STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

No. 2015AP001415

OCONTO COUNTY,

Plaintiff-Respondent,

v.

JONATHAN E. VAN ARK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE CIRCUIT COURT OF OCONTO COUNTY, THE HONORABLE MICHAEL T. JUDGE PRESIDING, FINDING THE DEFENDANT GUILTY OF OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

BARRY S. COHEN
Attorney for Defendant-Appellant

Barry S. Cohen, S.C.
N9661 Willow Road
Elkhart Lake, WI 53020
Telephone: (920) 565-4225
Facsimile: (920) 565-4034
barrycohen@barrycohenlaw.com

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ISSUE PRESENTED

Whether the trial court erred by directing a verdict that Jonathan Van Ark operated a motor vehicle with a prohibited alcohol concentration where the County presented no direct evidence of Van Ark's blood alcohol concentration at the time of driving and the court admitted evidence from a medical technician and lab analyst even though they concededly lacked a present recollection of the facts they were asked to testify about.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary in this case because the briefs adequately set forth the relevant facts and law. Because the appeal is before a single judge, publication is not available.

STATEMENT OF THE CASE AND FACTS

On September 27, 2014, at around 11:00 p.m., Oconto County Sheriff's Deputy Adam Zahn observed a truck parked at a closed gas station while the deputy was checking for "anything peculiar." (Trans. 83:23-85:13; App. 144-146). He activated his emergency lights and approached the truck. (Trans. 85:21-23; App. 146). Deputy Zahn observed James Van Rixel in the passenger seat and Jonathan Van Ark in the driver's seat of the truck which was not running. (Trans. 86:8-21; App. 147). The truck was registered to Van Rixel. In speaking with Van Ark, Deputy Zahn observed that Van Ark's "eyes were glossy and bloodshot and his speech was pretty slow and slurred." (Trans. 87:15-19; App. 148). Concerned that Van Ark's ability to drive was impaired, (Trans. 87:20-88:2; App. 148-149), Deputy Zahn requested Van Ark exit the truck to perform three field sobriety tests; a Horizontal Gaze Nystagmus test, a Walk-And-Turn test, and a One-Leg-Stand test. (Trans. 89:12-19; App. 150). Believing that Van Ark failed these tests because he was under the influence of alcohol, Deputy Zahn arrested him for Operating

While Intoxicated contrary to Wis. Stat. § 346.63(1)(a)[1]. (Trans. 90:13-96:21; App. 151-157). Deputy Zahn transported Van Ark to St. Clare Hospital where a sample of Van Ark's blood was withdrawn at 12:15 a.m. (App. 220). The blood test showed an alcohol level of .237 and Van Ark was also charged with Operating a Motor Vehicle With a Prohibited Alcohol Concentration contrary to Wis. Stat. § 346.63(1)(b). (See footnote 1). A jury trial was held on July 7, 2015.

Van Rixel testified that from 5:00 p.m. to between 8:00 p.m. and 9:00 pm., he and Van Ark consumed approximately two to three beers while doing housework at Van Ark's residence in preparation for Van Ark's upcoming wedding. (Trans. 44:1-45:9; App. 105-106). Van Rixel then drove Van Ark in Van Rixel's truck to a nearby pub and grill to meet with friends. (Trans. 46:7-15; App. 107). While there, Van Ark consumed approximately one or two more beers (Trans. 49:9-25; App. 110). Van Rixel suggested that he and Van Ark go to a gentlemen's club. (Trans. 50:3-10; App. 111) but asked Van Ark if he would drive. (Trans. 51:3-21; App. 112). Van Ark agreed, (Trans. 53:1; App. 114), but along the way, Van Ark decided against the trip and he phoned another friend who agreed to pick them up at a nearby gas station. (Trans. 54:19-55:2; App. 115-116). Around 11:00 p.m, Van Ark parked the truck at the gas station, turned off the ignition and waited with Van Rixel for their ride. (Trans. 57:21-22; App. 118).

