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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP2628

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In the Matter of the Refusal of Steven N. Jackson  
STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN N. JACKSON,

Defendant-Appellant.

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ON APPEAL FROM A FINDING THAT THE  
DEFENDANT UNLAWFULLY REFUSED AN IMPLIED  
CONSENT TEST, ENTERED IN THE LA CROSSE  
COUNTY CIRCUIT COURT CASE 15-TR-342, THE  
HONORABLE SCOTT L. HORNE, PRESIDING

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REPLY BRIEF OF DEFENDANT-APPELLANT

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**ARGUMENT**

**III. THE STATE’S ARGUMENT THAT  
THE RECORDING WAS  
AUTHENTICATED IN “OTHER  
WAYS” WAS UNDEVELOPED AND  
UNSUBSTANTIATED.**

**a. The State Asks the Court to Ignore  
On-Point Case law in Exchange**

**for an Undeveloped Ad Hoc  
Alternative.**

The State first complains that Jackson “rests virtually his entire argument upon this court’s decision in *State v. Curtis*, 218 Wis. 2d 550, 582 N.W.2d 409 (Ct. App. 1998).” (Respondent’s Brief: 4). However the State completely ignores the consistent federal authority cited in appellant’s brief, namely *Smith v. City of Chicago*, 242 F.3d 737 (7<sup>th</sup> Cir. 2001), *United States v. Carrasco*, 887 F.2d 794 (7<sup>th</sup> Cir. 1989) and *United States v. Blakey*, 607 F.2d 779 (7<sup>th</sup> Cir. 1979). These cases consistently apply the elementary principal recognized by this court in *Curtis*, that to admit a recording a witness must first establish that the *content* is an accurate depiction of the event.

Moreover, the brief of the respondent includes not a single case involving authenticating a recording by someone who did not witness the event or create the recording.

Rather the State argues vaguely that there are “other ways” to authenticate “evidence,” referencing Wis. Stat. § 909.015(4) (...“appearance, contents, substance, internal patterns, or other distinctive characteristics”...) and Wis. Stat. § 909.015(5)(“...identification of a voice...”). (Brief of Respondent: 5). It is unclear whether the State is hinting that these methods have some applicability to the admission of the audio-recording in this case, but if so the argument is wholly devoid of authority and is undeveloped. The State proposes no rule for the court to apply in lieu of the well-established rule set forth in *Curtis*, 218 Wis. 2d at 555. The court should not abandon neutrality and consider an undeveloped argument devoid of legal authority. *Industrial Risk Insurers v. Am.*

*Engineering Testing, Inc.*, 2009 WI App 62, ¶ 25, 318 Wis. 2d 148, 769 N.W.2d 82.

**b. The Circumstances Argued by  
the State Fail to Establish the  
Authenticity of the Recording**

The State first contends that Deputy Olson established the authenticity of the recording by “identify[ing] the video interface as the video system for his agency’s squad video.” (Brief of Respondent: 5). In support of this argument, the State cites only a single case that involves the admissibility of invoices as ancient documents in asbestos litigation. (Brief of Respondent: 7) (citing *Horak v. Building Services Industrial Sales Company*, 2012 WI App 54, ¶ 13, 329 Wis. 2d 403, 815 N.W.2d 400). The rule regarding authenticating ancient documents is that the proponent must establish, in part, that the document’s condition “creates no suspicions concerning its authenticity” and that it was in a place where if authentic it would likely be. *Id.* at ¶ 9. The evidence at issue in this case is an audio-recording not a document. There was no testimony about its creation or chain of custody. Further, the State does not explain why the ancient documents rule should control rather than cases involving audio-recordings.

Nonetheless Deputy Olson never claimed that there was anything unique or self-authenticating about the “interface.” Simply recognizing that the screen appeared to depict the agency’s squad video recording in no way authenticated the *content* of the audio-recording or even that it was an authentic recording from a squad video. He described no “markings” or aspects from which one can conclude the recording was authentic.

Moreover, the lower court relied upon the audio-recording, not the visual aspect of the recording. (13:17-18).

