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STATE OF WISCONSIN
COURT OF APPEALS
DIVISION III

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

COUNTY OF ONEIDA,

Plaintiff-Respondent,

vs.

APPEAL NO.: 2014AP002766

RANDALL J. BUSAROW,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

ONEIDA COUNTY CIRCUIT COURT
THE HON. PATRICK F. O'MELIA, presiding
Trial Court Case Nos.: 14TR1083 and 14TR1084

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I. ARGUMENT

Regardless that there is clear, convincing and satisfactory evidence of:

1. An accident while Busarow was driving after he had been drinking,
2. Less than optimal performance on field sobriety tests, and
3. An elevated breathalyzer result at 1:42 in the morning,

there is no clear, convincing and satisfactory evidence that Busarow was operating a motor vehicle while under the influence of an intoxicant at the time of the accident. That is because neither the time Busarow drank nor the time he drove can be ascertained from this record. The reasons for the critical void in the record are because:

1. No one who saw Busarow driving was questioned by the police or called to testify at trial,
2. No one ever asked Busarow when he drove or what time the accident occurred,
3. Busarow was not subpoenaed to testify at trial, and
4. There are no evidentiary facts that permit the court to reasonably infer the time of driving.

Deputy Semmerling testified that he didn't recall asking Busarow when the accident occurred. *Id.*, p.10. The trial court's finding that time of driving was after 10:49 P.M. (R.11:50-09) is pure speculation and is contrary to the great weight and clear preponderance of the evidence. For instance, the trial court's finding relies, in part, on it stating : "Once he gets there, he asks the defendant certain questions and they drive back to where the accident occurred...And, while there's no specific reference to time, it's minutes in terms of driving." R.11: 42. The time it took to drive back to where the accident occurred is speculation since Deputy Semmerling didn't testify specifically about any measure of time after he received the original dispatch and he testified that "I didn't activate the camera immediately when I had contact with Busarow". R.11:7-06. The trial court's speculative finding of the time of driving also relies on its finding

that Busarow's report of the accident was contemporaneous with the accident. R.11: 42-22. In the absence of any evidence of the distance between the accident and the location where Busarow reported the accident to the Sheriff's office the trial court's reliance on the call having been contemporaneous with the accident is not based on clear, convincing and satisfactory evidence.

In recognition of the void in the court's reasoning the State, in its Response brief, attempts to lend greater factual support to the trial court's finding of the time of driving regardless that facts cited by the State do not appear in the record. For instance, at page 4, in its attempt to incriminate Busarow from his having identified the time he last drank, the State says: "The half hour would be consistent with the amount of time a person would need to drive from Lake Nokomis to the point of the accident." Regardless that a location called "Lake Nokomis" doesn't appear anywhere in the record at bar, there is no evidence of any distance from any location to the "point of the accident". Similarly, the State asks this court to adopt the trial court's inference that Busarow "...went to the closest place to report the

accident" without citing any supporting evidentiary basis. Response brf., pages 6, 7-8. There is no evidence of the proximity of the Little Rice Resort (where Deputy Semmerling first picked up Busarow) to the accident scene or that it was the "closest place to the accident".

Equally as curious as is the failure of the State to establish by clear, convincing and satisfactory evidence the time of driving, is Deputy Semmerling's failure to either ask Busarow, or report what Busarow said was, the reason he left the roadway. Deputy Semmerling testified that his investigative report did not cite Busarow's explanation of why his truck went off the road. *Id.*, p.23:16. And, when defense counsel asked Deputy Semmerling what Busarow told him was the reason he went off the road, the trial court sustained the State's objection and wouldn't permit Deputy Semmerling to answer. *Id.* P.22:08. Without any evidence that Deputy Semmerling ever asked Busarow why he left the roadway the trial court found that a sober person would have explained the accident. *Id.*, p. 44:19 - 45:17. In this context (the absence of any

evidence) it is disingenuous for the State to argue that the trial court's inferential finding, that Busarow ran off the road because he was intoxicated, is not incredible as a matter of law. If it were to be otherwise, every driver, who had something to drink at some unknown time relative to driving, and who leaves a roadway, must be legally intoxicated. Such an inference (that such a driver must be intoxicated) is impermissible because the inferred fact is not more likely than not to flow from the proven facts on which it is made to depend. See Ulster v. Allen, 442 U.S. 140, 166 (1979).

At page 6 of its response brief, the State claims "Busarow argument hinges on the court rejecting the trial court's admission of the intoxicated result into evidence." In one sense, that's incorrect: Busarow's argument hinges on the time of drinking relative to the time of driving, and nothing else. Because the record does not permit a finding of the time of driving, the breathalyzer test results, that must be obtained within 3 hours of the driving to be admissible as evidence, should not have been admitted into evidence. And, the State did not call an

expert to validate the results of the test if it was administered outside of the 3 hour window.

As stated above, the primary focus of Busarow's argument is not that the court erred when it admitted the breathalyzer results. Rather, it is without clear, convincing and satisfactory evidence of both the time of drinking and of driving it is impossible for the court to find that Busarow was under the influence at the time of the accident.

