STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 15 AP 1487

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK G. MCCASKILL,

Defendant-Appellant.

# REPLY BRIEF 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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### I. A PERSON HAS NOT OPERATED A PARKED VEHICLE MERELY BY SLEEPING IN THE DRIVER'S SEAT.

The State's numerous claims with regard to this issue are wrong. First, it argues that law enforcement officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. That is so, but that is not what occurred here. After investigating, the officers arrested McCaskill who was merely sleeping in his parked car with the lights on and the engine off with no evidence the keys were in the ignition. That is an arrest without probable cause.

> 'Probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.

***Michigan v. DeFelippo***, 443 U.S. 31, 37 (1979). Here the officers lacked facts that would have caused a reasonably cautious or prudent person to believe that McCaskill committed the crime of operating while intoxicated. Once the law enforcement officers found Mr. McCaskill sleeping in his car, they could transport him to the hospital if they were concerned about his safety, ***State v. Blatterman***, 2015 WI 46, ¶59, 362 Wis. 2d 138, 864 N.W.2d, but there was no

probable cause to arrest him because they had no facts supporting any belief that he had manipulated the controls of the vehicle.

The State tries to distinguish this case from ***Village of Cross Plains v. Haanstad***, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447 (2006), on the theory that in ***Haanstad*** there was evidence that Ms. Haanstad did not drive the vehicle to where she was found sitting in the driver's seat with the engine running. ***Id.*** at ¶¶3-5. The State's theory is that ***Haanstad*** is therefore different because in this case there is no evidence "to absolve McCaskill of having driven the vehicle." (State's brief at 3). This is a request that this Court apply the wrong burden of proof. McCaskill does not have to prove anything; "The burden is on the state to show [it] had probable cause to arrest." ***Blatterman***, 362 Wis. 2d 138, ¶34.

In addition, if sitting in the driver's seat with the engine running is insufficient to establish that the person sitting in the driver's seat has operated the vehicle, then sleeping in the driver's seat without the car running or even without any proof that the defendant had the keys cannot possibly qualify as operation of the vehicle. The State ignores entirely the fact that Mr. McCaskill committed no crime unless the State can prove that he physically manipulated or activated "any of the controls of a motor vehicle

necessary to put it in motion." Wis. Stat. § 346.63(3)(b). Since the engine was running in ***Haanstad,*** there is far more evidence of activation in ***Haanstad*** than here. Yet even in that case the Wisconsin Supreme Court said that, "because there exists no evidence, direct or circumstantial, that Haanstad touched any controls of the vehicle necessary to put it in motion while she was intoxicated," "Haanstad did not 'operate' the motor vehicle as defined in Wis. Stat. § 346.63(3)(b)." ***Haanstad***, 288 Wis. 2d 573 at ¶¶24-25.

## II. THE EVIDENCE WAS INSUFFICIENT.

The State applies only part of the law regarding sufficiency of the evidence. It says that this Court must accept the inferences drawn by the trier of fact "unless the evidence the inference is based on is incredible as a matter of law." (State's brief at 5; *citing* ***State v. Wilson***, 149 Wis. 2d 878 (1989)). However, circumstantial evidence that does not exclude the possibility of innocence is insufficient. As stated in ***State v. Poellinger***, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990) (emphasis added), addressing the burden at trial:

> In order to overcome the presumption of innocence accorded a defendant in a criminal trial, the state bears the burden of proving each essential element of the crime charged beyond a reasonable doubt. It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial

> evidence is oftentimes stronger and more satisfactory than direct evidence. Regardless of whether the evidence presented at trial to prove guilt is direct or circumstantial, **it must be sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence** in order to meet the demanding standard of proof beyond a reasonable doubt.

The State has not rebutted McCaskill's claim that "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." (State's brief at 2). Therefore, it has admitted it. *See* ***Charolais Breeding Ranches v. F.P.C. Sec. Corp.***, 90 Wis. 2d 97, 109, 279, N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed admitted). Given this admission and given the fact that circumstantial evidence is not sufficient unless it excludes every reasonable hypothesis consistent with innocence, this Court must reverse. Even viewing the evidence in the light most favorable to the prosecution, the evidence is insufficient. This Court can affirm only if it ignores the clear analysis listed by the Wisconsin Supreme Court in ***Haanstad.***

The State's reliance on ***State v. Mertes***, 2008 WI App 179, 315 Wis. 2d 756, 762 N.W.2d 813, is misplaced as it is easily distinguishable. McCaskill concedes that had the keys been in the ignition then ***Mertes*** would apply. However, the keys were in the ignition in ***Mertes,*** and in this case there is not even any evidence

that McCaskill had possession of the keys. Furthermore, contributing to the circumstantial evidence in ***Mertes*** was Mertes' admissions that he had come from Milwaukee and was heading back; had been there about 10 minutes; and there was no suggestion of a passenger or other driver. ***Id***. at ¶14. None of those facts are present in this case, and here it is undisputed that neither officer testified that the keys were in the ignition. ***Mertes*** defines a line that the facts in this case do not approach.

