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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 15 AP 1487

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK G. MCCASKILL,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE PORTAGE COUNTY CIRCUIT COURT, THE HONORABLE JOHN V. FINN PRESIDING.

Respectfully submitted,

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Defendant-Appellant

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STATEMENT OF THE ISSUES

1. Has a person operated a parked vehicle merely by being in the driver's seat with the lights on but with no evidence that he drove the car, started it, or even that the keys were in the ignition?

   The trial court denied a motion to suppress, and a jury found McCaskill not guilty of operating a motor vehicle under the influence of an intoxicant but found him guilty of operating a motor vehicle with a prohibited alcohol concentration.

2. Was the evidence sufficient to convict McCaskill of operating a motor vehicle with a prohibited alcohol concentration where there was no evidence that he operated the vehicle or activated any of its controls?

   This issue was preserved by jury trial.

3. Should a prior offense be excluded for the purposes of sentencing enhancement where McCaskill was convicted in violation of the right to counsel and where his plea was not knowing, intelligent, and voluntary?

   The trial court denied both of these claims raised prior to trial.

4. Should this court grant a new trial in the interests of justice where the verdicts were inconsistent?

   The jury returned a guilty verdict for operating a motor vehicle with a prohibited alcohol concentration but acquitted for operating a motor vehicle while under the influence of an intoxicant. Since the issue at trial was whether Mr. McCaskill operated the vehicle and not whether he was under the influence, these verdicts are logically inconsistent. Whether the inconsistency requires relief was not addressed in the trial court.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

The facts are undisputed. On August 31, 2011 at 12:30 a.m., police officers investigated a report that a vehicle had been parked in front of a home in Plover for approximately an hour with the lights on. (31:5). The officers who responded found that the vehicle was parked off to the side of the road and was not impeding traffic. There was someone in the driver's seat. (31:6). That person was the defendant, Mark McCaskill. Mr. McCaskill rented the vehicle in Mosinee four hours earlier. (31:7). Mr. McCaskill was sleeping and wore no shirt, socks, or shoes. Neither officer recalled whether the vehicle was running (31:8, 29) or whether they "located the keys or not." (31:24, 33). The officers could not rouse McCaskill, who smelled of alcohol and vomited on himself at one point, (13) and they eventually had him transported to the hospital where they did a blood draw. His blood was tested as containing .263 blood alcohol content. Approximately two hours later the officers went back to the hospital where all McCaskill said that he remembered was that he had been at a friend's house, had a drink with her, and he woke up at the hospital. He could not recall anything in between leaving his friend's house and awaking at the hospital. (31:17).

Prior to trial McCaskill filed a motion to suppress evidence arguing that the stop and arrest were unlawful. (37). At the motion

hearing held on November 2, 2012, the court found that "[n]either officer recalls whether or not the vehicle—whether the engine was running on the subject vehicle." (31:41). One officer could not recall if they located the keys to the vehicle or not, while the other one first claimed they were in the ignition but then retracted that claim and said that "he really does not recall." (31:44). Based on the above record, the court denied the motion because "it's more likely than not it's probable the defendant was the operator of the vehicle." (31:46).

At the motion hearing, officer Jeffrey Thomas of the Village of Plover Police Department testified that on August 31, 2011 a call was placed that led to him being dispatched because a resident in the area was concerned that a vehicle that had been parked in front of the resident's home for approximately an hour with the lights on. The caller wanted the vehicle checked. (31:5). Police were dispatched and found the vehicle parked off to the side of the road. It was not illegally parked or impeding traffic. (31:6). That individual in the vehicle was identified as Mark McCaskill. (31:14).

Later at the hospital, Mr. McCaskill had no recollection of driving the vehicle. (31:17).

The officer confirmed that he did not recall whether or not the car was running when he arrived at the scene. (31:18). He agreed that if the car had been running he would have reported that fact. (31:19)

The lights were, however, working. (31:18). He did not recall if keys to the car were ever located. (31:24).

