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**Appeal No. 2015AP000574 - CR
Circuit Court Case No. 2014TR002100**

In the matter of the refusal of David Francis Walloch:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DAVID FRANCIS WALLOCH,

Defendant-Appellant.

ON APPEAL FROM AN ORDER
ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY,
BRANCH III
THE HONORABLE TODD K. MARTENS, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

STATE OF WISCONSIN,
Plaintiff-Respondent

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STATEMENT OF ISSUES

- I. Whether the State sufficiently identified the Defendant at the refusal hearing?

Trial Court Answer: Yes

STATEMENT ON PUBLICATION

Plaintiff-Respondent does not request publication, pursuant to Section 809.19(1)(c), Wis. Stats.

STATEMENT ON ORAL ARGUMENT

Plaintiff-Respondent does not request oral argument, pursuant to Section 809.19(1)(c), Wis. Stats.

STANDARD OF REVIEW

This Court applies a two-part standard to review the Defendant-Appellant's motion to suppress: the Court will uphold the trial court's findings of fact unless they are clearly erroneous but reviews *de novo* the application of law to those facts. *State v. Hampton*, 2010 WI App 169, ¶ 23, 330 Wis. 2d 531, 793 N.W.2d 901.

STATEMENT OF FACTS

On October 15, 2014, Judge Martens presided over a Refusal Hearing and heard testimony from two witnesses: Officer Andrew Mammen and Lieutenant Joseph Cashin. (R. 1-2.) The Defendant did not personally appear. (R. 4:5-6.) Both Officer Mammen and Lieutenant Cashin testified at length about their training and education and their contact with and investigation of the Defendant that addressed the issues relevant to a refusal hearing. (R. 4-36.) After testifying to his training, education, and experience, Officer Mammen testified that on June 29, 2014, he investigated and subsequently arrested an individual he identified as David Walloch. (R. 6:23-25, 7:1-2.) After testifying regarding his training, education and experience, Officer Cashin testified that he acted as Officer Mammen's field training officer on July 28, 2014, and July 29, 2014, participated in the investigation, and that he affected an arrest on an individual Officer Cashin identified as David Walloch. (R. 25:22-24.) Both witnesses continually referred to the subject of the refusal as "the defendant," "Mr. Walloch," or "he." (R. 7-36.) The Defendant presented no evidence or testimony. (R. 4-36.)

ARGUMENT

I. THIS COURT SHOULD CONCLUDE THAT THE STATE SUFFICIENTLY IDENTIFIED THE DEFENDANT BY EVIDENCE BY A PREPONDERANCE OF THE EVIDENCE.

The issues relevant to a refusal hearing are: (1) whether the officer had probable cause to believe the defendant was driving or operating a motor vehicle while under the influence; (2) whether the officer complied with section 343.305(4); whether the defendant refused to permit the test. Wis. Stat. § 343.305(9)(a)(5) (2013-14). Inherent in these issues is identification of the defendant as the subject of the refusal. The State bears the burden of establishing the above-described requirements by a preponderance of the evidence. *State v. Piddington*, 2001 WI 24, ¶ 22, 241 Wis. 2d 754, 623 N.W.2d 528.

As the Defendant notes, there is no requirement that identification be satisfied by any particular method. *See Village of Butler v. Clay*, 2010 WI App 33, 323 Wis. 2d 824, 781 N.W.2d 551 (*citing United States v. Morrow*, 925 F.2d 779, 781 (4th Cir. 1991)). In this case, both witnesses testified that each identified the subject of their investigation as David Walloch. (R. 6:23-25, 7:1-2, 25:22-24.) There was no evidence introduced that contradicted this testimony. (R. 4-36.)

