

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

RECEIVED

03-17-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

Appeal Nos. 2014-AP-1949 and
2014-AP-1950

ANDREW T. JODA,
Defendant-Appellant.

Waukesha County Circuit Court
Case Nos. 13-TR-3495,
13-TR-3496, 13-TR-3497

**ON NOTICE OF APPEAL TO REVIEW JUDGMENTS OF
CONVICTION AND ORDER DENYING DEFENDANT'S MOTION
TO SUPPRESS EVIDENCE ENTERED IN THE CIRCUIT COURT
FOR WAUKESHA COUNTY, THE HONORABLE JENNIFER
DOROW, PRESIDING**

**DEFENDANT-APPELLANT'S
REPLY BRIEF**

ANTHONY D. COTTON
State Bar No. 1055106
Kuchler & Cotton, S.C.
1535 E. Racine Avenue
PO Box 527
Waukesha, Wisconsin 53186
Tel: (262) 542-4218
Fax: (262) 542-1993
Attorneys for Defendant-Appellant

TABLE OF CONTENTS	<u>PAGE</u>
TABLE OF AUTHORITIES	i
CASES	ii
ARGUMENT	1
I. DEPUTY BECKER’S GUESS DID NOT CONSTITUTE “SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT’S FINDINGS”	1
II. THE STATE’S ASSERTION THAT BECKER’S GUESS CONSTITUTED SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT THE COURT’S DECISION SIMPLY BECAUSE MR. JODA CONSUMED ALCOHOL IS ERRONEOUS	3
III. THERE WAS NO BASIS FOR THE COURT FINDING A GAP IN MR. JODA’S MEMORY	5
IV. THE STATE, BY ITS SILENCE, CONCEDES THAT THE COURT ERRONEOUSLY RELIED ON THE TIMING OF TRAFFIC LIGHTS TO DISCOUNT MR. JODA’S TESTIMONY	6
CONCLUSION	6
CERTIFICATION OF FORM, LENGTH, AND ELECTRONIC COPY	8

TABLE OF AUTHORITIES

CASES	<u>PAGE</u>
<i>State v. Walli</i> , 2011 WI App 86, 334 Wis.2d 402, 799 N.W.2d 898	1
<i>State v. Puchacz</i> , 2010 WI App. 30, 323 Wis.2d 741, 780 N.W.2d 546	1
<i>State v. Batt</i> , 2010 WI App 155, 330 Wis.2d 159, 793 N.W.2d 104	2

ARGUMENT

I. DEPUTY BECKER'S GUESS DID NOT CONSTITUTE "SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDINGS"¹

The State's statement of facts concurs with Mr. Joda's assertion that Deputy Becker ("Becker") was not sure if Mr. Joda made a U-turn in front of him or behind him. RB:4² Becker could not remember, but Mr. Joda's testimony was clear that he saw Becker coming towards him while Mr. Joda was stopped at a red light south of the highway, R.24:47, and that Becker was in front of him, traveling the same direction as him, after he had made his lawful U-turn north of the highway. R.24:48. Therefore, the circuit court was not confronted with contradictory accounts, but instead was presented with one witness who did remember what had happened and a deputy that was guessing.

This is different than the cases that the State cites to, even based upon the State's characterizations of those cases. In *State v. Walli*, 2011 WI App 86, 334 Wis.2d 402, 799 N.W.2d 898, the officer could remember seeing the defendant's vehicle veer towards him across the center line, and the potentially contradicting video was ambiguous. RB:9. In *State v. Puchacz*, 2010 WI App. 30, 323 Wis.2d 741, 780 N.W.2d 546, the officer remembered seeing a car cross the center line, his intern riding along did not see that, but admitted he was not watching. *Id.* 9-

¹ *Tourtillott v. Ormson Corp.*, 190 Wis. 2d 291, 297, 526 N.W.2d 515, 518 (Ct. App. 1994).

² RB:4 is a reference to the Respondent's Brief at page 4.

10. In *State v. Batt*, 2010 WI App 155, 330 Wis.2d 159, 793 N.W.2d 104, the officer testified that he had read the informing the accused verbatim and there was no argument on the part of any witness that the officer had not. Therefore, *Batt* is not analogous to the situation here.