There was no testimony that car keys were located for that vehicle on Mr. McCaskill or anywhere else.

Mr. McCaskill did not recall driving but he did recall being at his ex-wife's house. He did drink at his ex-wife's house that evening. (31:23).

The State then called officer Josh Pagel. He also did not recall the car running; however, he believed the keys were in the ignition. He did not write a report indicating that. (31:32). He admitted, however, that he was not the lead officer. That was officer Thomas. Thomas did not recall the keys being in the ignition nor whether they were ever found. (31:32, 24, 19). Officer Pagel admitted that he did not recall if any keys were taken into property or if they were ever noted in any report. (31:33).

Officer Pagel also stated that the police, at some point, found paperwork in the vehicle that belonged to a rental company with Mr. McCaskill's information on it. (31:33). The officer did not recall if the rental agreement indicated an address for Mr. McCaskill. The officer also did not recall looking at Mr. McCaskill's driver's license to see if he lived in the area or not. (34).

The Court stated:

> I think that there's reasonable inferences here and circumstantial evidence from which the Court concludes that it's more likely than not it's probable that the defendant was the operator of the vehicle. It's probable that the defendant was under the influence of alcohol at the time given the fact that he was unconscious – or nonresponsive. We know he had a drink, and there was this odor of alcohol in the vehicle, and the defendant threw up.
>
> I think that's sufficient probable cause, and therefore the motion is denied. (31: 46).

The defendant filed a motion and affidavit challenging his prior operating a motor vehicle while under the influence of an intoxicant case from 2005. (38; 39; 40). That motion was to exclude evidence of that prior because the defendant was uncounseled and did not waive his right to counsel because the plea to that charge was not knowing, intelligent, and voluntary.

At the motion hearing held on November 2, 2012, the defense argued that there was no plea questionnaire and waiver of rights form filled out as in a normal case. The transcript also showed the trial court in the 2005 case (who was the same judge as in the court below) did not discuss any potential penalties only the plea agreement. There was no indication that Mr. McCaskill was advised of the penalties he was facing or the fact that a plea agreement is only a recommendation to the court and is not binding to the court. (31). The motion had alleged Mr. McCaskill was not aware of the range of penalties he was facing

nor the maximum penalty and believed that the only penalty he faced was a penalty agreed on by the district attorney. (31; 38; 39; 40:4-9). The prosecutor for the State said he was not convinced that the *prima facie* showing had been made because he felt that there was a false statement in Mr. McCaskill's affidavit saying that at his first appearance in the case, on September 19, 2005, certain things occurred when that was not his first appearance. (31:51). The prosecutor noted that Mr. McCaskill stated, "My attorney told me I should ask for a signature bond." (31:52). The State argued that at the initial appearance in the case, McCaskill understood his right to have an attorney and consulted with an attorney who told him what to say at the initial appearance. (31: 50-52).

The court denied the motion. (31: 56-61). The court did not find that the defense failed to make a *prima facie* showing but found that the record showed that Mr. McCaskill was aware of his right to an attorney. The judge was surprised that other counties used waivers of rights forms or plea forms when a person is appearing *pro se*. (31:59). The court noted that the State recommended the guidelines in the previous case (31:59-60) and that the record showed that the defendant knew at the initial appearance what the maximum penalty could be. (31:60). The court noted that he told the client that he was giving up his right to have an attorney and the defendant understood

that fact. (31:60). The court did agree that Mr. McCaskill was not told the court was not bound by the plea agreement. (31:60). The court, however, found that the record should be sufficient and denied the motion. (31:60-61).

McCaskill also claimed his plea was entered in violation of his right to counsel and his plea had not been knowing, intelligent and voluntary because, "he believed that the penalties he was facing were the penalties he had agreed upon with the district attorney." (31:49). In support of his motions, McCaskill filed an affidavit that alleged that, "At the time I entered the guilty plea, I was not advised of the maximum penalties I faced." (40:2).

