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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

FOND DU LAC COUNTY,

Plaintiff-Respondent,

v.

Appeal No. 2017AP000343
Circuit Court Case No.
2016TR009784

CHRISTY ANN KASTEN,

Defendant-Appellant.

APPELLANT'S BRIEF AND APPENDIX

On appeal from a Judgment of Conviction (OWI 1st) entered on February 2, 2017
Circuit Court for Fond du Lac County
Honorable Dale L. English, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument may be necessary because no case could be located on the exact issue of making an inference from evidence that was ruled inadmissible hearsay, and may be of interest statewide.

Publication may be appropriate because the outcome of this case will provide guidance regarding the limits in inferential fact finding as well as the to what standard foundational facts need be established for the application of the three-hour presumption regarding use of test results in drunk driving cases.

INTRODUCTION

At 8:30 p.m. on Tuesday, August 16, 2016, Fond du Lac County Sheriff's deputy Andrea Prahl was dispatched to a general area. A call had been previously placed at an unknown time from Paul Kiser, the stepfather of Defendant-Appellant Christy Kasten, indicating he didn't know if Kasten was drinking but was worried. Nothing was observed by Prahl at that time and area.

At 9:30 p.m., Prahl went to Kiser's home and located Kasten asleep in the driver's seat of her vehicle parked in her driveway. The ignition of Kasten's vehicle was off. Prahl did not determine when Kasten actually drove.

At the court trial, the County presented no evidence as to when Kasten drove. The County presented evidence of a blood draw at 10:52 p.m., but had no evidence that Kasten was impaired or had a prohibited BAC at whatever time she actually drove or operated her vehicle prior to Kiser's call.

The County attempted to introduce into evidence a dispatch CAD report generated after Kiser's call, but the court excluded the report and any of its contents for substantive use because it was all hearsay and had not been previously disclosed. The county failed to call any witness from the dispatch center to attempt to provide timing to the earlier events or authenticate the CAD report.

Prahl testified she had no idea when Kiser called nor how much time might elapse between the sheriff's department receiving calls and dispatchers thereafter entering information and dispatching officers.

Notwithstanding the hearsay rulings excluding the CAD report and substance of the dispatch times, nor the lack of evidence any dispatch operations, the trial Court nonetheless ruled it was making an inference that the time Prahl was dispatched to look for Kasten (8:30 p.m.) was the time when Kiser's call must have been made. From this inference the court then made a finding that Kasten was driving at 8:10 p.m. The court had no evidentiary foundation nor reasonable inferences upon which to make this finding.

There was insufficient admissible evidence at trial to sustain this conviction. The conviction must be overturned.

STATEMENT OF THE CASE

A complaint was filed on September 9, 2016 in the Fond du Lac County Circuit Court charging Kasten with drunk driving, first offense. CR 1.

A court trial before the honorable Dale L. English was held on February 2, 2017. By agreement, the first witness called was Kasten's mother, Terry Kiser. CR 17, page 6.

Terry Kiser Testimony

Kiser explained that she is a nurse at Fox Lake Correctional, normally working from 5:30 a.m. until 2:15 p.m. She was working that shift on the day Kasten was arrested for alleged OWI. CR 17, 6.

Kiser explained she was at her home in Brandon, WI, on the afternoon in question and recalls the events leading up to Kasten's arrest. CR 17, 7.

Kiser explained she normally goes to bed between 8:00 and 8:30 p.m. CR 17, 8.

Kiser testified that Kasten left the house that day after they had eaten supper, with Kasten saying she was going out for ice cream; Kiser said they normally eat around five o'clock. CR 17, 8.

Kiser saw Kasten leave the house and it was still light outside. She believes it was after 5:00. CR 17, 8-9.

Kiser was concerned due to Kasten's alcohol issues that going out for ice cream meant going to by alcohol. CR 17, 9.

Kiser did not see Kasten drinking that evening. CR 17, 9.

Kiser then got into her own vehicle and drove to where she suspected Kasten might go, attempting to locate her. CR 17, 9-10.

Unable to locate Kasten, Kiser returned home, estimating she was out for about 10 minutes, and confirming it was still daylight outside when she got back. CR 17, 10.

