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COURT OF APPEALS
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2015AP865-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

vs

Alejandro Herrera-Ayala,
Defendant- Respondent.

PLAINTIFF-APPELLANT'S BRIEF

By: Carley N. Miller
Attorney for Plaintiff-Appellant
Assistant District Attorney
State Bar No. 1082284

Brown County District Attorney's Office
Law Enforcement Center
300 East Walnut Street
P.O. Box 23600
Green Bay, WI 54305-3600
(920) 448-4190

On appeal from the Circuit Court
of Brown County, Hon. Marc A. Hammer,
Circuit Judge, presiding.

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STATE OF WISCONSIN
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STATE OF WISCONSIN,
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Alejandro Herrera-Ayala,
Defendant- Respondent.

PLAINTIFF-APPELLANT'S BRIEF

STATEMENT OF ISSUES

Whether the officers' administration of the field sobriety tests rendered the results of Alejandro Herrera-Ayala's performance unreliable.

The court specifically held 1) that the arresting officer had the requisite level of reasonable suspicion to conduct a traffic stop and conduct field sobriety tests; but 2) the officer lacked probable cause to arrest Alejandro Herrera-Ayala under the totality of the circumstances. The court held that the officers failure to remedy the language barrier during the administration of field sobriety tests rendered them unreliable, and held that a Preliminary Breath Test should have been administered.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2015AP865-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

vs

Alejandro Herrera-Ayala,
Defendant- Respondent.

PLAINTIFF-APPELLANT'S BRIEF

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

STATEMENT OF FACTS

On January 31, 2014, a three-count criminal complaint was filed charging Alejandro Herrera-Ayala with Operating While Intoxicated-Second Offense, Operating with a Prohibited Alcohol Concentration-Second Offense, and Operating While Revoked-Second Offense based on an incident that occurred on Saturday, November 16, 2013.

On August 21, 2014, Alejandro Herrera-Ayala via defense counsel filed an initial motion challenging 1) the reasonable suspicion for the administration of Standardized Field Sobriety Tests (SFSTs), 2) the probable cause to arrest; and 3) that the evidence obtained therefrom violated the Alejandro Herrera-Ayala's constitutional rights.

On October 29, 2014, a motion hearing was held following the filing of the defense's motion. In anticipation of the motion hearing, the defense provided the circuit court with the squad video. *See* Green Bay Police Dept. COBAN Video (Aug. 21, 2014).

The video depicts a white Blazer making a left hand turn in front of Officer Asplund's squad camera. The squad makes a U-turn, and when the car pulls around, the Blazer is parked, and there is a man walking away from the Blazer towards the squad car. *See id.* at 00:00-00:45. Officer Asplund makes contact with the subject, and asks him whether he speaks English. The man (later identified as Alejandro Herrera-Ayala) answers, in English, "yes." *Id.* at 01:48. Officer Asplund asks him why he parked his car there. Alejandro Herrera-Ayala answers, again in English, "I don't have no car." Officer Asplund tells him he saw him get out of the Blazer. Alejandro Herrera-Ayala answers in English, "no, no." *Id.* at 01:48-02:00. The officers ask Alejandro Herrera-Ayala multiple questions in English. He asks "what?", they repeat themselves, and he answers the questions appropriately in English. *Id.* at 03:30. One officer asks him to spell his name, and he responds in English. He uses mixed Spanish and English when explaining how many drinks he had. Alejandro Herrera-Ayala provided his date of birth in English as "3-15-85." Officers learn from dispatch that he has one prior Operating While Intoxicated (OWI) conviction. *Id.* at 03:31-07:43. The officers ask him to move towards the front of the squad car. Although they repeat the request a few times, Alejandro Herrera-Ayala ultimately complies. *Id.* at 08:40. Officer Asplund asks Alejandro Herrera-Ayala, "You were driving that car, right?" and makes a driving gesture with his hands. *Id.* at 10:12. Alejandro Herrera-Ayala continues to deny in English that he was driving the car. *Id.* Officer Asplund tells him everything is being recorded on his camera, and says "see that blinking red light, look at my car." Alejandro

Herrera-Ayala turns to look at the car. *Id.* Alejandro Herrera-Ayala continues to use English to explain that he was not driving and claims he was walking down the street. *Id.* at 10:48-11:47. Officer Brann arrives, and they ask him to translate for field sobriety tests. He can be heard saying he would get questioned on the stand about his fluency, and does not feel comfortable translating. *Id.* at 15:30. Officer Brann conducts a brief Horizontal Gaze Nystagmus (HGN) test on Alejandro Herrera-Ayala, and the officers discuss whether to perform field sobriety tests in Spanish. *Id.* at 17:20-18:00. The officers locate Alejandro Herrera-Ayala's ID and wallet in the Blazer. When confronted with it, Alejandro Herrera-Ayala says he wasn't driving. Again, he denies driving in English. *Id.* at 18:39. When Officer Brann hears him do so, Officer Brann exclaims, "Why am I speaking Spanish?! He's speaking English!" *Id.* at 18:49. In English, Alejandro Herrera-Ayala denies ownership of the wallet. *Id.* at 19:07.