The record establishes that McCaskill appeared for a first appearance in the prior case on August 30, 2005, pro se. (35). The court asked McCaskill if he had the complaint, which he did, and whether he wanted it read, which he did not. The court told McCaskill of the penalties and then said, "Do you want to talk to an attorney before proceeding?" McCaskill said "I already got an attorney," and the court accepted McCaskill's not guilty plea. (35:4-5). The attorney McCaskill referenced actually represented him on a different matter and not the pending case. That attorney had simply advised McCaskill to ask for a signature bond. (31:56, 35:6).

At the next hearing (the plea and sentencing) on September 19, 2005, the court did not address whether McCaskill was competent to represent himself. (36). It also did not mention the maximum and minimum penalties. Instead, the court accepted a plea bargain to the aggravated guidelines sentence, asked McCaskill if he understood his various constitutional rights and then accepted the plea. After accepting the plea, the court said it "should ask" if he realized he was giving up his right to be represented by attorney which could be appointed to him at county expense. McCaskill answered, "Yeah." (36:2-6). The court did not ask if McCaskill wished to waive his right to an attorney, however. The court also did not find McCaskill had actually waived this right. Furthermore, no colloquy or waiver of attorney occurred prior to the sentencing portion of the proceedings. (36:6-9).

McCaskill argued that his plea was not knowingly entered. The State argued that McCaskill's claim was wrong because he was advised of the maximum penalties at the original hearing. (31:53). The court concluded that the record did not establish a basis to exclude the prior conviction saying:

> Whether or not the defendant is advised the Court was not bound by the plea agreement, I don't see that in here. But if the defendant's indication is he thought that the penalty was what he negotiated with the prosecutor, as far as I know he was sentenced to the recommendation following the guidelines.
> …

> So even if the defendant thought that that was the possible penalty, that's what it was. I don't know how the defendant could have—could have thought that that was the maximum penalty because he was previously informed as to what the penalty was and he had a copy of the criminal complaint.
>
> So on that analysis, the defendant's motion is denied, and this will be treated as a fourth. (31:60-61).

The case proceeded to jury trial on November 13 and 14 of 2014. The jury acquitted Mr. McCaskill of operating a motor vehicle while under the influence of an intoxicant but found him guilty of operating a motor vehicle with a prohibited alcohol concentration even though the defense was that McCaskill had not been operating a motor vehicle. (33; 34; 12; 14).

Defendant then filed a Notice of Intent to Pursue Post-Conviction Relief. (23). He now appeals to this Court. (27).

ARGUMENT

I. A person has not operated a parked vehicle merely by being in the driver's seat with the lights on but with no evidence that he drove the car, started it, or even that the keys were in the ignition.

This Court should reverse and suppress any evidence flowing from the arrest of Mr. McCaskill because there was no probable cause to arrest him for operating a motor vehicle under the influence of an intoxicant or with a prohibited alcohol concentration. Therefore, the arrest violated the Fourth Amendment to United States Constitution through the Fourteenth Amendment and Article I, sec. 11 of the Wisconsin Constitution.

A person commits the crime of operating under the influence of an intoxicant if he "operate[s]" a vehicle while under the influence of an intoxicant. The statutes define "operate" as meaning "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Wis. Stat. § 346.63(3)(b). In this case, there existed no probable cause to arrest Mr. McCaskill of operating a motor vehicle while intoxicated because there is absolutely no evidence that he manipulated or activated any of the controls necessary to put his car in motion.