Thereafter, Kiser observed Kasten arrive back home. She was inside at the time but went outside to meet Kasten. She said it was dusk at the time, but it was not dark enough to need headlights on an automobile. CR 17, 11.

Kiser then spoke with Kasten and told her if she is going to drink she can stay in the car and was not allowed back in the house. Kiser went back in and locked the door. CR 17, 11.

Kiser estimates she went to bed about 30-45 minutes after leaving Kasten in the driveway. CR 17, 12 and 15.

Kiser also confirmed that living out in the country, she and her daughter have both hit dear multiple times, such that it has become a concern for which they expressly avoid driving at night. CR 17, 13-14.

Christy Kasten Testimony

Next, Kasten Testified. CR 17, 16. She was 36 years old on the day of trial. She has a bachelor's degree in business from 2004. CR 17, 21.

Kasten recalled being arrested on August 16, 2017. CR 17, 16. She said she was in her car in her driveway because she was not allowed in the house. CR 17, 17.

Kasten admitted to driving that day, estimating the last time she drove was 7:30 p.m. She came to that estimation because it was dusk, she did not need her headlights, and it was still light out. CR 17, 17.

Kasten admitted to drinking Vodka that day, right before she left the house, about 7:00 p.m. CR 17, 18.

The amount of Vodka was 1/3 of a .750 bottle. CR 17, 18-19. She was leaving to get more alcohol. CR 17, 19 and 20.

Kasten explained she went to Waupun, taking about 8 minutes, purchased alcohol, and then drove home in about eight to nine minutes. CR 17, 19.

Kasten confirmed that when she got home, her mom came out and talked to her about not coming in the house, so she told her she was going to sleep in her car. CR 17, 19.

She adjusted the seat and fell asleep in the car in the driveway. CR 17, 38.

Kasten does not know how long she was in her car, she knows that the police came and woke her up and it was completely dark out. CR 17, 19.

On Cross-examination, Kasten also explained the issue with the dear and that she does not drive at night. CR 17, 22.

Kasten confirmed that when she drove on August 16, 2016, she did not require headlights. CR 17, 22.

Kasten agreed she has struggled with an alcohol issue. CR 17, 22.

Kasten explained she had been living at home since July 2015, and had been through counseling. CR. 17, 23.

Kasten described her drinking history before this incident in more detail. She explained that she started a drinking binge on the previous Saturday by bringing into her home two .750 bottles of Vodka. Over the course of a day and a half, she drank one full bottle and a good portion of the other. Her best estimate is that 1/3 was left in the second bottle, which is about the limit she can drink in a few gulps. CR 17, 24.

Kasten explained that downing 1/3 bottle of Vodka in a short time, while difficult for most, was not difficult for her in light of her past drinking problems and 6-year history of drinking. CR 17, 25 and 34-35.

After drinking on the Saturday binge, Kasten passed out, which is the point of the binge (she has been dealing with in counseling). CR 17, 25.

Kasten explained that on Tuesday, August 16, 2016, she didn't realize at first she still had the 1/3 bottle left from the Saturday/Sunday binge, and after she found it and drank it, she knew she would need more, which is why she immediately drove to Waupun that day. CR 17, 27.

Kasten testified that she did not feel impaired when she drove to the liquor store at 6:55-ish, CR 17, 27. She explained that She knew after just having drank the Vodka she would have enough time to drive the short distance to the liquor store and back before the alcohol hit her. CR 17, 38-39. Kasten acknowledged

that she did feel impaired later that night after the officer woke her up from being asleep in the driveway. CR 17, 32 and 33.

A map was introduced, Exhibit 1 (CR 8, Ex. 1), which confirmed the route Kasten took from her mom's home to the liquor store and back, with a distance of about 9-10 miles one way. CR 17, 29-31.

On redirect, Kasten stated that on Tuesday as far as eating goes she was grazing all day. CR 17, 31.

Kasten stated she weighed 175 pounds. CR 17, 32.

Paul Kiser Testimony

Paul Kiser was then called by the County to testify. CR 17, 39.