The screen did not establish that the conversation was a true and accurate recording relating to Mr. Jackson. Deputy Olson never explained how the voice-over related to the empty snowy parking lot on the screen. Rather, he admitted he had no independent knowledge that the video involved Mr. Jackson at all. (13:29).

The state then argues that Deputy Olson's ability to recognize Sgt. Jacobson's voice establishes the authenticity of the recording. (Brief of Respondent: 5). Applying *Curtis*, recognizing a voice gets the State partway, but there must also be testimony that "the tapes accurately depict the conversations." *Curtis*, 218 Wis. 2d at 555. Deputy Olson admitted that he did not know who Sgt. Jacobson was talking to or whether it involved the arrest at issue. (13:29). Thus the fact that one of the voices sounded like Sgt. Jacobson's does not establish it accurately depicted a conversation involving the defendant.

The State goes on to argue that the recording's authenticity is established because "Deputy Olson confirmed that no other individuals other than Jackson were with Sgt. Jacobson before he left for the hospital and he placed no other individuals under arrest at the time." (Brief of Respondent: 6). The State consistently misidentifies the issue. Deputy Olson testified that he doesn't know if the time on the video was accurate or if it even involved the defendant. (13:28). So who was in Sgt. Jacobson's car when it left Deputy Olson's sight is irrelevant. The issue is the accuracy of a recording that Deputy Olson did not create, purporting to involve an event at a time and place that Deputy Olson was not present.

Finally, the State claims that Deputy Olson "encountered difficulties answering questions about an arrest made nearly one year prior..." seemingly implying that

Deputy Olson's memory is to blame. (Respondent's Brief: 8). Deputy Olson "encountered difficulties," not because he didn't remember, but because he was not present. Had there been evidence in Deputy Olson's reports that would have established the authenticity of the recording, the State would have used such reports to refresh Deputy Olson's recollection. But Deputy Olson could only report what he observed, and thus his recollection and reports would say nothing about the accuracy of the recording.

#### **IV. PROBABLE CAUSE DID NOT EXIST TO ARREST MR. JACKSON**

The State's arguments regarding probable cause were addressed in the appellant's brief-in-chief with one exception. The State argues that there was probable cause to believe Mr. Jackson was driving in part because "Deputy Olson indicated that Jackson did not name any other individuals that were with him at the time of the crash, nor did Jackson indicate that someone else was driving." (Brief of Respondent: 11). The State bears the burden of proving that Jackson was lawfully seized. *See State v. Payano-Roman*, 2006 WI 47, ¶ 42, 290 Wis. 2d 380, 714 N.W. 2d 548. A suspect's failure to provide information does not give rise to reasonable suspicion or otherwise warrant a detention or seizure. *State v. Griffith*, 236 Wis. 2d 48, 69, 613 N.W.2d 72 (2000). The State is burden-shifting by asking the court to find probable cause based on the defendant's failure to provide exculpatory information.



## CONCLUSION

For the above-stated reasons, the defendant-appellant respectfully requests that the trial court's order finding that he unlawfully refused an implied consent test be REVERSED.

Dated this 22nd day of July, 2016.

Respectfully submitted,

/s/ Todd E. Schroeder

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## **CERTIFICATION AS TO FORM/LENGTH**

I 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 1925 words.

Dated this 22nd day of July, 2016.

Signed:

/s/ Todd E. Schroeder

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**CERTIFICATE OF COMPLIANCE  
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of July, 2016.

/s/ Todd E. Schroeder

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## CERTIFICATION OF SERVICE

I hereby certify in accordance with Wis. Stat. § 809.80(4) that on July 22, 2016 the undersigned caused 10 true and correct copies of the **REPLY BRIEF OF DEFENDANT-APPELLANT** to be served on the following:

**VIA COURIER TO:**

Clerk of Court of Appeals  
110 East Madison Street, Suite 215  
Madison, WI 53703

I further certify in accordance with Wis. Stat. § 809.80(4) that on July 22, 2016, the undersigned caused 3 true and correct copies of the **REPLY BRIEF OF DEFENDANT-APPELLANT** to be deposited in the U.S. – First Class Mail to be served on the following:

**VIA U.S. MAIL TO:**

Attorney John. W. Kellis  
Office of the District Attorney  
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/s/ Mary L. Johnsrud

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