Probable cause to arrest for operating under the influence or with a prohibited alcohol concentration requires a reasonable belief

that the defendant has operated a vehicle while intoxicated or with a prohibited alcohol concentration. As stated recently by the Wisconsin Supreme Court:

> Warrantless arrests are unlawful unless they are supported by probable cause. "Probable cause to arrest . . . refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle [at a prohibited alcohol concentration]." "The burden is on the state to show [it] had probable cause to arrest."
>
> In determining whether probable cause exists, we examine the totality of the circumstances and consider whether the police officer had "facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant . . . committed or [was] in the process of committing an offense." The probable cause requirement "deals with probabilities" and must be sufficient "to lead a reasonable officer to believe that guilt is more than a possibility." This standard is case-specific: "[t]he quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case."

State v. Blatterman, 2015 WI 46, ¶¶34–35, 362 Wis. 2d 138, 864 N.W.2d 26 (citations omitted). Whether an arresting officer had probable cause to believe a defendant operated a motor vehicle under the influence of an intoxicant is a question of law that this Court reviews *de novo*. ***Washburn County v. Smith***, 2008 WI 23, ¶16, 308 Wis. 2d 65, 746 N.W.2d 243.

Under the facts of this case, there exists no probable cause to believe that Mr. McCaskill operated his vehicle while intoxicated because the State has failed to prove that he activated or manipulated any control necessary to put his car into motion. The State argued

below that there existed circumstantial evidence that McCaskill must have driven the car, but there are two problems with this claim. First, it is easy to imagine numerous scenarios where the defendant was driven to the scene and got in the driver's seat after the other driver left. It just is not true that he must have driven the vehicle. Second, no Wisconsin case has ever gone so far as to find that a person has operated a motor vehicle merely by being in the driver's seat with the lights on but with no evidence that the keys were in the ignition or that the engine was running. Courts have required more, including keys in the ignition, running engines, testimony that a witness saw the defendant driving, or evidence that the defendant had somehow activated the vehicle's controls. *See, e.g.,* ***State v. Modory,*** 204 Wis. 2d 538, 544, 555 N.W.2d 399 (Ct. App. 1996); ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 628, 291 N.W.2d 608 (Ct. App. 1980).

The case most directly on point is ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶109, 288 Wis. 2d 573, 709 N.W.2d 447, and it requires reversal. In that case:

> Haanstad testified that she did nothing more than sit in the driver's seat with her feet and body facing the passenger seat, never touching or manipulating the gas pedal, steering wheel, or the keys which were in the ignition, or any of the other controls of the car. The Village of Cross Plains ("Village") presented no testimony to the contrary. That evidence was uncontroverted.

Id. at ¶10. The keys were in the ignition and the engine was running, but the testimony was that another man drove Haanstad to the

location. The Village asserted that the mere fact that she was in the driver's seat meant that she "operated" the vehicle. The Wisconsin Supreme Court reversed on these facts finding that "there is no evidence that the defendant 'activated' or 'manipulated' any control in the vehicle that is necessary to put the vehicle in "motion" and therefore there was no evidence that supported a conclusion that Haanstad was "operating" the motor vehicle as defined in Wis. Stat. §346.63(3)(b). ***Id.*** at ¶¶21, 24.

This Court must reach the same conclusion in this case. There simply is no evidence that Mr. McCaskill activated or manipulated any control necessary to put the vehicle in motion. The fact that the State has never produced any evidence that Mr. McCaskill even had the keys to the car, much less that they were in the ignition or that the ignition was on, eviscerates the State's claims. Without proof of the keys or that the car was running, the most the State can claim, as in ***Haanstad***, is that Mr. McCaskill was sleeping while intoxicated. *See* ***Id.*** at ¶21 (If Haanstad were guilty, she was at most "guilty of sitting while intoxicated."). Therefore, as in ***Haanstad,*** this Court must reverse and suppress the evidence due to lack of probable cause to believe McCaskill was operating a motor vehicle.

II. The evidence was insufficient to convict McCaskill of operating a motor vehicle with a prohibited alcohol concentration where there was no evidence that he operated the vehicle.