He called 911, but he could not say at what time nor the date. CR 17, 40-41. He said he called because he suspected Kasten was going to get alcohol, but did not see her drinking at the relevant time, only knew she had been drinking days earlier. CR 17, 41.

He made the call after Kasten had already left the house. CR 17, 42. Specifically, he explained it was about 10-20 minutes between Kasten leaving the house and his wife, Terry, leaving to try to find her in Rosendale. CR 17, 50. He explained that he called the sheriff's department after his wife had already left, which means 10-20 minutes after Kasten had already left the house. CR 17, 50. He confirmed he never called before she left. CR 17, 51.

He called a second time to let them know she was safe and her car was in the driveway. CR 17, 42. He said he told them he did not need anyone to come out and do a wellness check. CR 17, 43.

He did not confront Kasten before she left. CR 17, 43.

He did not know that officers actually came to the house that night. CR 17, 44.

He explained that he made the second call after Kasten returned, that he could see her car it he driveway through the window when her mom was out talking to her about not coming back inside. CR 17, 45.

He did find that she bought alcohol and it was on the front seat, unopened. CR 17, 45.

He confirmed there has been an issue of hitting dear and not driving at night; he has hit three deer with his car. CR 17, 45-47.

He explained after Kasten returned that there was enough light outside that he could see Kasten and her mom talking in the driveway. CR 17, 51. He estimated that was a distance of 20 feet. CR 17, 56.

He explained he called the sheriff the second time after his wife had spoken to Kasten and then came in and informed him that Kasten would be sleeping in the driveway, but he couldn't say how long they had been talking in the driveway. CR 17, 53-54,

He said that the bottle of vodka he found on the front seat was unopened and he took into his possession unopened. CR 17, 54.

Deputy Andrea Prahl testimony

Prahl testified next for the County. CR 17, 58.

When she tried to testify as to what dispatch told her, the court sustained the hearsay objection and struck her testimony. CR 17, 59-60.

The court allowed her to say why she was dispatched solely to explain what she believed was the reason she was going on a call, but not for the content of the hearsay statements or entries from dispatch. CR 17, 60-61.

Prahl stated she was dispatched a second time at approximately 9:15 p.m. to Kasten's house and arrived there about 9:30 p.m. CR 17, 61.

Kasten's vehicle was parked in the driveway. Prahl saw Kasten in the driver's seat with the seat reclined. Kasten was lying back with her eyes closed. There was a skinny brown bag on the front passenger seat. CR 17, 61-62.

Prahl knocked on the window and made contact with Kasten. CR 17, 62.

Kasten told Prahl that she was sleeping in her car because she was not allowed in her parents' home. Kasten told her she had went down to Waupun to get more alcohol. CR 17, 63-64.

Kasten said she could not remember when she last drank but she was drinking Vodka. She did not drink anything since leaving the residence earlier. CR 17, 64.

Prahl had Kasten step out and perform filed sobriety tests and then arrested Kasten. CR 17, 64-69.

Prahl searched the vehicle and found the unopened bottle of vodka. CR 17, 69.

Prahl transported Kasten to St. Agnes Hospital for a blood draw. CR 17, 71-72.

The County attempted to introduce the dispatch CAD report (CR 8, Exhibit 2), to which there were objections. CR 17, 73-74.

There was discussion about the business records exception and potential discovery violation for failure to previously disclose the CAD report. CR 17, 74-79. The county attempted to have Prahl qualified as a person with knowledge for purposes of establishing the business records exception for the CAD report. CR 17, 79-81.

Defense counsel was allowed to *voir dire* the witness re the hearsay issue. Prahl explained that she did not create the CAD report and has no idea who did. She explained that the time entries are from somebody manually typing information into the system. Prahl stated she has no idea what delay there might be between the person receiving the information from a call and the information then getting typed into the system. CR 17, 81-82.

Prahl did not know what the time entries corresponded to. She did not know of the delay between the verbal phone calls and the time the entry is made.

She didn't know why there was a text entry when a verbal phone call was made. CR 17, 83.

Prahl further explained on redirect that dispatch is an intermediary between citizen calls and the sheriff's deputies, and that she does not know how much time elapses from dispatch receiving information from a citizen and dispatch employees entering it into the CAD system to get it out to patrol deputies. CR 17, 84.

