automatically admissible and to be considered reliable assuming compliance with appropriate testing procedures. Pursuant to Wis. Stat. sec. 343.305(5)(d), "At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while...having a prohibited alcohol concentration...the results of a test administered in accordance with this section are admissible on ... any issue relating to the person's alcohol concentration. Test results shall be given the effect required under s. 885.235."

Wis. Stat. sec. 885.235(1g) provides that "In any action or proceeding in which it is material to prove that a person ... had a prohibited alcohol concentration ...while operating or driving a motor vehicle ... evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect."

The jury instructions defining "prohibited alcohol concentration" incorporate the statutory presumptions by

informing the jury as follows:

The law states that the alcohol concentration in the defendant's breath sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of the operating. The law recognizes that the testing device used in this case is a scientifically sound method of measuring the alcohol concentration of an individual. The state is not required to prove the underlying scientific reliability of the method used by the testing device.

Wis-JI Criminal 2669; (23: 304).

However, if the State is relying upon the statutory presumptions for use of the breath test result, the jury instruction imposes one additional requirement upon the State, specifically that "the state is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person," Wis-JI Criminal 2669; (23: 304) (emphasis added).

The defendant's motion for a directed verdict was based on this requirement, as the uncontroverted testimony demonstrated Deputy Gillett did not correctly operate the testing device by following mandatory procedures.

C. Deputy Gillett Failed to Correctly Administer the Intoxilyzer Test, and Therefore the State Was Not Entitled to Rely on the Statutory Presumptions of Admissibility and Reliability

The statutory presumption of admissibility afforded by sec. 885.235 can be lost based on non-compliance with proper testing procedures. See *State v. Zielke*, 137 Wis. 2d 39, 403 N.W.2d 427 (1987). The Wisconsin Supreme Court ruled in *Zielke* that "noncompliance with the procedures set forth in [WIS. STAT. § 343.305] does not render chemical test evidence otherwise constitutionally obtained inadmissible at the trial of a substantive offense involving intoxicated use of a vehicle," but the State "loses its right to rely on the automatic admissibility provisions of the law." *Id.*, 137 Wis. 2d at 41, 49. See also *County of Dane v. Winsand*, 2004 WI

App 86, ¶7 n.6, 271 Wis. 2d 786, 679 N.W.2d 885 (failure to establish compliance with procedural requirements does not entitle a defendant to exclusion of chemical test results, but the evidence “would simply lose the benefit of §§ 343.305(5)(d) and 885.235”); *State v. Piddington*, 2001 WI 24, ¶34, 241 Wis. 2d 754, 623 N.W.2d 528 (In event of failure to comply with implied consent section requirements, the defendant can pursue “an order prohibiting the automatic admissibility of the blood test result pursuant to Wis. Stat. § 885.235. Instead of relying upon the automatic admissibility of the blood test, the State would have to establish the admissibility of the blood test, including establishing a foundation”).

Failure to comply with TRANS. code requirements for proper breath testing procedure also results in stripping the test of the statutory presumptions of admissibility and reliability. For example, in *State v. Baldwin*,³ the court of appeals held that the failure to comply with TRANS. 311.04’s requirement of evaluation and approval of quantitative breath test instruments before regular use resulted in stripping the test of automatic admissibility and presumption of accuracy:

We have earlier held that pre-use evaluation and approval are threshold requirements for automatic admissibility; we now hold that where test results are obtained using an instrument not evaluated and approved as required in § 343.305(6)(b), STATS., and WIS. ADM.CODE § TRANS 311.04, the results are no longer entitled to automatic admissibility or to a prima facie presumption of accuracy to establish the defendant's blood alcohol level. In such cases, prosecutors who wish to rely upon the breath test results will be required to present evidence of the instrument's scientific accuracy

³ *Baldwin* was reversed by the Wisconsin Supreme Court on other grounds, specifically that the particular testing device used in that case met the requirement for having been evaluated, tested, and approved for use in Wisconsin. *Busch*, ¶4. The *Busch* decision did not alter the holding that stripping the test of the statutory presumptions would have been the appropriate remedy if it had violated the requirements of TRANS. 311.04. In fact, *Busch* held that since the testing device complied with TRANS. 311.04, it was entitled to the statutory presumptions. *Id.* ¶29. Thus the holding of *Baldwin* that violation of the mandatory procedures from TRANS. 311 results in stripping the test of sec. 885.235 presumption remains intact. *State v. Budd*, 2007 WI App 245, ¶13 n. 4, 306 Wis. 2d 167, 742 N.W.2d 887 (Review of a published court of appeals’ decision by the supreme court leaves intact any portion of the opinion not reversed).

and reliability and prove compliance with accepted scientific methods as a foundation for the admission of the test results.