Van Ark testified that he drank approximately one beer per hour from 5:00 p.m. to 11:00 p.m., (Trans. 64:1-5; 66:14-16; 67:12-21; App. 125; 127; 128), and that he did not feel impaired by alcohol. (Trans. 69:13-23; App. 130). While driving Van Rixel's truck, he "got a bad feeling" so he decided to call his friend for a ride home. (Trans. 70:7-71:16; App. 131-132). Van Ark steadfastly testified that his decision to stop driving was not due to alcohol impairment. He

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[1] Wis. Stat. § 346.63(1) prohibits a person from driving or operating a motor vehicle while (a) "under the influence of an intoxicant… to a degree which renders him … incapable of safely driving;" or (b) with "a prohibited alcohol concentration."

The term, "prohibited alcohol concentration" is defined as "an alcohol concentration of 0.08 or more." Wis. Stat. § 340.01(46m).

maintained that he had no difficulty driving, (Trans. 80:11-14; App. 141), and that he did not believe his alcohol level was above the legal limit at the time of driving. (Trans. 80:15-18; App. 141).

James Blum, a medical technologist, testified that he worked at St. Clare Hospital on the evening of September 27, 2014. (Trans. 125:7-9; App. 186). His job duties at St. Clare included collecting blood samples from people arrested for OWI. (Trans. 125:10-13; App. 186). When the prosecutor showed him a document purported to be related to the blood draw and asked Blum about it, defense counsel objected and requested that the witness indicate whether he had a present recollection of the incident. (Trans. 126:10-17; App. 187). Blum conceded that he did not actually recall having any contact or drawing any blood from Van Ark. (Trans. 126:13-22; App. 187). Defense counsel continued his objection:

> Your Honor, I believe that if the witness does not have a recollection of something that was previously recorded, the witness may not testify. The document may perhaps be admissible, but the witness' testimony is not permissible such as to give the jury the impression that he's talking about what happened. Admissibility of his testimony and admissibility of the document are two different things, and I can cite the case to the Court.

(Trans. 127:5-13; App. 188). The County countered that, "it goes to weight and not credibility." (Trans. 127:14-15; App. 188). The court overruled defense counsel's objection and allowed Blum to testify as to the specifics of his interactions with Van Ark. (Trans. 127:21-129:1; App. 188-190).

Blum then testified that he wrote his name, the date, and the time of the blood draw on a document later admitted as Exhibit 2. (Trans. 127:21-24; App. 220). He indicated that when he draws blood from those arrested for OWI, he uses a kit from the State of Wisconsin containing specific equipment necessary for the blood draw. (Trans. 128:11-17; App. 189). Blum further testified that when he drew Van Ark's blood sample, he used the equipment provided him in the State's kit, (Trans. 128:18-20; App. 189), and he followed the instructions he was supposed to. (Trans. 128:21-129:1; App.

189-190). At that point, defense counsel renewed his objection as follows:

> The witness has already testified he does not have a recollection of this incident, so asking him questions about whether he did any particular thing on that occasion are improper. It gives the jury the impression that he has an actual recollection and he's testifying about it.

(Trans. 129:2-8; App. 190). The court again overruled the objection. (Trans. 129:9; App. 190). Blum testified that he followed his normal procedure when he withdrew a sample of Van Ark's blood, (Trans. 129:12-18; App. 190), and that after doing so, he labeled the test tubes, sealed them, wrote Van Ark's name and date on the seal and handed the test tubes and corresponding paperwork to Deputy Zahn. (Trans. 129:19-24; App. 190).

Stephanie Weber, a chemist at the Wisconsin State Laboratory of Hygiene then testified. (Trans. 131-139; App. 192-200). When the prosecutor asked Weber about Van Ark's blood test, defense counsel objected by stating:

> Your Honor, I would have a similar objection before any questions are asked of this witness regarding anything that she may have done regarding blood or testing. I'd simply ask that the Court inquire of this witness whether, as she sits here today, she has any present recollection of receiving, testing, or doing anything with any blood sample relating to Mr. Van Ark.