The court ruled that any content of any calls to dispatch or dispatch calls out to officers would be inadmissible hearsay, and as for the times on the CAD report the court was not going to receive it into evidence. The CAD report was NOT received into evidence. CR 17, 84-89.

Prahl then continued and testified that she was first dispatched at 8:30 p.m. to the area of County Highway TC to locate a vehicle, but not to a specific address. 9:15 p.m. was the second dispatch. CR 17, 89-91.

On cross, Prahl said that when she went to the address, W10418, it was dark out. She used a flashlight to approach the vehicle. CR 17, 92.

She had to knock a few times before Kasten awoke. Prahl is the one that opened the driver's door. Kasten informed her she had been sleeping. CR 17, 94.

Prahl acknowledged the blood draw of Kasten's occurred at 10:52 p.m. CR 17, 96-97.

At no point did she ever touch the hood of Kasten's vehicle to see if it was still warm. CR 17, 97.

The bottle she located in the front passenger seat was still factory sealed/unopened. There were no other containers in the car. CR 17, 97.

Prahl does not know when Kasten drove and no other deputy observed her driving. CR 17, 98.

Prahl does not know what Kasten's alcohol level was at whatever time it was she may have driven, nor whether she was impaired. CR 17, 99.

The keys were in the ignition but in the off position. Prahl never observed Kasten touch the keys. CR 17, 99.

Lab Technician Testimony

Kayla Neuman from the State Lab of Hygiene testified. CR 17, 101.

The blood test result for Kasten was 0.197. CR 17, 105.

The blood collection time was confirmed to be 10:52 p.m., and the result of 0.197 is specific for that time because it is a measurement of the condition of the blood in the tubes at the time of collection. CR 17, 106.

Neuman explained that it would take eight to nine ounces of alcohol for a 175-pound female to get to that a 0.197 BAC level, assuming it all absorbed into the blood at the same time. CR. 17, 107.

She cannot speak to any specifics about absorption time for any particular person, only to generalities and assumptions. She stated that it takes between 30-90 minutes for alcohol to fully absorb into the blood on average, with a majority of alcohol absorbing 15 to 20 minutes after the last drink. For any individual,

absorption rates depend upon stomach contents, weight, and metabolism. CR 17, 107-108.

After doing the math, Neuman explained there are 25.36 ounces in a .750 ml bottle. CR 17, 112.

Neuman then calculated that for a 175-pound female to get to 0.197 BAC after a three-hour period, she would have consumed between 9 and 11 ounces of alcohol, or about 40% of a .750 bottle (which is very close to what Kasten testified she consumed in estimating the 1/3 bottle shortly before leaving her house). CR 17, 113.

Then Neuman was asked the crucial question in this case and gave the following answer:

> "Q Any way to accurately determine between the point of drinking and three hours later when the test occurs, where along that line the .08 threshold is crossed?
>
> A No."

CR 17, 114, lines 6-9.

She also then confirmed that the alcohol that Kasten drank on Saturday to Sunday would have been fully eliminated by the time Tuesday rolled around. CR 17, 114-120.

Upon redirect, the County had her confirm that if the time frame was 3 hours and 57 minutes for a 175-pound female, she would have had to drink between 10-12 ounces to get to 0.197. BAC. CR 17, 121.

Both parties then rested with the agreement to admit the lab report into evidence confirming the 10:52 p.m. blood draw time. CR 17, 122.

During closing the defense pointed out that the problem with the case is that the court would be speculating on when Kasten drove and what her BAC level was whenever that was. There was no other expert testimony which would allow the court to make any calculations, and no reliable way to conclude by clear, satisfactory, and convincing evidence what Kasten's BAC level was when she drove. CR. 17, 124-128.

The County argued Kasten's credibility, but the defense pointed out that the absence of evidence is not evidence; take away Kasten's testimony and there was no evidence as to when she drove. CR 17, 131.

The Court then made the following findings:

The alcohol that Kasten drank Saturday to Sunday had been fully eliminated by Tuesday and was not part of the equation. CR 17, 137.

The court is not accepting Kasten's timeline of drinking at 6:55 p.m. and then getting to and from the store and back to her house by 7:30 p.m. CR 17, 138.