Officer Asplund and Officer Brann administer the HGN test. *Id.* at 19:35. Officer Brann gives instructions in Spanish, and Officer Asplund gives instructions in English. When Officer Asplund tells Alejandro Herrera-Ayala in English to keep his arms at his sides, he straightens his arms to his side. *Id.* The majority of the HGN instructions were in Spanish. *Id.* at 19:35-21:10. Officer Asplund next conducts the walk and turn test. He gives the instructions in English. He tells Alejandro Herrera-Ayala to move over in front of the squad car. He complies, losing his balance. *Id.* at 21:04. In English, Officer Asplund instructs him to get back into the starting position for the Walk and Turn test. Alejandro Herrera-Ayala complies. *Id.* at 22:33. Officer Asplund explains and demonstrates the test. He asks Alejandro Herrera-Ayala if he has any questions. Although Alejandro Herrera-Ayala looks back briefly over his shoulder, he does not say anything before starting the test. *Id.* at 22:34-23:29. Alejandro Herrera-Ayala takes too many steps, and when the officers prompt him to turn around, he does so. *Id.* at 23:54. He asks "nueve?", and walks back towards the squad. *Id.* at 23:58. In English, Officer Asplund instructs Alejandro Herrera-Ayala to get into the starting position for the one leg stand test. He complies. *Id.* at 24:28. Officer Asplund, in English, explains and demonstrates the test. *Id.* at 24:29-25:10. He explains three times using English, Spanish, and a mix of English and Spanish, that Alejandro Herrera-Ayala must count out loud, "one thousand one, one thousand dos, tres. Keep counting until I tell you to stop. One thousand one, one thousand two, one thousand three." *Id.* at 24:41-25:00. Alejandro Herrera-Ayala looks back over his shoulder. *Id.* at 25:00. Alejandro Herrera-Ayala begins the test, immediately putting his arms up. *Id.* at 25:09. He sways while balancing, and Officer Asplund instructs him to

watch his foot and count out loud “uno, dos, tres.” *Id.* at 25:10-25:17. Officer Asplund asks him if he can count, and Alejandro Herrera-Ayala begins counting. The officers verbally react, and Alejandro Herrera-Ayala leans to his left and falls out of the position. *Id.* at 25:18-25:29. Alejandro Herrera-Ayala is placed under arrest. *Id.* at 25:32.

At the motion hearing on October 29, 2014, Officer Asplund testified that on November 16, 2013, he “was working an OWI enforcement assignment...looking for possible intoxicated drivers or other violations.” Mot. Hrg. Tr. 8: 9-16. At approximately 12:42 a.m., Officer Asplund testified he observed a white Blazer on Baird Street. *Id.* at 8:21-23. He followed the vehicle, and observed that “it immediately took a left turn onto Cherry Street and then immediately took a right-hand turn into the very first driveway that is on Cherry Street, and then...its tires hit the curb as [it] was pulling into the driveway.” *Id.* at 9:12-18. Officer Asplund indicated the car was too far to the right and turned too sharply into the driveway. *Id.* at 9:21-22. He testified he did not know at that point if the car was avoiding him or pulling into its residence. He indicated “I decided not to conduct a traffic stop” and continued down the street, where he parked and continued to observe the vehicle. *Id.* at 10:3-11. Officer Asplund indicated several minutes went by, and he observed the vehicle pull onto Baird Street, take a left turn heading north, and then “all of a sudden, he signaled real quick and veered left and took a sharp turn.” *Id.* at 10:25-11:1-12. Officer Asplund testified that the turn was suspicious, because normal driving behavior includes signaling or braking more in advance of a turn. *Id.* On cross examination, Officer Asplund explained that he got the impression the vehicle spotted his squad car and decided to turn. *Id.* at 37:1-23. He then activated his headlights and attempted to catch up to the vehicle. As he turned around, he observed the driver pull quickly over to the right side of the road, exit the vehicle, travel to the other side of the road, and start walking. *Id.* 11:15-21.

Upon making contact with the driver on the street, Officer Asplund testified he “could smell a strong odor of intoxicants coming from him. He kind of had an accent. At times he spoke English and at times he spoke Spanish, but it appeared to be somewhat slurred.” *Id.* 13: 7-19. Officer Asplund testified the subject verbally identified himself, and his ID and keys were located in the Blazer. *Id.* at 15:3-15, 40:4. Alejandro Herrera-Ayala denied driving and denied ownership of the vehicle. *Id.* at 15:4-10. Alejandro Herrera-Ayala acknowledged that he had been drinking. *Id.* at 14:13-16. Officer Asplund testified he decided to conduct field sobriety tests based on the odor of intoxicants, slurred speech, and the driving behavior.

Id. at 15: 16-25. Officer Asplund specifically testified that the car hitting the curb, the elusive driving, and the driver pulling over and abandoning the car were suspicious. *Id.* Because Officer Asplund was unsure whether the slurred speech was due to intoxication or potential language difficulty, he asked that Officer Brann respond to assist with the traffic stop. *Id.* at 16:2-18. Once Officer Brann arrived on scene, he assisted in explaining the SFSTs. *Id.* at 17:5-9. While conducting the HGN test, Officer Asplund testified that it appeared to him that Alejandro Herrera-Ayala understood that he needed to stand still and keep his hands at his sides before doing the test. *Id.* at 17:15-17. Officer Asplund observed six total clues on the HGN test. *Id.* at 19:9. He indicated that he explained and demonstrated the walk and turn test. *Id.* at 19:20-25, 20:1-2. He indicated that Alejandro Herrera-Ayala did not appear to have any difficulty understanding what the instructions were. *Id.* at 20:3-7. Alejandro Herrera-Ayala exhibited several clues during the performance of this test. *Id.* at 20:15-25, 21:1-16. Lastly, Officer Asplund testified that he explained and demonstrated the one-leg stand test. *Id.* at 22:1-3. Alejandro Herrera-Ayala lifted his arms, lost his balance, and put his foot down. *Id.* at 22:10-13. Officer Asplund testified “at times it seemed like when I would ask questions in English, he understood and was talking, and at other times, he may not have understood completely.” *Id.* at 45:2-5. Officer Asplund indicated that he tried to use Spanish and Officer Brann to help with communication. *Id.* at 45:6-11. Officer Asplund testified that intoxicated people have a hard time following simple directions, therefore he did not think that the language issue was the sole reason the directions were not being followed. *Id.* at 47:4-11.