(Trans. 133:18-25; App. 194).

In response to the court's inquiry on the matter, Weber testified, "I do not have any personal recollection of this specific sample, but we do take notes and note any irregularities that we notice." (Trans. 134:1-8; App. 195). The court then overruled defense counsel's objection and permitted Weber to testify about receiving Van Ark's blood sample. (Trans. 134:8-24; App. 195). When the County asked Weber, "as best you can recall, was there anything unusual about the specimen as far as its condition as concerned?" defense counsel renewed its object arguing, "She indicated she has no recollection of doing anything with this sample. The question's improper." (Trans. 134:25-135:2; App. 195-

196). Again the court overruled the objection, (Trans. 135:3), and Weber was permitted to testify that, "there was nothing unexpected about the samples as they were received." (Trans. 135:11-12). Weber also testified about the general process of analyzing blood samples for alcohol, (Trans. 135:16-136:10; App. 196-197), that she employed the same procedure for analyzing Van Ark's blood, (Trans. 136:11-14; App. 197), and that her analysis yielded a blood alcohol level of .237 g/100mL. (Trans. 136:17-20; App. 197). Weber calculated that Van Ark would have had to consume more than 7.9 beers between 5:00 p.m. and 11:00 p.m. in order for his blood alcohol level to be .237 % at 12:15 a.m. (Trans. 137:13-23; App. 198).

The County then rested its case and after confirming that the defense did not intent to call any witnesses, moved the court "to take this case from the jury and find the defendant guilty." (Trans. 141:2-7; App. 202). The County further argued:

> We have him driving. We have the blood test. We have the officer's testimony. There's absolutely no evidence that's going to contradict the testimony of the witnesses that's been presented at this point. It's a civil case. It can come from the jury, and I think that the evidence is more than clear, satisfactory, and convincing that this defendant is guilty of at least one of these violations. So I think this case should come from the jury. I think the Court should take it from the jury and enter a directed verdict for the plaintiff here.
>
> ...
>
> The testimony, of course we have to look at the elements of the offense. In my opinion, as concerns both offenses, all the evidence points to the defendant's guilt. The only thing that doesn't that I heard was the defendant saying, well, I didn't think my blood test was that high, and that's the only thing that I heard.
>
> So as far as the operating with a prohibited alcohol concentration, we have him driving. No one denies that he was certainly driving. So on the operate with a prohibited alcohol concentration charge, was he driving? Yes. No question about it.

> The only question is what – did he violate the second element in that he had a prohibited alcohol concentration. The evidence on that is the blood test. The blood test was taken within three hours of the driving. There's been no challenge to the blood test result, none whatsoever, that I'm aware of. The Court accepted the blood test result, and the blood test result indicated the defendant's blood ethanol concentration was .237.
>
> I don't know of any other evidence involving his prohibited alcohol concentration charge that contradicts what the County's evidence is. Defense counsel did not have any person saying that that evidence was incorrect, unreliable, or in some way suspect. I didn't hear any. And there was some objections to his knowledge about it, but if the Court accepted it, you could deny the objection and accept the State's testimony—County's testimony.
>
> So far as that is concerned, the only evidence that I'm aware is the testimony about the driving and the testimony about the blood test. The blood test was taken properly, from what I heard, and we have the results, which I heard. To me, that is evidence that is clear, satisfactory, and convincing that the defendant violated Section 346.63(1)(b) of the Wisconsin Statutes. Looking through the jury instructions, there's no problem with the blood alcohol content curve here. There's nothing raised about that. So we have no—to me, from my standpoint, I didn't see any defense to that charge.
>
> ....

(Trans. 141:8-144:14; App. 202-205).