Even if this Court finds that there existed sufficient probable cause to arrest, this Court should reverse because the evidence at trial was insufficient to find that McCaskill operated a motor vehicle with a prohibited alcohol concentration. This may be so because the quantum of evidence necessary for probable cause is less than that for guilt but is more than bare suspicion. ***Brinegar v. United States,*** 338 U.S. 160, 174-75 (1949). Insufficiency of the evidence may be raised on appeal without having been raised in the trial court. ***State v. Hayes***, 2004 WI 80, ¶54, 273 Wis. 2d 1, 681 N.W.2d 203. This Court will not reverse for insufficient evidence "unless the evidence, viewed most favorably to the state and conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). While jurors are allowed to draw logical inferences from the evidence, "[a] jury cannot base its findings on conjecture and speculation." ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 791, 451 N.W.2d 203 (Ct. App. 1995).

In this case, the evidence was insufficient as a matter of law because there is absolutely no evidence that Mr. McCaskill ever

activated or manipulated any of the controls necessary to put his vehicle in motion. The evidence viewed most favorably to the State is that McCaskill *could* have driven the car to that location and is in fact the most likely person to have done so. That is not enough to prove beyond a reasonable doubt that McCaskill did drive the vehicle while intoxicated. Thus, this Court should reverse and grant McCaskill a new trial.

III. McCaskill's 2005 conviction should be excluded for sentencing purposes because it was entered in violation of the right to counsel and because it was not knowingly, intelligently, and voluntarily entered.

The trial court erred as a matter of law when it counted a conviction from 2005 for sentencing purposes. That conviction was entered in violation of the right to counsel, and McCaskill's plea to that charge was not knowing, intelligent, and voluntary. As to the latter point, Mr. McCaskill did not know the maximum possible sentence, and he entered his plea based upon his mistaken belief that the penalty to which the parties agreed constituted the maximum sentence permitted.

A defendant may collaterally attack a prior conviction to prevent its use as a penalty enhancer when the prior conviction was obtained in violation of the defendant's right to counsel. *See* ***State v. Hahn***, 2000 WI 118, ¶¶28–29, 238 Wis. 2d 889, 618 N.W.2d 528.

The defendant has the initial burden of making a prima facie showing by affidavit and citation to any relevant portions of the record that he or she did not know or understand some aspect of the right to counsel or the information that should have been provided, and thus did not knowingly, intelligently and voluntarily waive that right. ***State v. Ernst***, 2005 WI 107, ¶¶25, 33, 238 Wis. 2d 300, 699 N.W.2d 92. Once a *prima facie* case has been made, the burden shifts to the State to prove by clear and convincing evidence at an evidentiary hearing that the defendant in fact possessed the constitutionally required understanding and knowledge for a valid waiver of counsel. ***Id***. at ¶27. A written waiver of rights form, regardless of the detail it may provide, has been deemed insufficient to replace a personal colloquy when such colloquy is required. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶31-32, 317 Wis. 2d 161, 765 N.W.2d 794. This Court independently reviews whether a prima facie showing case has been made and, if so, whether the established facts show a violation of the right to counsel. ***Ernst***, 238 Wis. 2d 300 at ¶10.

Before a court allows a defendant to proceed pro se**,** the court must perform a personal colloquy with the defendant to ensure that the defendant knowingly, intelligently, and voluntarily waived the right to counsel. ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d

716 (1997). As part of this colloquy the court must verify that the defendant:

> 1) made a deliberate choice to proceed without counsel,
> 2) was aware of the difficulties and disadvantages of self-representation,
> 3) was aware of the seriousness of the charge or charges against him, and
> 4) was aware of the general range of penalties that could have been imposed on him.

Id. at 206. Unless the record reveals the defendant's deliberate choice and awareness of the facts, a knowing and voluntary waiver of counsel will not be found. ***State v. Peters***, 2001 WI 74, ¶21, 244 Wis. 2d 470, 628 N.W.2d 797. In addition, a court must determine that a defendant is competent to represent himself before allowing him to proceed pro se. ***Id.*** at 212. In Wisconsin, the competency standard to represent oneself is higher than the competency standard to stand trial. ***Id.*** When deciding if the defendant is competent, the court should consider such facts as "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." ***Id.*** (quoting ***Pickens v. State***, 96 Wis.2d 549, 569, 292 N.W.2d 601 (1980)).