In short, the evidence was insufficient because the State admits that the evidence does not exclude scenarios where Mr. McCaskill did not operate a vehicle while intoxicated.

## III. THE 2005 CONVICTION SHOULD BE EXCLUDED FOR SENTENCING PURPOSES.

The State concedes that the plea colloquy in the 2005 case does not meet the standard laid out in ***Bangert*** because it does not deny it. ***Charlois, supra***. Rather it claims McCaskill has made a false statement when he swore in his affidavit that, "I was not represented by a lawyer at any time in the Portage County case." The transcripts speak for themselves. The initial hearing went as follows:

> THE COURT: Do you understand this is a criminal charge. (sic) The penalty for a third offense is a fine of no less than $600, no more than 2,000 plus costs. Jail sentences not less thirty days, not more than one year and other penalties. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you want to talk to an attorney before proceeding?
>
> THE DEFENDANT: I already got an attorney.
>
> THE COURT: I'm sorry?
>
> THE DEFENDANT: Not guilty. I already have—
>
> THE COURT: You want to enter not guilty pleas here today?
>
> THE DEFENDANT: Yes Sir.
>
> THE COURT: The court accepts that.

McCaskill subsequently told the court, "My attorney asked for a signature [bond], if you can." (35:4-6)

At the plea hearing on September 19, 2005, the court accepted a plea agreement following a very brief colloquy in which the court failed to advise McCaskill of the maximum charges that he faced. After accepting the plea, the court added.

> THE COURT: Do you realize you're giving up your right to have an attorney represent you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you realize if you can't afford an attorney the State would provide you one through the public defender's office, and if

> they would not represent you, you could still ask the Court for an appointment of an attorney at county expense if you're indigent? Do you understand that?
>
> THE DEFENDANT: Yeah. (36:5)

This record does not satisfy the requirements of either a valid plea or a valid waiver of the right to counsel. The plea was not a proper plea because the State has never denied that, "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 punishments had been made to induce the plea." (McCaskill's brief at 27). McCaskill has correctly identified that "At the time of the guilty plea, I was not advised of the maximum penalties I faced" as the law requires. *See* ***State v. Bangert***, 131 Wis. 2d 346, 261-62, 389 N.W.2d 12 (1986) (McCaskill's brief at 26-27). The State has argued that the court did inform McCaskill of the maximum penalties at the initial hearing, but McCaskill has asserted, and the State has never denied, that the relevant time is what the defendant knew at the time of the plea itself. (Brief at 28).

Instead of defending the adequacy of the colloquy in the 2005 conviction, the State replies that McCaskill cannot collaterally attack the prior plea because McCaskill was represented by counsel and his

claims that he was not represented are false. However, McCaskill's claim that, "I was not represented by a lawyer at any time in the Portage County case," is true. No attorney ever entered an appearance or ever appeared on the record in that case. Furthermore, subsequent counsel for McCaskill has explained, "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). (McCaskill brief at 12).

McCaskill's claim to the court that "I already got an attorney," was not a valid waiver of counsel. Nor was his admission that he understood that he was giving up his right to have an attorney. As stated in ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), before a defendant may validly waive counsel the court must: 1) ascertain that the defendant has made a deliberate choice to proceed without counsel; 2) must make sure that the defendant was aware of the difficulties and disadvantages of self-representation; 3) establish that the defendant understands the seriousness of the charges; and 4) knows the general range of penalties possible. Here the court failed to make sure that McCaskill's choice was deliberate and informed because it failed to

ascertain that McCaskill was aware of the difficulties of self-representation or that he understood the general range of penalties. It was not a valid waiver.

The State's only response is to say that this case is similar to ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, where the Court denied a collateral attack. However, that claim is wrong. This case is different because, as addressed above, McCaskill did not validly waive counsel, and he has established a prima facie case that the plea colloquy in the prior case failed to establish that McCaskill knew or understood all of the information that should have been provided.

The issue in ***Ernst*** was whether "in a collateral attack, the violation of the ***Klessig*** requirements can be raised to the level of a constitutional violation and, if so, under what circumstances." ***Id.*** *at* ¶22. The Court concluded that, "For there to be a valid collateral attack, we require the defendant to point to facts that demonstrate that he or 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 or her right to counsel." ***Id***. at ¶25. The Court found that Ernst had failed to prove a prima facie case because he "made no mention of specific facts

that show that his plea was not a knowing, intelligent, and voluntary one." ***Id***. Ernst's motion failed because all he did was claim that the court had failed to address all 4 of the ***Klessig*** factors with Ernst, and this claim lacked specific facts.