Defense counsel countered:

> That's all well and fine for all the reasons that Mr. Mraz has indicated, and he'll get up and argue all of that again to the jury. The jury may come back and convict Mr. Van Ark. But none of that has anything to do with the motion for directed verdict.
>
> Mr. Mraz is basically arguing that the lack of, in his opinion, theory of defense or the lack of defense witnesses, experts, or challenges is akin to or is the same as the defense conceding the County's case, and that's clearly not the case.
>
> It was clear to the jury, and I'm sure clear to the Court, that the defense has challenged the blood test. I

made it clear to this jury that we were opposing any testimony regarding any of the blood test evidence. The County did not produce a single witness that had any recollection of doing anything with this blood, and the jury may reject the blood test entirely on that basis.

The fact that the Court received the testimony, received a blood test result over the objection of the defense certainly, according to the jury instructions, permits a jury to take a test that is from a sample drawn within three hours to convict Mr. Van Ark of operating with a prohibited alcohol concentration or operating under the influence, but they're not required to do that. That's I think how Mr. Mraz is interpreting the jury instruction and because he put in the test evidence. If the jury instruction in fact said the jury was required to use the blood test evidence taken within three hours as the defendant's alcohol level at the time of driving, we may be talking about something different, but that's not what the instruction says.

So first of all, based on the fact that there was no evidence presented by a witness that anybody had any recollection of doing anything with the blood, the jury may disregard that blood test entirely.

Further, there has been nothing established by the County in terms of what the defendant's alcohol level at the time of driving was. There was a blood test that the Court received as evidence taken sometime after the driving. No witness, no evidence established what the defendant's alcohol level was at the time of driving. And again, a jury's entitled to use –

...

There is no evidence that has been presented in this record of what Mr. Van Ark's alcohol level was at the time of driving. There isn't any evidence on that. There is evidence that has been presented and accepted by the Court of what his alcohol level was sometime after driving, but that's not their burden. Their burden is to prove that at the time of driving his alcohol level was above the legal limit. That hasn't been done.

A blood test taken within three hours is given to the jury, and they may, it is a permissible opportunity that the jury has. I again submit, Judge, that in this case where not one witness could testify about having done anything with the blood, the jury is permitted to reject the blood test evidence entirely.

...

> A motion for directed verdict is an extraordinary remedy obviously. It is one that requires the Court to view all of the evidence in the light most favorable to Mr. Van Ark. Mr. Mraz is really arguing if you look at all the evidence, as he views it, in the light most favorable to the County, the Court should direct a verdict. But when the Court considers all of the evidence or lack thereof in the light most favorable to Mr. Van Ark, as I've indicated that reasonable jury is entitled to do, he'll be acquitted.
>
> These are the issues for the jury. A granting of a directed verdict where these issues are present is improper and the motion should be denied.

(Trans. 146:13– 150:8; App. 207-211).

After hearing both parties' arguments, the court entered a directed verdict against Van Ark for the charge of Operating a Motor Vehicle With a Prohibited Alcohol Concentration. In support of its ruling, the court opined:

> Looking at the evidence that the Court has received, clear, satisfactory, and convincing, hearing the testimony of the med tech with the blood draw, hearing the testimony of the analyst who testified as to the procedure she went through in receiving the blood vials from the Oconto County deputy in the mail and how she addressed the analysis of the blood of the defendant, found the results were .237 grams per milliliter of alcohol in the defendant's blood, almost three times the minimum amount – or the maximum amount allowed by the defendant to operate a motor vehicle.
>
> Again, the defendant testified that he was driving a motor vehicle just a few minutes before parking the vehicle in the Fast stop and being encountered by Deputy Zahn. He was the driver of the vehicle. The keys were in the ignition. Vehicle was not operating. But within three hours of that contact within the Fast Stop, actually within an hour or less, the blood draw for Mr. Van Ark was accomplished. And the Court has heard no testimony from the defense to question the blood draw by the med tech or by the analysis of the analyst from the Department of Hygiene for the State of Wisconsin.