On November 14, 2014, a continued motion hearing was held. At that hearing, Officer Asplund testified that he could have made the OWI arrest following the HGN test based on his training and experience, his observations of the defendant, and his observation of six out of six total clues on the test. Cont’d Mot. Hrg. Tr. 86:18-24. He indicated that the defendant’s performance on the walk and turn and the one-leg stand tests bolstered his decision to place Alejandro Herrera-Ayala under arrest for OWI. *Id.* at 87:1-11. He further clarified that “I don’t know what he was understanding because I’m not in his head, but at times he would speak English and at [times] he would speak Spanish, so to give [him the] benefit of the doubt we called someone over to help translate and at times Officer Brann would step in and do some translation.” *Id.* at 101:9-14. Officer Asplund testified at length on cross examination about his observations and administration of the HGN test. *Id.* 88-100. He indicated that on the walk and turn test, he observed six out of eight total clues. *Id.* at 107:1-12. His

updated details were marked as Exhibit 4 (referred to hereinafter as Ofc. Asplund's Rpt (Nov. 14, 2014)) and admitted into evidence. *Id.* at 113:9-25, 114-115:1-8.

Officer Jeff Brann also testified at the continued motion hearing. He indicated that he had been dispatched to Officer Asplund's stop to assist with a subject who supposedly did not speak English but spoke Spanish. *Id.* at 117:20-23. Officer Brann testified

when I responded, I was under the impression that the driver or person that Officer Asplund was out with did not speak any English at all. I explained to Officer Asplund that [with] my limited Spanish-speaking ability I wasn't comfortable administering full field sobriety tests, but I could help the driver understand some of the instructions and clarify and be able to realize if he understood or did not understand the directions. When I heard the person that Officer Asplund was with speaking in English, I asked why I was called to interpret Spanish if he was speaking English?

Id. at 118:7-18. Officer Brann indicated he conducted a quick version of the HGN test to determine whether Alejandro Herrera-Ayala would be able to understand the instructions. Officer Brann was able to observe some clues. *Id.* at 119:1-22. He indicated he believed that "Officer Asplund would be able to... administer the HGN test with the person understanding what he was supposed to do to perform the test." *Id.* at 119:18-22. He also testified that he observed the odor of intoxicants emanating from Alejandro Herrera-Ayala and believed he was intoxicated. *Id.* Officer Brann testified that based on the way that the tests were administered by himself and Officer Asplund, he believed at the time that Alejandro Herrera-Ayala understood what he was supposed to do before each of the tests. *Id.* at 121:25, 122:1-23. He indicated Alejandro Herrera-Ayala "was asking questions and challenging the reason for the stop using English terminology." *Id.* at 124:22-24. He indicated that he relied on nonverbal cues to demonstrate the portions of the test he couldn't explain in Spanish. *Id.* at 130:20-23.

On December 10, 2014, at the second continued motion hearing, the defense indicated Alejandro Herrera-Ayala would not be testifying, and submitted a copy of the National Highway Transportation Safety Administration (NHTSA) SFST Manual. *See* NHTSA SFST Training Manual (Dec. 10, 2014).

On January 9, 2015, Alejandro Herrera-Ayala via defense counsel filed a brief in support of its motion to dismiss, which fine-tuned its original arguments. Based on the testimony elicited at the motion hearings, the defense now argued that: 1) there was not the requisite level of reasonable

suspicion for the administration of SFSTs; 2) the officer lacked probable cause to arrest because a) the officer's inability to effectively communicate with Alejandro Herrera-Ayala rendered the information gathered during the stop unreliable; b) the arresting officer failed to take sufficient measures to ensure accurate and meaningful communication with Alejandro Herrera-Ayala as required by Wis. Stat. §343.305(4); and c) the field sobriety tests were improperly administered, which rendered the results invalid.

On February 6, 2015, the State filed its response motion, arguing that: A) there was reasonable suspicion for the detention of Alejandro Herrera-Ayala and the administration of SFSTs; B) that there was probable cause to arrest because i) the officers were able to communicate with Alejandro Herrera-Ayala; ii) Officer Asplund complied with Wis. Stat. §343.305(4) (which governs the reading of implied consent warnings, *not* field sobriety test instructions); and iii) the field sobriety tests were properly administered by officers, who took additional steps to ensure accurate communication with Alejandro Herrera-Ayala.