The court can draw an inference that the initial contact from dispatch to Deputy Prahl came in a relatively close proximity to when Paul Kiser called the sheriff's department. CR 17, 138.

The court then found that if Terry Kiser left the home to look for Kasten 20 minutes after Kasten left the home, Kasten left the home and drove at 8:10 p.m., not 7:00 (this all assuming that Paul Kiser's call came in and was immediately dispatched out at 8:30 p.m.). The court did not believe that making this finding about the driving time was speculative. CR 17, 139.

That when Prahl performed field sobriety tests at 9:30 the defendant was over .08 BAC. CR 17, 139

That the 10:52 p.m. blood draw was therefore within 3 hours. CR 17, 139.

The court did not find sufficient evidence of operating while impaired. CR 17, 140.

The court did find, however, that Kasten drove with a prohibited alcohol concentration in her blood. CR 17, 140-141.

The court refused to reconsider its finding about the time of driving and the assumption about the inference correlating the dispatch call to the time of driving. CR 17, 142.

The court then applied the guideline penalties for over a .15 BAC over defense objection that even the court's findings did not support that conclusion (over a .15 at the time of driving) to the requisite burden of proof. CR 17, 143-144.

STANDARD OF REVIEW

Although reasonable inferences drawn from competing facts should not be disturbed unless clearly erroneous or against the great weight and clear preponderance of the evidence, the rule is different when the court draws a conclusion from essentially undisputed facts:

> "This finding rests upon conclusions drawn from the almost undisputed evidence as to the transactions between the several parties, rather than upon any conflict in the testimony. It therefore does not carry with it the same conclusiveness of a finding resting only upon probative disputed facts. It is rather in the nature of a legal conclusion drawn from undisputed evidence, which, if not in accordance with the view of this court, can be disregarded almost as readily as a pure error of law on the part of the trial court. This is said not by the way of criticism of the finding made or of its form, but as a reason why this court feels free to disregard it, though nominally a finding of fact."

Weigell v. Gregg 161 Wis. 413, 154 N.W. 645, at 646 (Wis., 1915); *accord Vogt, Inc. v. International Broth. of Teamsters, Local 695, A.F.L.* 74 N.W.2d 749, at 754, 270 Wis. 315 (Wis., 1956); *and Cutler-Hammer, Inc. v. Industrial Commission*, 109 N.W.2d 468, 13 Wis.2d 618 (Wis., 1961).

Areas outside of common knowledge are not susceptible to reasonable inferences, and absent testimony the trier of fact is not permitted to speculate as to

what inferences to draw. See *Ollman v. Wisconsin Health Care Liability Ins. Plan*, 505 N.W.2d 399, at 405, 178 Wis.2d 648 (Wis. App., 1993).

A judgment based on findings which are contrary to the undisputed testimony may be reversed unless the trial court was justified in wholly disregarding the undisputed testimony in light of the other evidence. *Bradley v. Selden*, 201 Wis. 61, 228 N.W. 494 (Wis., 1930).

Although a trial court is not required to adopt uncontradicted testimony if inherently improbable, the court may not disregard uncontradicted testimony as to the existence of some fact or the happening of some event in the absence of something in the case which discredits the testimony or renders it against reasonable probabilities. *Ashraf v. Ashraf*, 397 N.W.2d 128, at 132, 134 Wis.2d 336 (Wis. App., 1986); *Thiel v. Damrau*, 268 Wis. 76, 66 N.W.2d 747, at 752 (Wis., 1954); *Holbrook v. Holbrook*, 309 N.W.2d 343, at 347, 103 Wis.2d 327 (Wis. App., 1981).

ARGUMENT

I. THE COURT ERRED IN INFERING THE TIME OF DRIVING:

The court used as its hinge-pin for the entire case an inference drawn from the hearsay 8:30 p.m. dispatching of deputy Prahl. The court stated it was making a finding that the dispatch call was "close in time" to when Paul Kiser must have called in his concerns. Making this inferential finding was legal error for several reasons.