> So what the Court is looking at, of course, is is there any evidence that I can consider in dispute of what the Court has just recited as to the blood alcohol concentration.
>
> ...
>
> As far as a person being able to analyze whether they're impaired or not to drive a motor vehicle, I believe that an individual can do that, even though they're wrong. But just to make a blanket statement saying, I don't believe my blood alcohol concentration was above .08, that doesn't carry any weight with me because I don't think anyone can really evaluate what their alcohol concentration is within their blood just based upon what they've been drinking.
>
> So I really feel that by evidence that is clear, satisfactory, and convincing that I should direct a verdict against the defendant, Jonathan Van Ark, for driving a motor vehicle with a prohibited alcohol concentration in excess of .08, and for that offense, I will find him guilty and direct a verdict on behalf of Oconto County.

(Trans. 151:13-153:25; App. 212-213).

Defense counsel's motion for reconsideration was denied. (Trans. 154:1-16; App. 215). The court sentenced Van Ark by revoking his driver's license for nine months and imposing a forfeiture of $906.00. Van Ark then instituted this appeal.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DIRECTING A VERDICT AGAINST VAN ARK BECAUSE A REASONABLE JURY COULD HAVE CONCLUDED THAT THE COUNTY FAILED TO MEET ITS BURDEN OF PROOF.

A. The court erroneously permitted the medical technologist and the blood analyst to testify about matters to which they admittedly had no present recollection of, thereby giving the jury

the impression that the witnesses actually recalled the events to which they testified.

1. Standard of Review

A trial court's admission of evidence is analyzed under the erroneous exercise of discretion standard. See e.g., *State v. Rocha-Mayo*, 2014 WI 57, ¶ 22, 355 Wis. 2d 85, 848 N.W.2d 832; *State v. Webster*, 156 Wis. 2d 510, 515, 458 N.W.2d 373 (Ct. App. 1990). "This requires the trial court to correctly apply accepted legal standards to the facts of record, and to reach a reasonable conclusion by a demonstrated rational process." *Webster*, 156 Wis. 2d at 515. "A court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion." *State v. Hunt*, 2003 WI 81, ¶ 34, 263 Wis. 2d 1, 666 N.W.2d 771. "When a court fails to set forth its reasoning, it has been held that an appellate court independently should review the record to determine whether it provides an appropriate basis for the court's decision." *Id.* citing *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

2. Admission of the medical technologist's and blood analyst's oral testimony was improper because both witnesses lacked personal knowledge of the events to which they testified.

Wisconsin Statutes § 906.02 bars a witness from testifying "to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Testimony is deemed incompetent and inadmissible "if [the witness] does not of his own mind and memory know the facts to which he is testifying under oath." *Harper, Drake & Associates, Inc. v. Jewett & Sherman Co.*, 49 Wis. 2d 330, 343, 182 N.W.2d 551 (1971).

Blum testified that he could not remember having any contact with or drawing any blood from Van Ark. (Trans. 126:10-22; App. 187). Nonetheless, and over the defendant's objection, the court allowed Blum to testify about the specific procedures he employed when he withdrew a sample of Van Ark's blood. (Trans. 126:23-130:20; App. 187-191).

Similarly, the court allowed Weber to testify about the specific procedures she employed when she analyzed Van Ark's blood sample despite also lacking an independent recollection of doing so. (Trans. 133:18-137:12; App. 194-198). Both witnesses were also allowed to review documents to assist them in their testimony. However, neither witness was able to testify that after reviewing such documents they had a present (refreshed) recollection of the events surrounding the taking of Van Ark's blood or analysis of the sample.