On April 10, 2015, the circuit court entered its decision and order granting the defense's motion to suppress. *See* Cir. Ct. Br. V Dec. and Or. (Apr. 10, 2015). The court specifically held: 1) that the arresting officer had the requisite level of reasonable suspicion to conduct a traffic stop and conduct field sobriety tests; but 2) the officer lacked probable cause to arrest Alejandro Herrera-Ayala under the totality of the circumstances. The court held that the language barrier affected Alejandro Herrera-Ayala's performance on the field sobriety tests such that it rendered the field sobriety tests unreliable, and held that the officer should have administered a Preliminary Breath Test to remedy the lack of factors that would have supported a valid arrest.

The State now appeals the circuit court's order.

STANDARD OF REVIEW

“Whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact.” *State v. Nieves*, 304 Wis.2d 182, 188 (Wis. App. 2007) (citation omitted). Constitutional questions are reviewed de novo, and the trial court’s findings of evidentiary facts will be upheld unless they are clearly erroneous. *Id.* “Trial judges are accorded wide latitude to make decisions in the exercise of their discretion. Examples of discretionary acts include... admission of evidence.” Michael Heffernan, *Appellate Practice and Procedure*, §3.20 (Sixth Edition, State Bar of Wisconsin 2014). A discretionary act will be sustained if an appellate court finds that the circuit court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Dane Cnty. Dep’t of Human Servs. v. Mable K. (In re Termination of Parental Rights to Isaiah H.)*, 346 Wis. 2d 396, 414 (Wis. App. 2013).

Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. As we pointed out in *State v. Hutnik* (1968), 39 Wis.2d 754, 764, 159 N.W.2d 733, 738, “* * * there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.’

McCleary v. State, 49 Wis. 2d 263, 277 (1971). A failure to delineate the factors that influenced a decision or making an error of law constitutes a misuse of a circuit court’s discretion. *Id.* at 282; also see *State v. Hutnik*, 39 Wis. 2d 754, 763 (1968).

ARGUMENT

I. Officer Asplund Had Reasonable Suspicion To Detain Alejandro Herrera-Ayala And Conduct SFSTs.

A. Initial Detention

The circuit court improperly applied the standard for a traffic stop to the investigative detention in this case. Alejandro Herrera-Ayala was walking down the street by the time Officer Asplund made contact with him. Officer Asplund did not perform a traditional traffic stop of Alejandro Herrera-Ayala's vehicle. *See* Mot. Hrg. Tr. 13: 7-19. *Also see* Green Bay Police Dept. COBAN Video, 00:00-01:48(Aug. 21, 2014). "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior." *Terry v. Ohio*, 392 U.S. 1, 22 (1968). "[R]easonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Id.* The determination of the reasonableness of an investigatory stop "depends on the totality of the circumstances." *State v. King*, 175 Wis.2d 146, 150 (Wis. App. 1993) (citation omitted).

Officer Asplund testified that he has been a police officer with the City of Green Bay for fourteen years, holds an Associate's Degree in police science, and attends annual training that includes the detection and investigation of Operating While Intoxicated (OWI) offenses. Mot. Hrg. Tr. 7:9-25, 8:1-8. Officer Asplund testified that he observed evasive driving behavior. He testified that the moment he began following the vehicle, "it immediately took a left turn onto Cherry Street and then immediately took a right-hand turn into the very first driveway that is on Cherry Street, and then so doing it – it's tires hit the curb as [it] was pulling into the driveway." *Id.* at 9:14-18. Officer Asplund went on to testify that he went one street up and parked to continue to observe the vehicle. *Id.* at 10:2-25. He testified he decided to give the vehicle the benefit of the doubt, because at that point, Officer Asplund considered the car hitting the curb a deviation from designated lane (a traffic violation). *Id.* at 33:6-25, 34:1-10. Minutes later, the vehicle then pulled back onto the street towards the parked squad car. Once it got to Officer Asplund's location, "all of a sudden, it turned in front of me passing right by my location. So I guess the run wasn't maybe quite as normal he signaled real quick and veered left." *Id.* 37:1-24. Office Asplund

testified that he interpreted this as behavior as evasive. *Id.* Officer Asplund made contact with the subject on the street. *Id.* at 40:2-7. Officer Asplund had grounds to detain Alejandro Herrera-Ayala because he had reasonable suspicion that a crime or traffic violation had been committed. The totality of the circumstances, as articulated by Officer Asplund, demonstrate “reasonable suspicion that the driver of the vehicle made a series of unusual and impulsive driving choices, suggestive of impairment.” *In re Refusal of Anagnos*, 341 Wis.2d 576, 600 (2012).

B. Decision To Administer Field Sobriety Tests

The circuit court held that this was “an incredibly close case on the issue of whether Officer Asplund’s subsequent interaction with Herrera-Ayala gave rise to reasonable suspicion to administer the SFSTs.” Cir. Ct. Br. V Dec. and Or., 9 (Apr. 10, 2015). The State asserts it is not a close case. Officer Asplund testified he made contact with Alejandro Herrera-Ayala on the street, and immediately smelled the odor of intoxicants. Mot. Hrg. Tr. 41:11-17. Officer Asplund testified it was 12:42 a.m. on a Friday night.¹ He indicated he observed evasive and erratic driving, the car hopping the curb,² an abrupt turn after the driver spotted the squad car, the subject park his vehicle and immediately attempt to disassociate himself from it, slurred speech, irrational denial of driving or association with the vehicle,³ denial of ownership of his identification found in the vehicle, the admission of drinking,⁴ and the strong odor of intoxicants.⁵ Officer Asplund also learned

¹ The time of night and day of the week are facts that contribute to reasonable suspicion. *See State v. Lange*, 317 Wis.2d 383, 397 (2009); *In re Refusal of Anagnos*, 341 Wis.2d 576, 601 (2012).