In the case at bar, Becker admitted that he may have passed Mr. Joda and watched the U-turn from his rearview mirror. (“It’s possible but I don’t believe I would have [passed him]”). R.24:28. Since Becker could not remember whether he and Mr. Joda converged and passed before Mr. Joda made a lawful U-turn at the northern intersection, or recall if Mr. Joda had actually waited at the southern intersection for Becker to pass before making what would have been an illegal U-turn, or recall if Mr. Joda actually turned in front of Becker at that southern intersection, Becker’s conclusion that Mr. Joda made his turn at the southern intersection was not reliable.

Additionally, Becker’s testimony conflicted with his own written statement, a fact which he admitted during testimony. R.24:36. Becker admits his written report stated that he first observed Mr. Joda in the left turn lane with his left blinker on, while Mr. Joda’s vehicle was facing northbound on Grandview Blvd. *Id.* Becker admitted that his statement claimed Mr. Joda was in the left turn lane to head on to the westbound I-94 on-ramp. *Id.* Becker also admitted that the only place where there was either a left turn lane or an entrance ramp to westbound I-94 was north of I-94. *Id.* at 35. Becker testified that if Mr. Joda had conducted a U-

turn at the place his written report stated and described, then he was aware of nothing that would have made the U-turn illegal. *Id.* at 32.

Becker's testimony was not reliable because Becker could not recall sufficient facts for him to determine Mr. Joda's location at the time of the turn. He could not even remember his own location, let alone Mr. Joda's. His testimony was in conflict with his own written statement made close-in-time to the incident itself. Instead of testifying to actual memory, Becker guessed what intersection Mr. Joda was at based upon his own expectation of his past behavior, and that guess was insufficient evidentiary basis for the court's decision. The cases the State cites provide no basis for a circuit court relying on such a guess. Therefore, the court's decision was clearly erroneous.

II. THE STATE'S ASSERTION THAT BECKER'S GUESS CONSTITUTED SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT THE COURT'S DECISION SIMPLY BECAUSE MR. JODA CONSUMED ALCOHOL IS ERRONEOUS

The State suggests that, even though Becker was guessing, and even though his guess and testimony conflicted with his own written statement, there was sufficient evidence to support the court's finding of fact simply because Mr. Joda admitted to consuming alcohol. "A high level of intoxication should be sufficient for a Circuit Court to make a finding that is not clearly erroneous regarding the credibility of sober law enforcement versus an intoxicated defendant." BR:14. However, one witness consuming alcohol does not make the other witness's testimony credible and "sufficient" for a finding of fact.

As noted, Mr. Joda's testimony was not in contradiction with Becker's actual memory, but only in contradiction with Becker's guess. Becker did not have a clear memory of where Mr. Joda had made his turn, because Becker did not know if they had passed each other. Mr. Joda having consumed some alcohol could have weakened Mr. Joda's testimony, but it did not provide any more credibility to Becker's. The State provides no basis for its assertion that a circuit court can rely on law enforcement's guess if a contradicting witness has consumed alcohol. The court's ruling must still be based upon sufficient reliable evidence, and in this case it was not.

Even if Mr. Joda had not testified at all, the fact that Becker was guessing as to where he was when he saw Mr. Joda make his U-turn, the fact that he could not remember if their cars had passed each other, the fact that his written statement supported a finding of a lawful U-turn, and the fact that he could not remember any of the visual cues that would give himself knowledge as to where each of the vehicles were at the time, would have been sufficient doubt to make any finding that the U-turn occurred at the southern intersection clearly erroneous. Where, as here, the only evidence admitted to support the court's ruling is itself a guess, any finding adopting that conclusion is also a guess. That Mr. Joda testified to an account that was completely consistent with both his own innocence, and Becker's own lack of memory, only served to further weaken the evidentiary basis for the court's finding. The alcohol consumption did nothing to strengthen Becker's testimony as the State erroneously asserts.