The Wisconsin Supreme Court, in *Harper, Drake & Associates, Inc. v. Jewett & Sherman Co.*, 49 Wis. 2d at 342, stated:

> Under the doctrine of present recollection refreshed, a witness may look at a writing to refresh his memory and then testify in his own words as to the contents of the writing. Before this is allowed, however, the witness must be able to state, after looking at the writing, that he now recalls the facts therein on the basis of his own independent (although refreshed) recollection. If a witness can state that he has such an independent recollection, then he may testify to the facts in the writing and his testimony—not the writing itself—is admitted to evidence.
>
> If, on the other hand, a witness looks at a writing and it does not revive or refresh his memory to the extent that he can claim an independent recollection of the facts therein—then and only then—the writing itself and not the witness' testimony may come into evidence.
>
> ...
>
> In either case, no evidence, neither the witness' own testimony nor the writing itself will be allowed unless the witness can first testify that:
>
> (1) he knows the writing to be a true and accurate record of the facts therein; and
>
> (2) the writing was made at a time when the facts were fresh in his mind.

Neither Blum nor Weber testified that examination of their reports gave them a refreshed and independent recall of the facts to which they testified. The incompetence and

inadmissibility of their testimony was thus conclusively shown by their own acknowledgement that each could not remember doing the very thing(s) he/she was called to testify about. Therefore, the court erred in admitting their oral testimony as to the procedures they employed respective of Van Ark's blood withdrawal and analysis.

3. Because neither the medical technologist nor the blood analyst test had any present recollection of having any contact with Van Ark or doing anything with his blood sample, a reasonable jury could have disregarded the blood test entirely.

When a trial court erroneously admits evidence, this Court will reverse only if the error was prejudicial. *McCrossen v. Nekoosa-Edwards Paper Co., Inc.*, 59 Wis. 2d 245, 264, 208 N.W.2d 148 (1973). Trial court error is prejudicial "only when it reasonably could be expected to affect the outcome of the case," such that "it appears probable from the entire evidence that the result [of the trial] would have been different had the error not occurred." *Id.*

Neither Blum nor Weber testified to having any recollection of withdrawing and processing Van Ark's blood sample. Over defense counsel's repeated objections, however, both were permitted to testify in such a manner as to give the jury a contrary impression. Given that neither witness had a recollection of doing anything with Van Ark's blood, the weight to be accorded the blood test, if any, was a question for the jury. In light of Van Ark's evidence as to his rate of consumption prior to his arrest, and the fact that his blood test result was derived from a sample withdrawn over an hour after the time of operation, a reasonable jury may have disregarded the blood test result entirely and acquitted Van Ark.

B. The court's directed verdict was improper because a reasonable jury could have concluded that the County failed to meet its burden of proof that Van Ark Operated a Vehicle With a Prohibited Alcohol Concentration.

1. Standard of Review

A directed verdict is subject to de novo review. *Millonig v. Bakken*, 112 Wis. 2d 445, 450-51, 334 N.W.2d 80 (1983). On review of a court's directed verdict, an appellate court must take that view of the evidence which is most favorable to the party against whom the verdict was directed. *Millonig v. Bakken*, 112 Wis. 2d 445, 450, 334 N.W.2d 80 (1983). "A verdict should be directed only where there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion." *Millonig,* at 451. Stated differently, "it is only when proof is so clear and decisive, and the facts and circumstances are unambiguous and there is no room for fair and honest difference of opinion, that the court may take the case from the jury...." *Id.,* citing *Wappler v. Schenck*, 178 Wis. 632, 641-42, 190 N.W. 555 (1922). If a court entered a directed verdict erroneously, the judgment of conviction should be reversed and the matter remanded for a new trial. See *Wappler*, supra.

2. A reasonable jury could have concluded that the County failed to meet its burden of proof, thus granting a directed verdict was in error.