In order to avoid any question concerning a valid waiver, there must be clear evidence that the accused was informed of his right to counsel, but that he knowingly, intelligently, and voluntarily rejected

that offer based on information provided to him by the Court. ***Id.*** As noted above, a written waiver of rights form, regardless of the detail it may provide, has been deemed insufficient to replace a personal colloquy when such a colloquy is required. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶ 31–32, 765 N.W.2d 794. In the instant case, there was no waiver of rights form at all. Thus, there is even less showing that defendant waived any rights than in most cases in this state, given that most counties require such forms to have a record of any alleged waivers.

Valid collateral attacks require the defendant to point to facts that demonstrate that he/she "did not know or understand the information which should have been provided" in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his/her right to counsel. ***Ernst***, 2005 WI 107, ¶ 25. If a defendant presents the court with pleadings and an affidavit alleging that he was not represented by counsel, and that he did not at any time affirmatively waive his right to counsel, that shall be sufficient for the defendant to meet his initial burden of coming forward with evidence making a prima facie showing of a constitutional deprivation in the prior proceeding. ***State v. Baker***, 169 Wis. 2d 49, 77-78, 485 N.W.2d 237 (1992).

Once a defendant makes a sufficient prima facie showing for a collateral attack, the court should hold an evidentiary hearing, at which the State has the burden of showing that the defendant's waiver of counsel was knowingly, intelligently, and voluntarily entered. ***Ernst***, 2005 WI 107, ¶ 27. If the State fails to meet its burden at that hearing, the defendant is entitled to prevail in his effort to collaterally attack the prior conviction. ***Id.***

Although the State stated it did not feel the defense made a prima facia showing justifying the collateral attack of the prior conviction, the trial court decided the motion on its merits without an evidentiary hearing and did not specifically reach the issue of whether a prima facie showing was made. Thus, the issue for this Court is whether the trial court properly denied the motion after the hearing.

The prior offense must be excluded because the record is clear that the plea was entered in violation of the right to counsel. The court never conducted a personal colloquy sufficient to find that Mr. McCaskill had waived the right to counsel. On the contrary, the court notified McCaskill of the right to counsel in a prior setting that included unnamed other defendants. When it came time to address Mr. McCaskill personally, the court's entire colloquy at that previous intake proceeding consisted of asking McCaskill if he wanted an attorney and McCaskill responding, "I already got an attorney." (35:4-

5). In reality that attorney represented McCaskill on an entirely different matter and had merely told Mr. McCaskill to request a signature bond. Later, at the plea hearing, the court first took McCaskill's plea and then asked if he understood that he was giving up his right to have an attorney represent him. The court also failed to inquire prior to the sentencing portion of the case whether McCaskill wanted an attorney. There was no questioning or information regarding the dangers of self-representation and no colloquy or inquiry into McCaskill's competence to represent himself. Additionally, the court's colloquy, which was done only after accepting the plea, merely confirmed McCaskill understood he was giving up his right to an attorney, but the court never actually asked if that is what McCaskill actually wanted. Nor did the court ever find an actual waiver occurred prior to the plea and the sentencing. (36).

This colloquy falls far short of the standard established in ***Klessig*** as the court never made Mr. McCaskill aware of the difficulties and disadvantages of self-representation or determined McCaskill's competence to represent himself, and McCaskill did not make a deliberate choice to proceed without counsel. In fact, the colloquy reveals miscommunication rather than a knowing waiver of the right to counsel. The court thought that McCaskill was represented when in fact he was not. Therefore, the court never properly

determined that McCaskill made a knowing and intelligent waiver of his right to counsel. This record does not support a claim that McCaskill's waiver of the right to counsel was valid. Therefore, his prior conviction was entered in violation of the right to counsel.