The Wisconsin Court of Appeals has noted that the practice of defendants failing to personally appear at proceedings—appearing only by counsel—and then arguing a lack of evidence to prove identity has been addressed by other courts. *Clay*, 2010 WI App 33, ¶ 7 (“Although the effectiveness of this tactic is doubtful and its use is arguably puerile, there is no law against it. In fact, the law has

evolved to manage it.”) (*citing Morrow*, 925 F.2d at 781; *State v. Hill*, 83 Wash. 2d 558, 520 P.2d 618, 619 (Wash. 1974)). In *State v. Hill*, the Supreme Court of Washington addressed the sufficiency of evidence regarding the identity of a defendant at trial. 83 Wash. 2d 558, 520 P.2d 618 (1974). There the State did not introduce an in-court identification of the defendant into evidence, but testimony from the State’s witnesses referred to the defendant either by name or as “the defendant.” *Id.* at 560. The court concluded that these references during testimony, which were uncontested, were sufficient evidence to establish the identity of the defendant as the person the witnesses testified about satisfied the State’s burden of proof beyond a reasonable doubt. *Id.*

Likewise, in *United States v. Morrow*, the Fourth Circuit addressed the sufficiency of the State’s evidence at trial to identify the Defendant to a burden of beyond a reasonable doubt. 925 F.2d 779 (1991). At trial the State’s witnesses referred to the defendant as “the defendant” and by his name, but the State did not introduce evidence of an in-court identification of the defendant as the person about whom each witness testified. *Id.* at 780-81. The Court questioned one witness as to whether the person who the witness testified about was present in court and received an affirmative response identifying the defendant in court as that person. *Id.* at 780. The defendant argued that the Court’s questioning was impermissible and that absent that questioning the State failed to sufficiently identify the defendant. *Id.* at 781. The Fourth Circuit disagreed; it concluded the Court’s questions were permissible, but concluded those questions were not

necessary because the State's proof was sufficient to identify the defendant because both witnesses referred to the actor as "the defendant" or by name and no evidence contradicted that testimony. *Id.*

Like the evidence presented in *Hill* and *Morrow*, the State's evidence came from two officers who repeatedly referred to the Defendant either as "the Defendant" or by his name throughout their testimony. (R. 4-36.) They also both testified that they identified the subject of their testimony as an individual each identified as "David Walloch." (R. 6:23-25, 7:1-2, 25:22-24.) There was no evidence presented that contradicted this testimony. Furthermore, given that the courts in *Hill* and *Morrow* found this type of evidence satisfied the State's burden to identify a defendant at a criminal trial to a standard of beyond a reasonable doubt, certainly that same quantum and quality of evidence is sufficient to satisfy the lesser burden of "by a preponderance of the evidence." *See Morrow*, 925 F.2d at 781; *Hill*, 520 P.2d at 560.

The Defendant argues that the State's burden requires it to provide more specific evidence as to how the Defendant was identified and offers several suggestions of what additional evidence could—and he argues should—have been introduced. This argument is erroneous in light of the above-detailed case law and three undisputed facts: (1) both officers testified they identified the subject of their investigation as David Walloch; (2) no evidence introduced contradicted that testimony; and (3) the State's burden at a refusal hearing is "by a preponderance of

the evidence.” Accordingly, no additional evidence was necessary to establish the Defendant’s identify.

CONCLUSION

Because Officers Mammen and Cashin testified that they arrested an individual that each identified as David Walloch, this testimony is sufficient to satisfy the State’s burden of proving identity by a preponderance of the evidence. There was no evidence to contradict the testimony of Officers Cashin and Mammen. Accordingly, this Court should uphold the trial court’s decision.

Respectfully submitted,

Dated this 2nd day of July, 2015.

Sandra Jo Giernoth
Assistant District Attorney

FORM AND LENGTH 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 1,285 words.

Dated this 2nd day of July, 2015.

Sandra Jo Giernoth
Assistant 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, if any, which complies with the requirements of Wis. Stat. § 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 2nd day of July, 2015.

Sandra Jo Giernoth
Assistant District Attorney

CERTIFICATION OF MAILING

Pursuant to Sec. 809.80(3)(b), Stats., I hereby certify that on the 2nd day of July, 2015, in the City of West Bend, Washington County, Wisconsin, I mailed in a properly enclosed postage-paid envelope the original and ten (10) copies of the enclosed addressed to the following named person at the following post office address:

Diane Fremgen
Wisconsin Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Dated this 2nd day of July, 2015.

Sandra Jo Giernoth
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