State v. Baldwin, 212 Wis.2d 245, 263-64, 569 N.W.2d 37 (Ct. App. 1997), *rev'd sub nom. on other grounds*, *State v. Busch*, 217 Wis. 2d 429, 576 N.W.2d 904 (1998).

Wis. Stat. sec. 343.305(6)(b) is part of Wisconsin's statutory scheme of detecting, arresting, prosecuting and punishing drunk drivers and establishes the standards for performing breath tests. *See Baldwin*, 212 Wis. 2d at 255. The statute requires the Department of Transportation to approve techniques or methods of performing chemical analysis of the breath and to "test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath under sub. (3)(a) or (am) before regular use of the equipment." Wis. Stat. sec. 343.305(6)(b).

To implement Wis. Stat. sec 343.305(6)(b), the DOT has adopted Wisconsin Administrative Code sec. Transportation 311. TRANS code sec. 311.06(3) mandates that "Procedures for quantitative breath alcohol analysis shall include the following controls in conjunction with the testing of each subject," and subsection (a) requires "Observation by a law enforcement person or combination of law enforcement persons, of the test subject for a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject did not ingest alcohol, regurgitate, vomit or smoke." Trans. 311.06(3)(a) (emphasis added). Wisconsin courts have further held that "[a]dministrative rules promulgated pursuant to a power delegated by the legislature should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." *Busch*, ¶29. Use of the word "shall" in the TRANS. regulation indicates that the requirements are mandatory. *See State v. Grade*, 165 Wis. 2d 143, 148-49, 477 N.W.2d 315 (Ct. App. 1991); *see also Busch*, ¶20, n.7.

Deputy Gillett's testimony demonstrated that she

deviated from the mandatory testing procedure in significant ways. She testified that rather than reading Schrick the Informing the Accused form before administering the 20 minute observation period, Gillett read him the form during the 20 minute period (22: 158-61). Further, she testified that she was also performing other tasks during that period, including data entry, and therefore was not always watching Schrick (22: 158-61). Gillett acknowledged the TRANS. code and her training manual required her to observe Schrick closely for a minimum of 20 minutes, which she did not do (22: 158-61). Gillett specifically admitted she did not administer the test as required by the manual (22: 161).

Testimony from both Deputy Gillett and Dr. Fater concluded the purpose of the 20 minute observation period was to eliminate the possibility of residual mouth alcohol effecting the test result (22: 155-56, 264-65). Gillett acknowledged the point of making sure the suspect does not ingest alcohol, regurgitate, or chew tobacco is to prevent foreign objects from causing residual mouth alcohol (22: 156). Gillett agreed she was trained to remove foreign objects from a subject's mouth, and that dentures constituted a foreign object (22: 156-57). Yet Gillett did not check Schrick's mouth for foreign objects (22: 157), and Schrick's dentures remained in his mouth for the testing process (22: 230). Thus Gillett's failure to comply with the proper 20 minute observation procedure and testing procedures resulted in a foreign object remaining in Schrick's mouth during the test. Based on these errors, the breath test was not entitled to the benefit of the statutory presumptions.

D. Since No Expert Testimony was Presented to Establish the Test Result's Scientific Reliability and Accuracy, No Competent Evidence of Schrick's Blood Alcohol Concentration was Presented to the Jury, and Dismissal was Required

In his motion for a directed verdict, defense counsel essentially argued the breath test result could not be used by the jury because the State could not establish that the test had been "correctly operated" (23: 291). Even viewing the

evidence in a light most favorable to the State, counsel noted that the uncontroverted testimony showed Deputy Gillett failed to correctly administer the test and failed to eliminate foreign bodies from Schrick's mouth (23: 294-95). The trial court denied the defendant's motion on the grounds that there was "a difference of opinion between the state and the defense as to whether that 20-minute observation period was complied with," (23: 295). However, that holding ignored the Deputy's admission that she didn't administer the test in accordance with the mandatory protocol (22: 261) and that no one removed the dentures from Schrick's mouth before the test (22: 157, 230). Applying the standards from *Poellinger*, there was no reasonable inference that Gillett operated the test correctly, and no basis for the jury to find otherwise. *Poellinger*, 153 Wis. 2d at 503-04.

For the same reasons, defense counsel objected to the jury instruction regarding the prohibited alcohol concentration which contained the language on the statutory presumptions (23: 300). As discussed above, Gillett's non-compliance with mandatory the breath test should have resulted in stripping the test of the statutory presumption of admissibility and prima facie presumptions of accuracy and reliability. *Baldwin*, 212 Wis. 2d at 263-64. In the absence of those statutory presumptions, expert testimony was necessary to establish the probative value of the test. *Id.* No such testimony was presented by the State. Accordingly, the test result presented to the jury was not reliable or competent evidence of the defendant's blood alcohol concentration and should have been excluded.

