STATE OF WISCONSIN

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

DISTRICT IV

Appeal No. 13-AP-1166-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK K. SCHRICK,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

GERALD R. FOX
State Bar No. 1022389
District Attorney
307 Main Street
Black River Falls, WI 54615
Tel: (715) 284-0242
Fax: (715) 284-7600
gerald.fox@da.wi.gov

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of this case.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the state elects not to present a full statement of the case, Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the state will present additional facts as necessary in the "Argument" portion of this brief.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR DIRECTED VERDICT ON COUNT 2, THE PAC CHARGE, AS THERE WAS SUFFICIENT EVIDENCE TO SEND THAT COUNT TO THE JURY

I. APPLICABLE LEGAL PRINCIPLES AND STANDARDS OF REVIEW.

A. The defendant's "motion for directed verdict" is committed to the sound discretion of the trial court judge.

A directed verdict of acquittal at the close of the state's case-in-chief is in reality a dismissal on the merits, based upon a judicial finding that the evidence as to that charge is so lacking that no rational jury could convict. *See generally*, State v. Poellinger, 153 Wis. 2d at 503, and State v. Cavallari, 214 Wis. 2d at 47. Stated another way, in order to allow the charge to go to the jury, the trial court must find that the trier of fact could

accept the evidence as proof of the defendant's guilt beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307 (1979). Because such a dismissal deprives the state of a jury trial on that charge, the trial court must exercise its discretion with great care, viewing the evidence in the light most favorable to the state, *Id.*

The trial court has broad discretion to determine whether the state has made a prima facie case, that is, that the state has produced enough evidence to allow the jury to decide the ultimate question, and this court will not disturb the trial court's findings of fact unless those findings are clearly erroneous. The state concedes however, that the question whether the evidence, when viewed most favorably to the verdict, satisfies the elements of the crime is a question of law which this Court reviews de novo, *Cavallari, at 47.*

B. The question whether the state has shown that the intoxilyzer was properly operated is a factual determination for the jury to decide.

Fact-finding is the bedrock purpose of a jury trial. Indeed, every criminal jury is instructed that they are the sole judges of the facts, including the credibility, that is, the believeability, of the witnesses, and the court is the judge of the law only (Jury Instruction Nos. 100 and 300). Moreover, as much as the Rules of Evidence and the other protections afforded to defendants may frustrate the fact-finding process, the jury is instructed that they are not to search

for doubt, they are to search for the truth (Jury Instruction No. 140). Unless it can be shown that the jury lacks the collective qualification to decide a factual propositon, such as the predicate question whether a machine was operated properly, or the legislature has committed such a factual determination to the court alone, then the question is committed to the jury as part of their fact-finding role.

C. The jury instructions are to be reviewed as a whole.

When asked to determine the propriety of a given jury instruction, the reviewing court must review the instructions as a whole, in order to assess the effect on the jury of the questioned instruction in light of all of the other instructions given to the jury, State v. Hemphill, 2006 WI App 185, 296 Wis. 2d 198, (citation omitted). A challenge to an allegedly erroneous jury instruction warrants reversal and a new trial only if the error [is] prejudicial." Fischer v. Ganju, 168 Wis. 2d 834, 849, (1992). "An error is prejudicial if it probably and not merely possibly misled the jury." *Id*. at 850. This court reviews the appropriateness of a jury instruction under the facts of a given case *de novo*. *See* Hemphill, 296 Wis. 2d 198, ¶8.

D. The propriety of instructing the jury on the statutory presumption relies on a preliminary assessment of the quality of the evidence supporting the use of the breath test machine.

As discussed above, the trial court has broad latitude to give or modify a jury instruction. An essential part of that process is viewing the evidence, in the light most favorable to the proponent of the instruction, to determine whether it is supported by some evidence, Hemphill, 296 Wis. 2d at paragraph 8, citing State v. Coleman, 206 Wis. 2d 199 at 212-213 (1996).

II. APPLICATION OF LEGAL PRINCIPLES AND STANDARDS TO THE FACTS OF THIS CASE.

A. The jury heard sufficient evidence to find that Deputy Gillett operated the intoxilyzer breath test machine correctly.

Mr. Schrick was before the jury on two charges: Operating While Under the Influence of an Intoxicant, contrary to Section 346.63(1)(a) Stats, (OWI) and Operating with a Prohibited Alcohol Concentration, contrary to Section 346.63(1)(b) Stats, (PAC). Prior to the hearing on the motion for directed verdict and the jury instruction conference (page 284 et seq. of the trial transcript, attached at Respondent's Appendix), the jury heard evidence that Deputy Gillett, while sitting with Mr. Schrick during the 20-minute

observation period, wrote his OWI citation and completed some other arrest-related tasks. The defense used this evidence to attack the deputy's compliance with the operating instructions for the machine.

On redirect, the state, starting at Page 172 of the trial record, adduced more testimony from Deputy Gillett about the circumstances surrounding her observation of the defendant during the 20-minute observation period. That evidence included her close proximity to Mr. Schrick throughout the process (4-5 feet away), which related directly to her ability to see, hear, and smell him during that time.