In a prosecution for Operating A Motor Vehicle With A Prohibited Alcohol Concentration (OWPAC) contrary to Wis. Stat. § 346.63(1)(b), the County needed to prove by evidence which is clear, satisfactory and convincing that the defendant had a prohibited alcohol concentration at the time he operated a motor vehicle on a highway. WIS JI-Criminal 2660A[2]. The County attempted to meet its burden of proof by

[2] WIS JI Criminal 2660A states in pertinent part:

> The law states that the alcohol concentration in a defendant's blood sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of operating. If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was .08 grams or more of alcohol in 100 milliliters of the defendant's blood at the time the test was taken, ***you may find from that fact alone that the defendant had a***

introducing Van Ark's blood test result taken more than an hour after the time of driving. The blood test was presented through a medical technologist and a blood analyst.

Pursuant to Wis. Stat. § 885.235(1g)(c)[3] and WIS JI-Criminal 2660A[4], a trier of fact is permitted but not required to find that a person had a prohibited alcohol concentration at the time of driving, based upon the result of an alcohol test taken within three hours of the alleged driving. While a mandatory presumption requires the trier of fact to find the elemental fact upon proof of the basic fact unless the defendant presents evidence to rebut the presumption, a permissive presumption leaves the trier of fact free to credit or reject the elemental fact upon proof of the basic fact. See *State v. Vick*, 104 Wis. 2d 678, 693, 312 N.W.2d 489 (1981).

The County presented evidence from which the jury could infer that Van Ark's blood alcohol concentration exceeded .08% at the time of driving but it was not *required* to do so. The County presented no direct evidence of Van

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> ***prohibited alcohol concentration at the time of the alleged operating, but you are not required to do so***. ... you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged operating unless you are satisfied of that fact to a reasonable certainty by evidence which is clear, satisfactory, and convincing.

(emphasis added)

[3] Wis. Stat. 885.235(1g)(c) provides in relevant part:

> In any action or proceeding in which it is material to prove that a person ... had a prohibited alcohol concentration ... while operating or driving a motor vehicle, ... evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood ... is admissible on the issue of whether he ... had a prohibited alcohol concentration ... if the sample was taken within 3 hours after the event to be proved. ... The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that ... he had an alcohol concentration of 0.08 or more.

Ark's blood alcohol concentration at the time of driving. Nor did the County present any evidence on how the result of a test of Van Ark's blood taken more than an hour after driving may have related to his BAC at the time of driving. Van Ark testified that he did not believe his alcohol level was above the legal limit at the time he drove. (Trans. 80:15-18; App. 141). Because more than one inference was permitted, the directed verdict was improper. See, *Millonig*, at 451 ("Even if the evidence adduced is undisputed, if that evidence permits different or conflicting inferences, a verdict should not be directed...."); *Maryland Cas. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 81 Wis. 2d 248, 262, 260 N.W.2d 380 (1977) ("Where other causes are equally as probable as the one propounded by a plaintiff, there must be evidence that will permit a jury to eliminate them."). Whether or not Van Ark had a prohibited alcohol concentration at the time he drove was an issue which should have been decided by the jury. The Court of Appeals cannot say that on this record, no reasonable jury could find that the County did not meet its burden of proof.

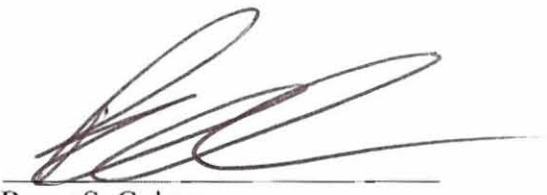
CONCLUSION

Because there was evidence of a blood test taken within three hours of driving which showed an alcohol level of .08 or more, the jury was *permitted* to find that Van Ark had a prohibited alcohol concentration *at the time of driving*, but the jury was not *required* to do so. The trial court judge incorrectly applied this inference in a mandatory fashion, which the court believed required it to find that Van Ark had a prohibited alcohol concentration at the time he drove. The jury may not have concluded the same. Based upon the lack of recollection of the blood test witnesses, the lack of evidence of Van Ark's alcohol level at the time of driving, and Van Ark's denial of driving with a prohibited alcohol concentration, a reasonable jury could have concluded that the prosecution had not met its burden of proving that fact by evidence which is clear, satisfactory and convincing. That determination was properly in the province of the jury and the court committed reversible error by taking the case from the jury and directing a verdict against Van Ark. The court of appeals should reverse the conviction and remand the matter for a new trial.