A. THE COURT MADE AN INFERENCE FROM EXCLUDED HEARSAY EVIDENCE.

The court rejected Kasten's testimony regarding time of driving. Assuming for the moment this was permissible, this left an evidentiary gap as to when she drove. But the absence of evidence is not evidence. *Whiteaker v. Black*, 347 Wis.2d 549, 830 N.W.2d 722, 2013 WI App 55 ¶ 26 (Wis. App., 2013).

The County bore the burden of proof. Absent Kasten's testimony about when she drove, the court had little else upon which to make a finding by clear, satisfactory, and convincing evidence. Paul Kiser did not know what time he called the Sheriff's Department. Terry Kiser could not say when she saw Kasten leave. Deputy Prahl had no knowledge of when Kasten drove.

The undisputed evidence was simply that Prahl was dispatched to an area at 8:30 p.m., but observed nothing. And that evidence was admitted solely for the purpose of why Prahl went to that area. The dispatch call evidence itself, including the time, was hearsay and was excluded from substantive use.

The trial court contradicted its own ruling and stated it was drawing a time inference from the substance of this excluded 8:30 p.m. dispatch of Prahl.[1] Since

[1] If the Court were reconsidering its exclusion of Exhibit 2 (CR 8, Ex. 2), it should be noted that therein the dispatch log says it was created at 8:18 p.m. but makes no mention of whether its creation reflects that actual time of the call. It also shows substantial delays between the documentation of various communications and the actual dispatching of officers. There is no means to decipher these entries without the assistance of a witness with knowledge of the document.

the evidence itself was excluded, so too would any claimed inference to be drawn from such evidence.

The court did not admit the CAD report. All times and contents therein were hearsay, CR 17, 84-89, and for good reason.

Prahl explained she has no idea what delay might occur between a dispatcher receiving a citizen call and the dispatcher entering information into the dispatch system for purposes of dispatching officers. CR 17, 81-82.

Prahl did not know the delay between verbal phone calls to the Sheriff's department and the ultimate time of dispatch. CR 17, 83.

Prahl explained that dispatch is an intermediary agency between citizen calls and the sheriff's deputies, and that she does not know how much time elapses from dispatch receiving information and their entering it into the CAD system to get it to patrol deputies. CR 17, 84.

The County could have called the dispatcher as a witness to provide this omitted information, but chose not to.

The remaining evidence was insufficient for the court to make any inferential finding as to when Paul Kiser's call was made, let alone the next step which was finding when Kasten last drove before the officer's 9:30 p.m. arrival at her driveway.

The court was not permitted to draw an inference unsupported by the evidentiary record, especially evidence that was excluded as inadmissible hearsay.

B. EVEN IF THE COURT COULD CONSIDER THE 8:30 TIME OF DISPATCHING PRAHL, THE INFERENCE THAT THE TIME COULD BE USED TO DENOTE WHEN PAUL KISER CALLED WAS NOT A REASONABLE INFERENCE.

The hearsay nature of the dispatch call is not the only problem; the inference itself was not reasonable, and under the rule of *Weigell, above,* can and should be disregarded by this reviewing court.

The trial court had no information in the record to conclude whether the dispatch call was placed immediately after Paul Kiser called, or some other time. Nobody from dispatch testified. The only evidence before the court was that Prahl had no idea how much time elapses between citizen calls and dispatching officers.

So while it was undisputed that Prahl was dispatched at 8:30 p.m., the court lacked any other evidence as to the operations of the dispatch center to draw an inference as to when Paul Kiser's call may have previously been made.

As such, the only reasonable inference to be drawn from the undisputed time of the dispatch call is to conclude that it represents the time when the dispatcher entered the information into the system. That was the only evidence in the record before the court.

Any other conclusions as to when Paul Kiser may have previously called the Sheriff's department prior to the dispatch call going out to officers is speculation. It is not an inference based on any fact in the record, but an assumption about dispatch practices and procedures.

There was no evidence presented about dispatch operations in this regard. Dispatch operations, or more specifically average time lapse between citizen calls and CAD entries, if there are any, is not information within the common knowledge of a trier of fact. Merely because judges and attorneys work in the legal system and 911 calls are common evidence does not ergo make judges experts on dispatch operations allowing the type of inference the trial court made. Even if the trial judge has some specialized knowledge about dispatch operations (which was not stated), that knowledge must be disregarded and reliance made only on the evidence presented at trial.