Not only was the prior conviction entered in violation of the constitutional right to counsel, but also McCaskill's plea in that case was not knowing, intelligent and voluntary. In ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the Wisconsin Supreme Court laid out the test for determining the constitutionality of a plea. According to that decision, before a court may accept a valid plea the court must undertake a personal colloquy to determine if the plea was made voluntarily with understanding of the charge and the potential punishment if convicted. *See also* Wis. Stat. § 971.08. The court said in order to take a valid plea the trial court has the duties:

> 1) To determine the extent of the defendant's education and general comprehension;
>
> 2) To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries;
>
> (3) To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty;
>
> (4) To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused;
>
> (5) To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him,

> (6) To personally ascertain whether a factual basis exists to support the plea.

Id. at 261–62. Not only must the court inform the defendant of the charge and the range of penalties but also the court must "ascertain that the defendant in fact possesses such information." ***Id.*** at 269. "A defendant's mere affirmative response that he understands the nature of the charge, without establishing his knowledge of the nature of the charge, submits more to a perfunctory procedure rather than to the constitutional standard that a plea be affirmatively shown to be voluntary and intelligently made." ***Id.*** Once a defendant makes a prima facie showing that the court did not do one of the duties listed above, and the defendant alleges he did not know the information which should have been provided, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary. ***Id***. at 274.

In this case, the plea in the 2005 case was not constitutionally valid. At the time of the plea, the court never determined McCaskill's education and comprehension. It never personally established that he understood the range of punishments, and it never determined whether any threats or promises had been made to induce the plea. In short, the plea was entirely perfunctory as not permitted. In response, the State argued that McCaskill had been given the complaint and told the

maximum penalties, and therefore even if he did not know the penalties at the time of the plea, his plea was knowing, intelligent and voluntary. Defense counsel argued that the State conceded that McCaskill was not advised of the penalties at the time of the plea, but neither of the attorneys were sure whether he also had to know of the charges at the time of the plea. (31:53–54). ***Bangert*** answers that question clearly: "The defendant must understand the nature of the crime at the time of the taking of the plea." ***Id.*** at 269.

The trial court's ruling also indicates why this Court must exclude the prior conviction for enhancement purposes. The court did not find that McCaskill knew the minimum and maximum sentences as required by ***Bangert***. Rather the court found that McCaskill was told that information at a previous initial appearance and that he was sentenced appropriately to the guidelines. (31:60). As stated by the court, "But if the defendant's indication is he thought that the penalty was what he negotiated with the prosecutor, as far as I know he was sentenced to the recommendation following the guidelines." It was essentially a harmless error analysis – the argument being that even if McCaskill did not understand, it did not matter. Harmless error is not the constitutional standard, however, knowing and voluntary relinquishment is. The court did not find that the State had proven that McCaskill did in fact know the applicable penalties. Therefore, this

Court must find that the prior plea was entered in violation of the United States Constitution and must be excluded for sentencing purposes. Thus, this Court should reverse with instruction that the trial court grant the motion relating to the prior conviction.

IV. This Court should grant a new trial in the interests of justice because the real controversy was not fully and fairly tried.

This Court should also grant a new trial in the interests of justice because the real controversy was not fully and fairly tried. Under Wis. Stat. § 752.35, this Court has the discretion to set aside a verdict and order a new trial where the real controversy has not been fully tried or where "justice has for any reason miscarried." *See also* ***Vollmer v. Luety***, 156 Wis. 2d 1, 456 N.W.2d 797 (1990) (Discretionary reversal proper where deficient verdict question kept real controversy from being tried). Here, discretionary reversal is necessary and appropriate because the jury verdicts are inconsistent.