Dated this 7th day of December, 2015.

Respectfully Submitted,

BARRY S. COHEN, S.C.



By: Barry S. Cohen
State Bar No. 1008523
Attorney for Defendant-Appellant

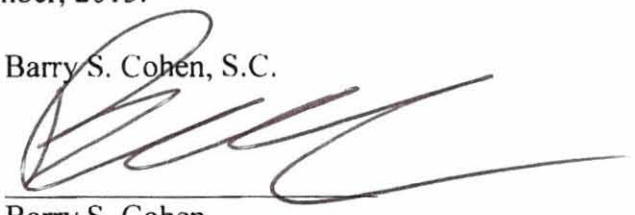
N9661 Willow Road
Elkhart Lake, WI 53020
Telephone: (920) 565-4225
Facsimile: (920) 565-4034
barrycohen@barrycohenlaw.com

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,388 words.

Dated this 7th day of December, 2015.

Barry S. Cohen, S.C.



Barry S. Cohen
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

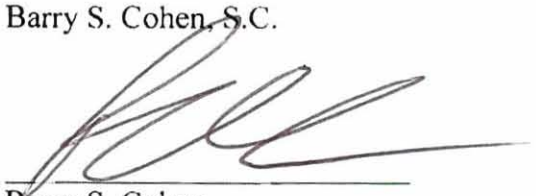
I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. (Rule) 809.19.(12).

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.

I further certify that a copy of this certificate has been served with the paper copies of this brief with the court and served on all opposing parties.

Dated this 7th day of December, 2015.

Barry S. Cohen, S.C.



Barry S. Cohen
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(2)(b)

I hereby certify that this brief conforms to the requirements of Rule 809.19(2)(b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been reproduced to preserve confidentiality and with appropriate references to the record.

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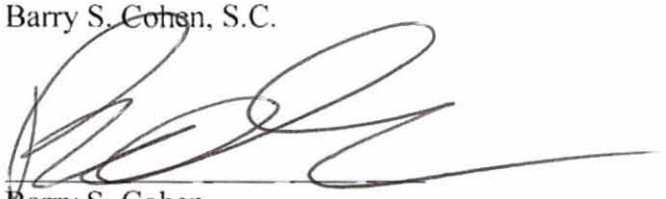


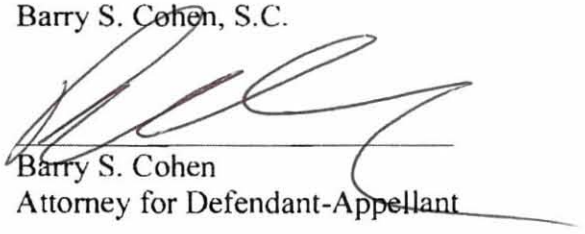
Barry S. Cohen
Attorney for Defendant-Appellant

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

Dated this 7th day of December, 2015.

Barry S. Cohen, S.C.



Barry S. Cohen
Attorney for Defendant-Appellant

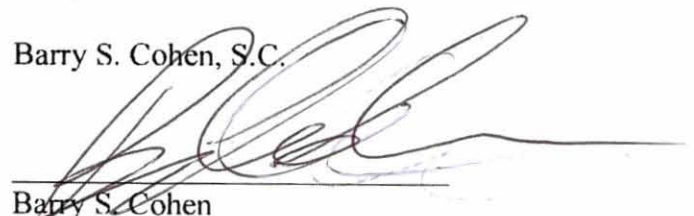
CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail on Monday, December 7, 2015.

I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated this 7th day of December, 2015.

Barry S. Cohen, S.C.



Barry S. Cohen
Attorney for Defendant-Appellant