² In *Anagnos*, the officer observed erratic, but not per se illegal, driving behavior. The Court held that the totality of the circumstances (the officer’s training and experience, the time of night, the day of the week, the suspicious driving) could confirm that there was cause for suspicion. *Anagnos*, 341 Wis.2d at 601.

³ *State v. Dunn*, 158 Wis.2d 138, 144 (Wis. App. 1990) (irrational denial of the odor of intoxicants is a factor in determining probable cause to arrest).

⁴ *See State v. Larson*, 266 Wis.2d 236, 241-42, (Wis. App. 2003) (defendant stated that he had just driven from a bar); *State v. Erickson*, 260 Wis.2d 279, 288-89 (Wis. App. 2003) (based on defendant’s admissions, there was reason to believe that the defendant had been drinking all night); *County of Jefferson v. Renz*, 231 Wis.2d 293, 296, (1999) (the defendant was stopped at 2 a.m. and he stated that he was a bartender and had three beers earlier); *Dane County v. Sharpee*, 154 Wis.2d 515, 517, 519-20, 453 N.W.2d 508 (Ct. App. 1990) (the defendant was stopped in the early morning hours and he stated that he had had two or three drinks that night).

⁵ An officer’s detection of an odor of intoxicants and observation of slurred speech are factors in determining if the defendant had been driving while intoxicated. *State v. Dunn*, 158 Wis.2d 138, 144 (Wis. App. 1990). *See also State v. Reese*, 353 Wis.2d 266, 270-71 (Wis. App. 2014).

that the subject had a prior OWI.⁶ Officer Asplund clearly observed enough to warrant a temporary detention to conduct SFSTs.

II. Based On The Totality Of The Circumstances, Officer Asplund Had Probable Cause To Arrest.

The circuit court found the administration of the SFSTs “fatally flawed.” Cir. Ct. Br. V Dec. and Or., 12 (Apr. 10, 2015). It indicated that “[t]he deficiencies of Officer Asplund’s conduct throughout the entirety of the traffic stop ultimately amount to deep fissures in each of the building blocks upon which he based his finding of probable cause.” *Id.* The circuit court held that “the sum of the whole of these deficiencies are greater than the sum of their parts.” *Id.*

Wisconsin has no requirement that police must perform field sobriety tests in order to determine probable cause. *State v. Kennedy*, 359 Wis. 2d 454, 468 (2014).

In the context of an arrest for a drunk-driving related violation or crime, a law enforcement officer may consider numerous factors in order to determine probable cause to arrest. Probable cause may be established through a showing of erratic driving and the subsequent ‘stumbling’ of the driver after getting out of the motor vehicle. In other cases, factors sufficient to support a finding of probable cause have included bloodshot eyes, an odor of intoxicants, and slurred speech, together with a motor vehicle accident or erratic driving.

Id. at 468-469 (internal citations omitted). The *Kennedy* court found probable cause to arrest based on the officer’s observations of skid marks on the road leading to the suspect’s car, the extent of the damage to both the suspect and victim’s vehicles, the odor of alcohol emanating from the suspect, and the suspect’s bloodshot eyes, slurred speech, and his swaying body. *Id.* “Probable cause exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.” *State v. Koch*, 175 Wis.2d 684, 701 (1993). Any one fact, on its own, may be insufficient for a determination of whether probable cause exists to arrest. *State v. Waldner*, 206 Wis.2d 51, 58 (1996). But the facts do not exist in a vacuum, and a court must consider the totality of the officer’s observations. “The building blocks accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence,

⁶ See *State v. Lange*, 314 Wis.2d 383, 397 (2009).

a point is reached where the sum of the whole is greater than the sum of its individual parts.” *Id.*

[A]n officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause. Probable cause is a flexible, commonsense standard. It requires only that the facts available to the officer would warrant a person of reasonable caution to believe that an offense likely was committed. The process deals with probabilities, not hard certainties. Law enforcement officers are permitted to formulate certain commonsense conclusions about human behavior and to consider the evidence as understood by those versed in the field of law enforcement.

State v. Nieves, 304 Wis. 2d 182, 189-190 (Wis. App. 2007). As detailed below, the SFST results should not have been struck from the probable cause determination.

A. Administration Of Field Sobriety Tests

The circuit court held, based on what it termed a flawed administration of SFSTs, that the SFSTs were unreliable and inadmissible. This conclusion is in stark contrast to the relevant facts contained within the record and is based on misapplication of law. Both officers testified they believed Alejandro Herrera-Ayala was able to understand their instructions and demonstrations with respect to the field sobriety tests. Indeed, Officer Brann specifically testified that “[w]hen I heard the person that Officer Asplund was with speaking in English, I asked why I was called to interpret Spanish if he was speaking English?” Cont. Mot. Hrg. Tr. at 118:7-18. Officer Brann indicated the defendant “was asking questions and challenging the reason for the stop using English terminology.” *Id.* at 124: 22-24. Again, the officers took what steps they could to address any communication issues. The officers had been talking and interacting with Alejandro Herrera-Ayala for over twenty minutes prior to the administration of SFSTs. *See*. Green Bay Police Dept. COBAN Video (Aug. 21, 2014). Once Officer Brann arrived on scene, he assisted Officer Asplund in explaining the field sobriety tests to the Defendant. Cont’d Mot. Hrg. Tr. at 17:5-9. Officer Asplund testified he normally asks drivers if they have “any medical problems or issues that prevent [them] from performing some tests?” *Id.* at 60:22-23. Officer Asplund indicated that he explained and demonstrated the tests to the defendant. *Id.* at 19:20-25, 20:1-2, 59:11-17. He indicated that the defendant did not appear to have any difficulty understanding what the instructions were. *Id.* at 20:3-7. Likewise, the squad video, when coupled with the NHTSA Manual, depicts the officers’ proper administration of the field