This is especially so since the trial court took judicial notice of the Wisconsin Department of Transport alcohol absorption chart (the Hinz chart). *Id.*, p.28:9-17. The Hinz chart conclusively establishes that alcohol is not immediately absorbed into the blood stream upon consumption. Consequently, without evidence of when Busarow drove, relative to when he drank, it cannot be inferred that he was under the influence at the time he drove.

However, the State continues to say at page 6-7: "However, a close reading of the record indicates that the trial court did not use the intoxilizer result in making its determination that the defendant was under the

influence of an intoxicant at the time he operated the motor vehicle. Since the prohibited alcohol concentration charge was dismissed, this court need not review the trial court's admission of the intoxilizer evidence." That's incorrect in every sense. The trial court found Busarow guilty of operating with a prohibited alcohol concentration. *Id.*, p. 49:08. The court didn't enter a verdict on the prohibited alcohol concentration charge because it entered the verdict on the operating while intoxicated charge. *Id.* Accordingly, this court should review the trial court's admission of the intoxilizer evidence. However, since the State didn't address Busarow's argument in his primary brief, Busarow incorporates that argument (that the intoxilizer results should not have been admitted into evidence because there's no clear, convincing and satisfactory evidence that the test was administered within 3 hours of driving) as though fully set forth herein.

The trial court, in its findings, and the State in its Response, devote an inordinate amount of attention to Busarow having exhibited signs of intoxication while performing the field sobriety tests ("FST"). R.11:48,

Response, pps. 4-6. However, in the context of this record Busarow's performance on the FST's is immaterial. Regardless that Busarow's performance during the FSTs may have been compromised by the severity of the accident (noted by the trial court at R.11:45), without knowing what Busarow drank, or when he drank, relative to the time he drove, his exhibiting signs of intoxication while performing the FSTs is of no evidentiary significance. The ultimate question is: was Busarow under the influence of an intoxicant when he was driving? Busarow's performance of the FST, is in no degree determinative of the ultimate question.

The State argues "The only question the trial court needed to resolve was why Busarow was unable to manipulate the controls of his vehicle safely". Response, p. 7. In support of the trial court's finding that the only reasonable inference is that Busarow lost control of his vehicle because of his consumption of alcohol, the State incorporates the trial court's findings:

1. The roadway was clear,

2. Busarow's performance on the FSTs,
3. Busarow stating that he didn't drink after the accident, and
4. If there had been an explanation other than alcohol a sober person would have given it. Response, p.7.

Although #1 may be accurate, none of the trial court's findings do not support the trial court's finding that Busarow was under the influence while driving. Busarow's performance on the FSTs (#2) is of no moment for the reasons set forth above. Busarow's statement that he didn't drink after the accident (#3) doesn't reveal when he drank before the accident or the time that he drove. And, the 4th point, that a sober person would have given an explanation for why he went off the road presupposes that Busarow was asked why he drove off the road, and that Busarow did not give an explanation. Both presuppositions are unsupported in this record since Deputy Semmerling was not permitted to answer whether Busarow told him why he left the roadway. R.11:22-23. That evidentiary ruling is curious in the light cast by the trial court's praise of Busarow's cooperation and veracity in his dealing with Deputy Semmerling following the accident. R.11:43-11 ("So

here we have him quite cooperative and that's shown in the videotape"), 47-22 ("And it had to have been one of the more friendly conversations that I've heard and observed on these tapes over the years...He was pretty forthright and did not appear to hide any information."). If the trial court thought Busarow's failure to explain the accident was determinative of guilt, it should have permitted Deputy Semmerling to testify what Busarow told him was the reason he left the roadway.

The trial court's finding that the only reasonable inference is that Busarow lost control of his vehicle because of his consumption of alcohol, therefore, relies only on Busarow's car leaving a clear roadway. Obviously, such a finding, that fails to take into account the myriad of other possible causes of a car leaving a clear roadway that are unrelated to consumption of alcohol (i.e., mechanical failure, driver fatigue, avoiding colliding with an animal, or with another vehicle, etc.), is not a finding that is based on clear, convincing and satisfactory evidence.

CONCLUSION

Because the record does not contain sufficient

evidence that is clear, convincing and satisfactory of either the time Busarow drank or of the time he drove the trial court's finding that he must've been under the influence of an intoxicant at the time of the accident should not be sustained by this court. Accordingly, the trial court's order adjudging Busarow guilty of OWI -1st offense should be reversed.

Dated at Milwaukee, Wisconsin this 12th day of March, 2015.

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CERTIFICATION OF E-FILING

I hereby certify that I electronically filed this reply brief, on March 12, 2015, and the digital file is identical with the hard copy that was filed, with the court on March 12, 2015.

Dated at Milwaukee, Wisconsin this 12th day of March, 2015.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

Mon spaced font*: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 11 pages.

Dated at Milwaukee, Wisconsin this 12th day of
March, 2015.

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