Inconsistent verdicts are those where the verdicts are "logically repugnant to one another." ***D'Huyvetter v. A.O. Smith Harvestore Products,*** 164 Wis. 2d 306, 475 N.W.2d 587 (Ct. App. 1991). The Wisconsin Supreme Court has said that:

> When a jury returns a verdict containing errors, inconsistencies or lack of compliance with the directions of the special verdict and instructions, the trial court may direct the jury's attention generally to the prospective error and require it to deliberate further to correct any errors that may exist. In doing so, the trial court must cautiously avoid suggesting which of the inconsistent answers is

> the error and must avoid dominating or dictating how an error or inconsistency is to be corrected.

Westfall v. Kottke, 110 Wis. 2d 86, 97, 328 N.W.2d 481 (1983). Furthermore, "when a verdict is inconsistent, such verdict, if not timely remedied by reconsideration by the jury, must result in a new trial." ***Id.*** at 98.

In this case, the jury's verdicts are unquestionably inconsistent. The only issue in this case was whether or not Mr. McCaskill operated the vehicle. If he did, then he operated a motor vehicle while under the influence of an intoxicant and he did so with a prohibited alcohol concentration. Under different facts it might be possible for a jury to find that a defendant was not under the influence but did operate a vehicle with a prohibited blood alcohol content, but that claim is not possible under the facts of this case. It is undisputed that Mr. McCaskill was very much under the influence of alcohol and that he had a blood alcohol concentration level with which he could not legally drive. His BAC was .263, well above the permissible level, and he was so under the influence that he was not able to get out of the car and walk on his own power. Therefore, if he operated his vehicle for purposes of Wis. Stat. § 346.63(1)(a), he operated it for purposes of Wis. Stat. § 346.63(1)(b).

The parties and the court noted the inconsistency after the verdict, but failed to remedy the deficiency as required by law. In fact, the court noted that the jury had "worked longer than the actual trial on this (verdict)." (34:8). Therefore, it is clear that the jury had difficulty reaching a verdict and split the difference by convicting on one count of operating a motor vehicle with a prohibited alcohol concentration, pursuant to Wis. Stat. § 346.63(1)(b) but acquitting of one count of operating a motor vehicle while under the influence of an intoxicant, pursuant to Wis. Stat. § 346.63(1)(a). This the jury could not do as the verdicts are inconsistent and therefore repugnant to one another.

Since the sentences are inconsistent and since the court failed to order the jury to reach a consistent verdict, these facts "must result in a new trial." Because the real controversy has not been fully and fairly tried, this Court should order a new trial.

CONCLUSION

This Court must reverse Mr. McCaskill's conviction for operating with a prohibited alcohol concentration because there is absolutely no evidence in the record that he ever activated or manipulated any control necessary to put his vehicle in motion. Like the Wisconsin Supreme Court's decision in ***State v. Haanstad***, without any such proof, he is guilty at most of sleeping while

intoxicated. For the same reason the evidence was insufficient. Even if he could be convicted, this Court should exclude McCaskill's 2005 conviction for enhancement purposes. The plea in that case was entered in violation of the right to counsel and was not knowing, intelligent, and voluntary. Finally, this Court should grant a new trial in the interests of justice because convicting McCaskill of operating with a prohibited blood alcohol content but acquitting him of operating under the influence is impermissibly inconsistent. If he operated for purposes of one statute then he operated his vehicle for purposes of the other, and the court should have told the jury that it had to reach a consistent verdict. Since the trial court did not do this, this Court should grant a new trial in the interests of justice.

For these reasons, Mark McCaskill, the defendant-appellant, respectfully requests that this Court reverse his conviction for operating a motor vehicle with a prohibited blood alcohol content and order a new trial. McCaskill also requests this Court reverse and grant the motion relating to the collateral attack of his prior offense.

Dated at Madison, Wisconsin, ________________, 2015.

Respectfully submitted,

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CERTIFICATION

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

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6193 words.

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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 § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
(4) 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.

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.

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