Therefore, prior to deciding on the jury instruction at issue, both the court and the jury had heard sufficient evidence from which to determine whether the issues raised by the defense actually amounted to a failure to operate the machine correctly. Put another way, the court first had to determine if there was some evidence to show that the machine was operated properly, and then to decide if the defense had so totally countered that evidence, when viewed most favorably to the state, with contrary evidence that no rational jury could rely upon the result to convict.

The court then went on to conduct a hearing on the motion for "directed verdict" and the ensuing jury instruction conference, all

starting at Page 284 of the trial record. The court was careful to observe that the predicate question vis-à-vis the presumption of accuracy instruction, was a question for the jury, Trial Pages 296-298, and stated its rationale succinctly. During this debate, Mr. Schrick's counsel did not contest, and thus, essentially conceded, that there was no specific definition for the word "observe" in the TRANS Code, or anywhere else (Trial, Page 293-94), such that its ordinary and common meaning would control.

B. The jury was informed repeatedly (orally by the court, by the state, by defense counsel, and in a set of written instructions), that they were the sole judges of the facts.

Mr. Schrick wants this Court to jump from the deputy's candid acknowledgement that she read the Informing the Accused form, and performed other arrest-related tasks, during the 20-minute observation period, (instead of simply staring intently at Mr. Schrick for the entire 20 minutes) to a finding that the machine was not operated properly, thus the results were legally inadmissible without expert testimony, and thus, the jury had no competent evidence upon which to rely in order to convict on Count 2, the PAC charge.

That argument ignores the jury's role in a PAC case. They are the sole "deciders" on the question whether the state had shown that

the breath test machine was operated properly. Certainly the state bears the risk that without expert testimony, they will find to the contrary, and thus acquit on the PAC charge, but the defendant does not get to short-circuit that process.

Nor was any special expertise required for the jury to decide that question. As posited by the state (at Trial Page 293) a mother reading a book is still perceived by the community as "observing" her child at the playground, so long as she is attentive enough to react timely to an event affecting the child. Given her close proximity to and constant presence with Mr. Schrick, the jury could easily find that while she had her head turned to enter his driver license data into the machine, she would still be in position to readily detect if he ate, drank, smoked, vomited, or did anything else that would affect the accuracy of the test results.

Crucially, there was no evidence offered by the defendant that he did any of the four things meant to be detected by the 20-minute observation period, either (Trial, Page 293-94). So, it stands to reason that the jury, having heard all of this evidence, and being instructed by the trial court and addressed by both lawyers, could rationally conclude that although Deputy Gillett completed a citation and entered Mr. Schrick's data into the breath test machine, she was

nevertheless "observing" him continually for the required 20-minute period, and that was their sole judgment to make.

C. The jury is presumed to have known that they could find that the state had not met its burden as to the breath test results; thus, their verdict attests that they resolved that question in favor of the state.

The jury instructions, taken as a whole, properly inform the jury that they are to decide the OWI and PAC questions separately, that is, they must return a verdict on both charges, and decide each separately (Jury Instruction 2669, Trial Pages 301-05). Especially in light of their acquittal of Mr. Schrick on the OWI charge, it should be obvious that they did so. Giving each word in the jury instruction its ordinary and common meaning, the jury knew they were free to acquit on the PAC charge if they were not convinced that the deputy complied with the 20-minute observation period, even if they had been convinced of Mr. Schrick's guilt on the OWI, and vice versa.

D. The jury's verdict on the PAC charge is amply supported by evidence in the record, and therefore, should be upheld.

The jury heard the evidence supporting the stop, and about the defendant's bloodshot eyes, alcohol consumption, failure on the alphabet test, and all of the other facts and circumstances that were admisible at trial. They were essentially asked to nullify the PAC

charge on the basis of "fairness" which term, or a variation thereof, was invoked frequently by defense counsel in his closing (Trial Pages 323, 326, 329, 330, 331, & 332) based in part on a claim that the machine was not operated properly. They declined, instead finding the defendant guilty.

That was their role, and their duty, and there was plenty of evidence in the record to support their verdict, both as to the predicate question of the machine's reliability, and the ultimate question of prohibited alcohol concentration.

The upshot of all of this is that no one should invade the jury's lawful province as sole judges of the facts, lest either the state or the defendant be deprived of the right to jury trial. The defendant can point to no mandatory authority for the proposition that the jury is not competent to decide whether the breath test machine was operated correctly, and therefore, this Court should respect their judgment, and that of the trial court, and uphold the verdict.

CONCLUSION

Mr. Schrick's challenge to the PAC conviction is that the jury should never have had the power to determine whether Deputy Gillett operated the breath test machine correctly, and that the trial

judge should have dismissed that charge at the close of the state's case, and, because he didn't, this Court should do so. For the foregoing reasons, this Court should respect the jury's verdict and affirm the judgment of conviction, in the interest of justice.

Dated this 13th day of September 2013.

Respectfully submitted,

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GERALD R. FOX
State Bar No. 1022389
District Attorney
307 Main Street
Black River Falls, WI 54615
Tel: (715) 284-0242
Fax: (715) 284-7600
gerald.fox@da.wi.gov

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 2684 words.

Dated this 13th day of September 2013.

_____
Gerald R. Fox
District Attorney

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, 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 13th day of September 2013.

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Gerald R. Fox
District Attorney