sobriety tests. See Green Bay Police Dept. COBAN Video, 17:00-25:45 (Aug. 21, 2014); also see NHTSA SFST Training Manual (Dec. 10, 2014).

Although *State v. Begicevic*, 270 Wis.2d 675 (Wis. App. 2004) and *State v. Piddington*, 241 Wis. 2d 754, 764-765 (Wis. App. 2004) focused on interpreting what is required of officers when conveying implied consent warnings, they also illustrate how Wisconsin courts have analyzed the administration of SFSTs when communication issues are present during an OWI investigation. In *Begicevic*, the defendant was Bosnian, he had lived in Wisconsin for six years, his primary language was Croatian, and he spoke some German and English. *Begicevic*, 270 Wis. 2d at 685. “Although he had a heavy accent and asked her if she spoke German, [the officer] believed that she was able to communicate her requests to him in English and began to instruct him on the field sobriety tests she wanted to conduct.” *Id.* at 683. She demonstrated and explained the SFSTs, which the defendant failed. *Id.* at 683-684. The court upheld the administration of SFSTs. In *Piddington*, the defendant was deaf and had requested a sign language interpreter. The officer discovered none were available. The officer found that he could communicate with Piddington through notes, gestures, and speaking. *Piddington*, 241 Wis. 2d at 764-765. Piddington admitted that he had been drinking, and the officer observed a strong odor of alcohol and that Piddington's eyes were glassy. *Id.* The officer instructed Piddington on the tests through oral and written instructions and demonstrated the tests for him. *Id.* Based upon Piddington's performance on the tests and a Preliminary Breath Test (PBT), he was placed under arrest. The Court upheld the administration of the field sobriety tests, stating that “[d]uring the stop, it was evident that Piddington sufficiently understood what was communicated to him. Piddington attempted to perform the sobriety tests and, as shown by the patrol car video-tape of the stop, he failed them due to his intoxication, not because he did not understand how to perform the test.” *Id.* at 782.

Based on the record in this case, the language barrier in this case was not as severe as those detailed in *Begicevic* or *Piddington*. Officer Asplund testified “at times it seemed like when I would ask questions in English, he understood and was talking, and at other times, he may not have understood completely.” Mot. Hrg. Tr. 45:2-5. Officer Asplund testified that he tried to use Spanish intermittently. *Id.* at 45:6-11. **Officer Asplund indicated that in general, most intoxicated people have a hard time following simple directions, and therefore he couldn't agree that the language issue was the sole reason that the directions were not being followed one hundred percent.** *Id.* at 47:4-11 (emphasis added). He testified that Officer Brann was the only officer available at the time with a better command of Spanish,

so he wanted to try to take advantage of that. *Id.* at 47:24-2, 48:5-15. Although Officer Brann was not a certified interpreter, he was able to communicate with the defendant, who was already communicating to officers in English. *See* Green Bay Police Dept. COBAN Video (Aug. 21, 2014). Officer Brann indicated that, based on the way the tests were jointly administered, he believed Alejandro Herrera-Ayala understood what he was supposed to do before each of the tests. Cont'd Mot. Hrg. Tr. at 122:1-6. Officer Brann indicated that he relied on nonverbal cues to explain or demonstrate the portions of the test he couldn't explain in Spanish. *Id.* at 130: 20-23. As detailed below, the officers took sufficient measures to ensure that Alejandro Herrera-Ayala understood the instructions and clearly comported with the standardized instructions promulgated by NHTSA when administering the SFSTs.

i. HGN Test

The circuit court's analysis of the administration of the SFSTs is flawed. The court disregards the fact that the arresting officer is trained to administer SFSTs in a standardized manner and look for designated clues that indicate impairment based on the manual promulgated by NHTSA. *Id.* 25:1-25, 26:1-8. With respect to the HGN test, the circuit court found that Alejandro Herrera-Ayala had issues understanding the instructions, despite no testimony or other evidence presented to that effect. The circuit court stated "[f]or instance, although Officer Brann translated Officer Asplund's instructions that Herrera-Ayala remain completely still during the HGN test and only follow the pen with his eyes, Herrera-Ayala's body and head visibly move side to side throughout the test." Cir. Ct. Br. V Dec. and Or., 13-14 (Apr. 10, 2015). However, swaying during the test is not a standardized clue. *See* NHTSA SFST Training Manual, VIII-3-VIII-8 (Dec. 10, 2014). There was no testimony that swaying was a factor Officer Asplund relied upon in his arrest decision. The court also glossed over the fact that the HGN test instructions were provided to Alejandro Herrera-Ayala in both Spanish and English. It is unclear how the Spanish instructions compromised the reliability of the test. Nothing in the record demonstrates they were erroneous. Likewise, this test is the most reliable. It is not as instruction-dependent as the other two tests because it measures nystagmus, i.e., an involuntary physiological response. *Id.* at VIII-3. Officer Asplund testified extensively to the fact that he administered the test properly. *See* Cont. Mot. Hrg. Tr. 88-100. Officer Asplund testified that it appeared to him that Alejandro Herrera-Ayala understood that he needed to