We can all speculate as to what may have happened, but speculation is not reasonable inference. For example, perhaps dispatch was busy handling an emergency; perhaps dispatch was short staffed; perhaps the dispatcher was using the restroom, or went on break before entering information. We just don't know. Assuming that a dispatcher normally enter items into the CAD system within a short period of time in the first place is no better than any other speculation.

Such hypotheses are not inferences but guesses. An inference is a conclusion reached on the basis of evidence and reasoning. Because there was no evidence of any dispatch operations regarding time between citizen calls and dispatch times, the conclusion that Paul Kiser's call was close in time to the 8:30 p.m. dispatch time was by definition not based on evidence and reasoning. That was an assumption which as a matter of law amounts to speculation.

If we ask, on what evidence did the court rely upon to infer that Paul Kiser's call was near in time to Prahl being dispatched, we quickly realize the answer is "none." The court must have been relying on inherent beliefs or harbored information not presented at the trial. The court was making a broad assumption that every time officers are dispatched it is always close in time to the citizen call coming in. This was not part of the evidentiary record.

So while the court chose to reject Kasten's timeline, what the court could not do is fill in the evidentiary gaps. The entire basis for the court finding that Kasten drove with a PAC, and that the blood draw was within 3 hours of her driving, was speculation that the dispatch time was the same time as Paul Kiser's call to the sheriff.

To put it in context, 7:52 p.m. was the 3-hour cut-off prior to the blood draw which would create a presumption under section 885.235(1g) Wis. Stats. There was no clear, convincing and satisfactory evidence presented by the County that Kasten drove at 7:52 p.m. or thereafter. The only evidence of time of driving was between 6:55 p.m. and 7:30 p.m., but the court said it rejected that timeline.

The court making an impermissible inference about a temporal connection between hearsay dispatch time and the time of Paul Kiser's call, thereby making a finding about the time of driving being 8:10 p.m. and within the 3-hour presumption period, was legal error and must be reversed. Kasten has been convicted of an offense for which there was insufficient evidence presented.

C. THE COURT ERRED IN REJECTING KASTEN'S UNCONTRADICTED TESTIMONY ABOUT HER DRIVING TIME.

Kasten testified as to her driving time being between 6:55 p.m. and 7:30 p.m. on August 16, 2016. Her testimony was uncontradicted.

Additionally, Kasten's testimony was corroborated by several other items of evidence. First, the exhibit 1 map corroborated the drive times and distances.

Next, the amount of daylight was described by Terry and Paul Kiser. Terry said it was dusk but not dark enough to need headlights. Paul could see Terry Kiser and Kasten talking after Kasten came back. There was enough light to see through the window and 20 feet out to the driveway.

All three testified about the dear problem and avoiding driving at night.

Terry Kiser explained her normal bedtime and work schedule which corroborated Kasten's drive time.

Finally, The remaining record contained nothing that rendered Kasten's testimony improbable or otherwise justified the court in wholly disregarding Kasten's uncontradicted testimony about her time of driving.

Prahl did not feel the hood of the car.

When Prahl arrived at 9:30 p.m. it was dark out and she needed to use her flashlight.

While the court claimed that Prahl's field sobriety testing led her to a conclusion that Kasten was over .08 after 9:30 p.m., this was not inconsistent with Kasten's description of what she drank and when she drove earlier.

The court's rejecting Kasten's timeline appears entirely based upon considering the hearsay dispatch time and assuming it was close in time to when Paul Kiser called the sheriff. CR 17, 137-139.

The court had virtually no evidence upon which Kasten's description of the timeline was rendered improbable under the rule of *Ashraf/Thiel/Holbrook above*.

And there is good reason for this rule in the adversary system. If the County had evidence to contradict Kasten, the law presumes the County would have presented that evidence as part of the trial. But it did not.

What the court did was reject uncontradicted testimony which was supported by other evidence in the record, and then replace that testimony with an inference from excluded hearsay, all towards the end of convicting Kasten for drunk driving when no evidence was presented to establish when she drove nor that she was impaired or had a PAC whenever she drove.