Since there was no other evidence presented to establish Schrick's blood alcohol concentration at the time he operated a motor vehicle, there was no evidence upon which the jury could convict. Thus the trial court erred in denying the defense motion to dismiss at the close of evidence, and the conviction on count 2 must be vacated and dismissed.

II. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON THE STATUTORY PRESUMPTION OF RELIABILITY FOR THE BREATH TEST

**WHEN THE OFFICER WHO
ADMINISTERED THE TEST
COMMITTED NUMEROUS ERRORS IN
THE TESTING PROCESS**

A. Summary of Arguments and Standard of Review

Even if the court finds the State presented sufficient evidence for the jury to find guilt on the prohibited alcohol concentration charge, the appellant contends the trial court erred when it instructed the jury on the presumption of reliability of the testing device. The uncontroverted evidence showed the test result was not entitled to the statutory presumptions based on Deputy Gillett's errors, and the defense objected to instructing the jury on the statutory presumptions. The court denied this request, and instructed the jury it could rely on the scientific accuracy of the result. Schrick submits this violated his rights to due process and entitles him to a new trial.

A court must exercise its discretion to "fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *State v. Fonte*, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. A reviewing court on appeal independently reviews whether a jury instruction is an accurate statement of the law applicable to the facts of a given case. *Fonte*, 2005 WI 77, ¶9.

B. Deputy Gillett Failed to Correctly Administer the Intoxilyzer Test, and That Test Was Not Entitled to a Jury Instruction On the Statutory Presumption of the Reliability of the Breath Test

As demonstrated above, Deputy Gillett committed numerous errors in the testing process, including reading Schrick the Informing the Accused form and performing data entry during the 20 minute observation period, resulting in not having close and attentive observation for a minimum of 20 minutes, as well as the failure to eliminate a foreign object (dentures) from Schrick's mouth to reduce the possibility of

residual mouth alcohol. Further, these errors should have resulted in stripping the test of the statutory presumption of admissibility and prima facie presumptions of accuracy and reliability. *Baldwin*, 212 Wis. 2d at 263-64. Accordingly, the defense objected to the jury instruction on prohibited alcohol concentration which included the language on the statutory presumptions (23: 300).

The trial court instructed the jury on those presumptions over the defendant's objection (23: 304). Since that test should not have been afforded those statutory presumptions, the court's decision to instruct the jury on those presumptions was erroneous.

C. The Court's Erroneous Decision to Instruct the Jury On the Statutory Presumptions Regarding the Breath Test Was Not Harmless Error

Instructional error does not automatically entitle the defendant to reversal, but is instead subject to application of the harmless error rule. *State v. Dyess*, 124 Wis. 2d 525, 547, 370 N.W.2d 222 (1985). The test for harmless error asks "whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result." *Dyess*, 124 Wis. 2d at 543. The burden of proving no prejudice is on the State, as the beneficiary of the error. *Id.* "The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction." *Id.*

Here the State cannot prove the error is harmless beyond a reasonable doubt. The whole issue on count 2 was whether the jury could rely upon the Intoxilyzer result given Deputy Gillett's non-compliance with proper testing protocol. In this regard, the objected-to instruction specifically told the jury, "The law recognizes that the testing device used in this case is a scientifically sound method of measuring the alcohol concentration of an individual. The state is not required to prove the underlying scientific reliability of the method used by the testing device," (23: 304). That is powerful language directing the jury it could rely upon the result of the breath test.

Defense counsel was allowed to argue the contrary position in closing, of course. But Wisconsin courts have previously recognized that arguments of counsel don't have nearly the same impact as jury instructions. See *State v. Perkins*, 2001 WI 46, ¶42, 243 Wis. 2d 141, 626 N.W.2d 762 (“Arguments by counsel cannot substitute for an instruction by the court. Arguments by counsel are likely to be viewed as statements of advocacy, whereas a jury instruction is a definitive and binding statement of law”).

The jury instruction in this case afforded the breath test result a presumption of scientific reliability that was not justified based on Deputy Gillett's errors. Those instructions almost certainly undermined defense counsel's arguments against accepting the test result. Given the crucial nature of this evidence to the conviction on count 2, the State cannot possibly show that instructing the jury on the presumption of scientific reliability was harmless error.

Accordingly, due process requires reversal of the conviction on count 2 and the defendant be granted a new trial.

CONCLUSION

For the reasons discussed in section I of this brief, the defendant-appellant respectfully requests that the court vacate the judgment of conviction and dismiss the charge. For the reasons discussed in section II of this brief, the defendant-appellate respectfully requests that the court vacate the judgment of conviction and remand the case for a new trial.

Respectfully submitted this 29th day of July, 2013:



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,024 words.

Signed on July 29th, 2013:



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**CERTIFICATE OF COMPLIANCE
WITH 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 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.

Signed on July 29th, 2013:

A handwritten signature in black ink, appearing to read 'CDR', with a stylized, cursive flourish.

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