In contrast, as listed above, in this case McCaskill has pointed to specific facts that the court never advised him of the maximum penalties at the time of the plea and never ascertained that he understood the disadvantages of self-representation. Because the record does not establish that Mr. McCaskill understood everything that he should have known, the burden shifts to the State to prove that he did know. *See* ***Ernst***, 2005 WI 107 at ¶27, *see also* ***State v. Baker***, 169 Wis. 2d 49, 77-78, 485 N.W.2d 237 (1992) (State has burden of proving that defendant knowingly, voluntarily, and intelligently waived his right to counsel).

The State has failed to carry its burden of proving that Mr. McCaskill knowingly, intelligently, and voluntarily waived the right to counsel. He did not understand the risks of self-representation, and the court failed to advise him at the time of his plea of the penalties that he was facing. This Court must reverse.

## IV. THIS COURT SHOULD GRANT A NEW TRIAL IN THE INTERESTS OF JUSTICE.

The State's response to this issue makes the decision for this Court very simple: If it believes that the verdicts are not inconsistent, as the State claims, then it should reject this claim. If it believes that the verdicts are inconsistent, then it must reverse. The State has provided no reason for any other ruling.

The verdicts are inconsistent. McCaskill was either operating while intoxicated or he was not. A person with a .263 blood alcohol level is drunk under any definition the Court cares to apply. There might be circumstances where a person is guilty of one but not the other, but not under these facts. The distinction between operating a vehicle with a prohibited alcohol concentration and operating under the influence might matter under different facts—such as a commercial driver or a driver under the age of 18 who was not under the influence but was operating with more than a .0 blood alcohol content as prohibited by Wis. Stats. §§ 346.61(7)(a)1 & 346.61(2m)—but there is no practical or legal difference between operating with a blood alcohol content of .263 and operating while under the influence with the same level of intoxication. The only issue is whether McCaskill manipulated any device necessary to put the vehicle in motion, and here he did not.

The State compounds its analytical errors by citing to the wrong standard of review. ***State v. Forster***, 260 Wis. 2d 149, 659 N.W.2d 144 (Ct. App. 2003), does not, as claimed by the State, provide the appropriate standard of review. That case was a sufficiency of the evidence case involving statutory interpretation, and it was not a case in which the verdicts were inconsistent or repugnant to each other. None of the other cases cited by the State are any more help to its claims. In ***Dunn v. United States***, 284 U.S. 390 (1932), for example, the Supreme Court said that consistency in the verdicts was not necessary where "Each count in an indictment is regarded as a separate indictment" and where "an acquittal on one could not be pleaded as res judicata of the other." ***Id***. at 393. In ***Nabbenfeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978), the Court said that the law does not require a jury to "either totally believe or disbelieve a witness." In ***State v. Thomas***, 161 Wis. 2d 616, 468 N.W.2d 729 (Ct. App. 1991), the Court found the evidence sufficient to convict Thomas of intimidating a victim where it also found him not guilty of armed robbery. ***Id*** at 630. In ***State v. Johnson***, 184 Wis. 2d 324, 516 N.W.2d 463 (Ct. App. 1994), the Court reversed on other grounds and said it found no problem with inconsistent verdicts where the jury convicted of battery and second-

degree reckless endangerment but acquitted of second-degree reckless endangerment while using a dangerous weapon. In ***State v. Thomas***, 2004 WI App 115, 274 Wis. 2d 513, 683 N.W.2d 497, the Court found no grounds for reversal where the jury convicted Thomas of felon in possession of a gun but not guilty of carrying a concealed weapon.

As stated above in ***Dunn***, consistency in criminal verdicts is not necessary where each count can be considered as a separate indictment. That analysis must not apply where a finding of guilt for both operating under the influence of an intoxicant, a violation of Wis. Stat. §346.63(1)(a) and operating with a prohibited blood alcohol content, a violation of Wis. Stat. § 346.63(1)(b) result in only one conviction. *See* Wis. Stat. § 346.63(7)(b). Guilt on one creates the same legal result as a finding of guilt on the other despite the fact that they have separate elements. Because the issue was whether McCaskill drove and not whether he was under the influence or driving with prohibited blood alcohol content, the verdicts are inconsistent. Therefore, as in ***Westfall v. Kottke***, 110 Wis. 2d 86, 97, 328 N.W.2d 481 (1983), "when a verdict is inconsistent, such verdict, if not timely remedied by reconsideration by the jury, must result in a new trial." Here the verdict was inconsistent and the issue

has not been fully and fairly tried. This Court should reverse in the interests of justice.

## CONCLUSION

For these reasons, Mark McCaskill, the defendant-appellant, respectfully requests that this Court reverse his conviction in this case.

Dated at Madison, Wisconsin, _____, 2016.

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 2,938 words.

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