II. THE EVIDENCE WAS INSUFFICIENT TO FIND THAT KASTEN DROVE WITHIN 3 HOURS OF THE 10:52 P.M. BLOOD DRAW

The 10:52 p.m. blood draw was not established to have occurred within 3-hours of Kasten's driving or operating her motor vehicle. Prahl arrived at 9:30 and did not know when Kasten drove.

As explained above, the dispatch call is of no consequence to this issue. Paul Kiser called in at an unknown time. Kasten was uncontradicted that she drove last at 7:30 p.m.

There is little more than assumption or vague estimations as to exactly when Kasten drove. Nothing established Kasten driving on or after 7:52 p.m. by any standard of proof.

The County was not entitled to any presumption under section 885.235(1g) Wis. Stats. because the County failed to establish that the 10:52 p.m. blood test was administered within 3 hours of Kasten's driving. As such, the results were not admissible on the issue of whether Kasten was under the influence or had a prohibited alcohol concentration. § 885.235(1g) Wis. Stats. The court therefore improperly used this evidence.

III. THE EVIDENCE WAS INSUFFICIENT TO FIND THAT KASTEN HAD A PROHIBITTED BLOOD ALCOHOL CONCENTRATION AT THE TIME OF DRIVING.

The court's overall conclusion that Kasten drove with a prohibited alcohol concentration is not supported by the record. It is against the great weight and clear preponderance of the evidence. It is further based on the improper consideration of the hearsay dispatch call time over the trail court's own ruling, and the improper presumption derived from § 885.235(1g) Wis. Stats.

Prahl found Kasten impaired at 9:30 p.m. based on her field sobriety tests. That does not tell us when she drove. It does not tell us if she was impaired when

she drover sometime earlier. It is certainly not clear, convincing and satisfactory evidence of the prohibited alcohol concentration sometime earlier.

The 10:52 p.m. test results of 0.197 were not admissible on the issue of Kasten's BAC more than three hours earlier.

Even if the test result is considered for 10:52 p.m., the only evidence presented by the county was that there was no reliable method to determine if Kasten was over .08 when she drove hours earlier. Neuman's testimony corroborated Kasten's claim that she downed about 40% of a .750 ml bottle of Vodka before she drove more than three hours earlier. Neuman stated she could not reliably calculate Kasten's BAC earlier.

Any conclusion that Kasten was .08 or higher whenever it was that she drove was speculation. It was not established by clear, satisfactory and convincing evidence. This conviction must be reversed.

IV. THE COURT IMPROPERLY SENTENCED KASTEN TO AN IGNITION INTERLOCK DEVICE

As indicated, the court issued a sentence for Kasten based on the guidelines for a .15 or higher BAC and therefore ordered an ignition interlock device. That device was only authorized if Kasten's BAC met the threshold of section 343.301(1g) "at the time of the offense."

The defense objected that even using the court's own (faulty) inferential fact finding, there was no way to conclude Kasten's BAC met this threshold at the time of driving.

The court had no authority to order the ignition interlock device. § 343.301(1g) Wis. Stats. It is also inappropriate to apply the guidelines as the sole basis for a sentence. *State v. Jorgensen*, 264 Wis. 2d 157, 667 N.W.2d 318, 2003 WI 105 ¶ 27 (Wis., 2003).

CONCLUSION

The County failed to present evidence of when Kasten drove, or what her BAC was when she drove. The court improperly rejected Kasten's testimony and then filled in the missing evidence with an improper inference. The county failed to meet its burden of proof and yet the Court convicted Kasten of driving with a prohibited alcohol concentration. The conviction must be reversed.

The court then went on to sentence Kasten to an ignition interlock device even though the court had no way to conclude her BAC level at the time of the offense. Even if her conviction is not overturned, the IID order was not authorized.

Respectfully Submitted:

Dated:_____

_____

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CERTIFICATION TO FORM AND LENGTH

I hereby certify that this Brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with proportional serif fond. The length of the body of this Brief is 27 pages and 6,159 words.

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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 s. 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.

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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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I hereby certify that on the date signed below, I mailed 10 copies of this brief and appendix (original plus 9) to:

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