III. THERE WAS NO BASIS FOR THE COURT FINDING A GAP IN MR. JODA'S MEMORY

The State makes no attempt to contradict Mr. Joda's argument that the court's determination that Mr. Joda was mistaken about his travel time was not supported by evidence, and was, therefore, clearly erroneous. Yet the State relies on the alleged gap as an argument in favor of the court discounting Mr. Joda's testimony. As Mr. Joda argued in his opening brief, Mr. Joda never gave any precise time that he left his place of origin, and instead stated that he left "around Midnight." Neither party then entered any evidence as to how far his place of origin was from the place where he was stopped, nor any evidence as to how long it should have taken him to travel that distance. Therefore, any determination that there was a gap was not supported by sufficient evidence in the record and was clearly erroneous. It follows that discounting Mr. Joda's testimony based upon a clearly erroneous finding of fact not supported by evidence was equally erroneous.

Mr. Joda testified to a clear recollection of events that were potentially consistent with what Becker testified he could actually remember. The only reasonable basis for discounting Mr. Joda's testimony in favor of Becker's guess was Mr. Joda's consumption of alcohol, but that consumption of alcohol did not mean Becker's guess was based on independent recollection, or make Mr. Joda's account any less factually plausible. Therefore, the court's reliance on Becker's guess was clearly erroneous.

IV. THE STATE, BY ITS SILENCE, CONCEDES THAT THE COURT ERRONEOUSLY RELIED ON THE TIMING OF TRAFFIC LIGHTS TO DISCOUNT MR. JODA'S TESTIMONY

Mr. Joda's brief noted that "[n]o evidence was offered by either party that any particular lights changed in tandem or in conjunction with any other lights. No evidence was offered to indicate that there were or weren't any turn arrows that would have potentially caused oncoming traffic to have different signals than opposing traffic. No determination about Mr. Joda's account can be drawn at all from the light colors testified to." Brief at 13. However, the court still relied on the light colors to discount Mr. Joda's testimony. R.24:64-5.

The State makes no attempt to contradict this argument from Mr. Joda, nor does it make any attempt to explain how the lower court's reliance on the light colors was supported by facts or law. Therefore, the State should be found to have conceded that the court's reliance on this basis to discount Mr. Joda's testimony was clearly erroneous.

CONCLUSION

Where was Mr. Joda when he made his turn? Mr. Joda testified that he was at the northern intersection, acting lawfully. Becker testified he *believed* Mr. Joda was at the southern intersection, but when pressed, admitted he lacked recollection of any facts that would make him able to make this determination. He did not know where he was in relationship to Mr. Joda's vehicle and could not recall how he had observed Mr. Joda make the turn (through his front window, in his rear-view mirrors, or otherwise). Becker guessed. His guess was contradicted by his

own written statement. Mr. Joda remembered though, and the court relied on erroneous grounds not supported by facts in the record to discount Mr. Joda's testimony.

Because Becker's testimony amounted to his guessing, and because the court erroneously discounted Mr. Joda's testimony that contradicted Becker's guess, the lower court's finding of fact was clearly erroneous. This Court should reverse the lower court's finding of fact, reverse that court's denial of Mr. Joda's suppression motion that relied on the erroneous finding of fact, and remand to the circuit court for further proceedings in accordance with its judgments.

Dated this 17th day of March, 2015.

KUCHLER & COTTON, S.C.

By: _____
Anthony D. Cotton
Attorney for Defendant-Appellant
State Bar No. 1055106

1535 E. Racine Avenue
PO Box 527
Waukesha, Wisconsin 53186
Tel: (262) 542-4218
Fax: (262) 542-1993

**CERTIFICATION OF FORM, LENGTH, AND
ELECTRONIC COPY**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2210 words.

I further certify that I have submitted an electronic copy of this reply brief, which complies with the requirements of Wis. Stat. § 809.19 (12), and that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated this 17th day of March, 2015.

KUCHLER & COTTON, S.C.

By: _____
Anthony D. Cotton
Attorney for Defendant-Appellant
State Bar No. 1055106

1535 E. Racine Avenue
PO Box 527
Waukesha, Wisconsin 53186
Tel: (262) 542-4218
Fax: (262) 542-1993