stand still and keep his hands at his sides before doing the test. *Id.* at 17:10-25. Officer Asplund testified that Alejandro Herrera-Ayala kept his head straight and focused on the tip of his pen. Six out of six total clues were observed on the HGN test. *Id.* at 18:1-2, 19:1-16. The circuit court did not acknowledge that Officer Asplund could have made an arrest decision at the conclusion of the HGN test. *Id.* at 86:22-24. The circuit court similarly disregarded the evidence that explained the significance of the clues observed on the HGN test. Officer Asplund testified that “[t]he studies say about 81 percent of the people are intoxicated if there are six clues observed on them.” Mot. Hrg. Tr. 19:14-16. The NHTSA Manual likewise states “[b]ased on the original research, if you observe four or more clues it is likely that the suspects BAC is above .10.” NHTSA SFST Training Manual, VIII-8 (Dec. 10, 2014). The record is clear that the HGN test was performed in accordance with NHTSA, is reliable, and Officer Asplund’s observations should not be struck from the probable cause analysis.

ii. Walk And Turn Test

With respect to the walk and turn test, the court indicated that Officer Asplund should have deviated from his standardized training and “demonstrate[d] the walk and turn test fully.” Cir. Ct. Br. V Dec. and Or., 14 (Apr. 10, 2015). This interpretation might be more tenable if the defendant had only taken three steps if he was relying solely on the walk and turn demonstration, but he took too many steps on both sets of steps. *See* Green Bay Police Dept. COBAN Video (Aug. 21, 2014). The number of steps was also translated. The court disregards much of the record by relying on an exaggerated interpretation of Alejandro Herrera-Ayala’s body language. The court, in its analysis, does not point to any facts in the record to explain why it came to the conclusion that “each of the clues noted by Officer Asplund could have been attributed to Herrera-Ayala’s misunderstanding of the instructions.” Cir. Ct. Br. V Dec. and Or., 14 (Apr. 10, 2015).

The NHTSA Manual sets forth the instructions and demonstrations an officer must perform during the walk and turn test. NHTSA SFST Training Manual, VIII-9 (Dec. 10, 2014). It lists eight standardized clues: 1) cannot keep balance; 2) starts before instructions are finished; 3) stops while walking; 4) does not touch heel-to-toe; 5) steps off the line; 6) uses arms to balance; 7) improper turn; and 8) incorrect number of steps. *Id.* at VIII-10-11. The manual states that “[b]ased on original research, if the suspect exhibits two or more clues on this test or fails to complete it, classify the suspects BAC as above .10.” *Id.* at VIII-11. The manual also states that

“combining 4 or more clues of HGN and two or more clues of the walk-and-turn, suspects can be classified as above .10 BAC 80% of the time.” *Id.* Officer Asplund’s testimony and report indicate he observed five out of eight total standardized clues, specifically: 1) starts too soon; 2) missed heel to toe on the first 9 steps; 3) raised arms on the return nine steps; 4) took too many steps on both sets of steps; and 5) made an improper turn. *See* Ofc. Asplund’s Rpt. (Nov. 14, 2014). Alejandro Herrera-Ayala’s understanding or interpretation is not contained within the record. It is unknowable what he did or did not understand. These officers testified that they believed Alejandro Herrera-Ayala spoke English and comprehended their instructions. As far as the officers knew, he had had experience with SFSTs before due to his prior conviction for OWI. The record is clear that he complied with officer requests throughout the stop, and a Spanish-speaking officer was present to assist with any questions or translation. Alejandro Herrera-Ayala never asked questions, or “what”, as he had prior to the SFSTs. Officer Asplund was trained to look for and analyze these standardized clues in his assessment of probable cause. The testimony, the NHTSA Manual, and the video demonstrate that the administration of this test was conducted in a standardized and reliable manner.

iii. One Leg Stand Test

The court held that the officer should have “instruct[ed] Alejandro Herrera-Ayala how long he should count.” Cir. Ct. Br. V Dec. and Or., 14 (Apr. 10, 2015). Again, this holding contradicts the testimony of Officer Asplund as to how he has been trained to administer the tests and contradicts the NHTSA Manual’s instructions on the manner of administration. *See* NHTSA SFST Training Manual, VIII-12-14 (Dec. 10, 2014). Whether or how long a subject counts is not a standardized clue. The standardized clues include: 1) the suspect sways while balancing; 2) uses arms for balance; 3) hopping; 4) puts foot down. *Id.* at VIII-13. The significance of the clues observed on this test is based on research that shows that “a person with a BAC above .10 can maintain balance for up to 25 seconds, but seldom as long as 30.” *Id.* The manual also indicates that “if an individual shows two or more clues or fails to complete the one leg stand, there is a good chance the BAC is above .10.” *Id.*

The court found “[w]hen Officer Asplund asked Herrera-Ayala whether he had questions, he again turned to Officer Brann but did not receive additional instructions.” Cir. Ct. Br. V Dec. and Or., 14-15 (Apr. 10, 2015). The video depicts Alejandro Herrera-Ayala looking back over his

shoulder briefly before starting the test. Green Bay Police Dept. COBAN Video, 24:20 (Aug. 21, 2014). Alejandro Herrera-Ayala did not testify. It is unclear how the court knows he was looking for help. Alejandro Herrera-Ayala did not verbalize any request for clarification prior to starting any of the tests, including the One Leg Stand. The court relies on facts that are outside of the record by drawing unreasonable inferences based on a two-dimensional video about Alejandro Herrera-Ayala's subjective understanding. The court states "Herrera-Ayala's body language should have been a clear indicated [sic] to Officer Asplund to modify his instructions to speak more slowly or take extra precautions to clarify Herrera-Ayala understood." Cir. Ct. Br. V Dec. and Or., 15 (Apr. 10, 2015). Officer Asplund is required to observe the indicators and clues of impairment he was trained to look for. To require officers to interpret body language on top of the innumerable other duties they are required to perform during traffic stops and during the administration of roadside SFSTs is directly contradictory to the standards promulgated by NHTSA.

B. Preliminary Breath Test

The circuit court couches much of its decision in its finding that officers should have conducted a PBT prior to placing Alejandra Herrera-Ayala under arrest. Although a PBT would have been helpful in the probable cause determination, probable cause to arrest is not always dependent on the presence of a PBT. The test of probable cause for a PBT is greater than the level of proof required for reasonable suspicion and less than that required for probable cause to arrest. *County of Jefferson v. Renz*, 231 Wis.2d 293, 314 (1999). The court's decision improperly hinges on the absence of this factor, rather than considering the substantial array of factors cited by Officer Asplund that formed the basis for his arrest decision.

CONCLUSION

The circuit court stated that “the court does not mean to suggest that a translator be called to every traffic stop where the officer and suspect are having trouble communicating. However, it is reasonable to expect officers to take additional steps like rephrasing questions and being diligent to make sure a defendant with a known language issue understands instructions given in English prior to attributing failure of the SFSTs to intoxication.” Cir. Ct. Br. V Dec. and Or., 15-16 (Apr. 10, 2015). However, the officers in this case DID take additional steps to have a Spanish-speaking officer present and made reasonable efforts to convey the SFST instructions. This is especially underscored by the fact that officers are NOT subject to the strict standard regarding the communication of implied consent warnings. The circuit court’s findings disregard the record, which demonstrates that officers were interacting and talking with Alejandro Herrera-Ayala primarily in English for twenty minutes prior to the administration of SFSTs. Alejandro Herrera-Ayala answered questions and was sophisticated enough to challenge the reasons for the stop in English. The two officers testified indicated they believed he was able to understand English to a degree where they were comfortable performing the tests in a mix of Spanish and English. Officer Asplund conducted the SFSTs objectively and in accordance with his training and the NHTSA Manual. To hold he should have done otherwise flies in the face of a longstanding plethora of well-established research involving the administration and interpretation of SFSTs. The practical effect of the circuit court’s ruling would require officers to locate a certified Spanish Interpreter to respond to a traffic stop at 12:42 a.m. on a Saturday morning or fully demonstrate each portion of each test. This would violate the standards prescribed by NHTSA, extend traffic stops, waste time precious to OWI investigations, and likely draw numerous defense motions. The officers took sufficient measures to ensure Alejandro Herrera-Ayala understood the instructions. The record demonstrates that all of the facts known to Officer Asplund at the time were sufficient to lead him to believe Alejandro Herrera-Ayala had operated his vehicle while intoxicated, forming probable cause to arrest. *See Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189 (Wis. App. 1985). The circuit court erroneously disregarded the facts available to the officer as well as the commonsense observations the officer made about Alejandro Herrera-Ayala’s behavior based on his training and experience. *See Nieves*, 304 Wis.2d at 189-190.

For the foregoing reasons, the State respectfully requests that the Court reverse the ruling of the circuit court and remand for further proceedings.

Respectfully submitted this 17th day of August, 2015.

Carley N. Miller
Attorney for Plaintiff-Appellant
Assistant District Attorney
State Bar No. 1082284
Brown County District Attorney's Office
Law Enforcement Center
300 East Walnut Street
Green Bay, WI 54305-3600
(920) 448-4190

CERTIFICATION
As To Form And Length

I hereby certify that this brief and appendix conform to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix and that the text is Times New Roman proportional serif font, 14 point body text, and 11 point text for quotes and footnotes. The Statement of Facts, Standard Of Review, Argument, and Conclusion Sections of this brief are 18 pages and 6,879 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 17th day of August, 2015.

Carley N. Miller
Attorney for Plaintiff-Appellant
Assistant District Attorney
State Bar No. 1082284
Brown County District Attorney's Office
Law Enforcement Center
300 East Walnut Street
Green Bay, WI 54305-3600
(920) 448-4190

CERTIFICATION OF MAILING

I hereby certify that this brief and appendix were deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on August 17th, 2015. I further certify that the brief and appendix were correctly addressed and postage was prepaid.

Dated this 17th day of August, 2015.

Carley N. Miller
Attorney for Plaintiff-Appellant
Assistant District Attorney
State Bar No. 1082284
Brown County District Attorney's Office
Law Enforcement Center
300 East Walnut Street
Green Bay, WI 54305-3600
(920) 448-4190