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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP44-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES R. MUELLER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in Marathon County Circuit Court,
the Honorable Greg Huber, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Whether the state presented sufficient evidence for the jury to convict Mr. Mueller of driving under the influence of low levels of prescription drugs to an extent that rendered him incapable of driving safely.

The circuit court answered yes by entering a judgment of conviction on the jury's guilty verdict. (35; App. 133).

II. Whether Mr. Mueller's Fourth Amendment right to be free from unreasonable seizures was violated when an officer extended a valid traffic stop to conduct field sobriety tests because "something felt off" and subsequently placed Mr. Mueller under arrest for driving under the influence of a drug.

The circuit court answered no, and denied Mr. Mueller's motions to suppress. (53:28–31; App. 128–31).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because the briefs can adequately set forth the arguments in this matter. This case does not qualify for publication because it is a misdemeanor appeal. *See* Wis. Stats. §§ 809.23(1)(b)4 and 751.31(2)(f).

STATEMENT OF THE CASE AND FACTS

On August 15, 2016, the state charged James R. Muller with operating a motor vehicle while intoxicated, fourth offense, contrary to Wis. Stat. §§ 346.63(1)(a) and 346.65(2)(am)4. (1).

Mr. Muller moved to dismiss the criminal complaint on the grounds that the four corners of the complaint failed to support the allegation that he was driving under the influence of an intoxicant. (7:1–2). The state subsequently filed (1) a motion to amend the complaint, and (2) an amended complaint charging Mr. Mueller with operating a motor vehicle under the influence of drugs, fourth offense. (10; 11). The circuit court accepted the complaint at a subsequent hearing. (53:4; App. 104).

Following the state's motion to amend the complaint, Mr. Mueller filed two motions to suppress evidence as fruits of an illegal seizure. (8; 9). The circuit court held a hearing and denied the suppression motions. (53:28–31; App. 128–31). Mr. Mueller subsequently filed a motion for reconsideration, which the circuit court denied. (54).

The parties then proceeded to trial and the jury returned a guilty verdict. (55:181–182). The circuit court accepted the jury's verdict and entered a judgment of conviction at the conclusion of trial. (55:182; 35; App. 133).

Mr. Mueller will summarize all of the pertinent facts of his case where appropriate in his argument.

ARGUMENT

I. The State Presented Insufficient Evidence for a Jury to Find That Mr. Mueller Was Operating a Motor Vehicle Under the Influence of Low Levels of Prescription Drugs to an Extent That Rendered Him Incapable of Driving Safely. Therefore, the Conviction Must Be Reversed.

A. Introduction and Relevant Facts

1. Introduction

The sole issue at trial was whether Mr. Mueller was impaired by his prescription medications to an extent that rendered him incapable of safely driving. The presence of a prescription drug in an individual's system is not sufficient to prove that their ability to drive safely was so impaired.

At trial, the state offered testimony that: (1) Mr. Mueller was operating a vehicle, which was stopped in the middle of a lane of traffic; (2) Mr. Mueller's behavior seemed strange to Officer Austin; (3) Mr. Mueller exhibited clues on two field sobriety tests designed primarily to predict impairment due to alcohol use; (4) Mr. Mueller admitted to taking prescription Clonazepam; and (5) Mr. Mueller had approximately 16 nanograms per milliliter of Clonazepam and Zolpidem in his blood. It was undisputed that (1) Mr. Mueller had a valid prescription for Clonazepam and Zolpidem, and (2) the level of each prescription in his blood was below the therapeutic level.

The state presented general testimony regarding the potential side effects of Clonazepam and Zolpidem that the average person *might* experience. However, the same witness specifically said he could not render an opinion as to whether

the low levels of prescription drugs found in Mr. Mueller's blood impaired his ability to drive safely.

In the absence of direct testimony that Mr. Mueller's ability to drive safely was impaired by prescription drugs, the state attempted to prove this element via circumstantial evidence. The state did not present sufficient circumstantial evidence to connect Mr. Mueller's behavior to the general testimony regarding the potential impairing side effects of his prescription drugs, and this court should therefore reverse.

2. Relevant Facts

Trial Testimony of Officer Austin

Officer Austin testified that on July 16, 2016, he observed Mr. Mueller's vehicle stopped in a lane of traffic on Business Highway 51 in Wausau. (55:67). The officer turned off the highway, came back around, and observed Mr. Mueller's vehicle stopped in the easternmost lane of traffic. (55:68). His vehicle was approximately 75 feet from the traffic light, which was green. (55:68).

Officer Austin activated his emergency lights and pulled up behind the vehicle, which he believed was disabled. (55:68). The officer did not independently observe any erratic driving or receive any driving complaints prior to the stop. (55:89). The officer also testified that cars were going around Mr. Mueller's vehicle while it was stopped, but noted that the highway "wasn't that busy" at the time. (55:67, 68).

When the officer approached the vehicle, Mr. Mueller had his head down and was writing something on a piece of paper. (55:91). When asked if everything was okay, Mr. Mueller informed the officer that he was waiting for the light to turn green. (55:69). The officer said that the light was

green, and Mr. Mueller thanked the officer and attempted to drive away. (55:69). Officer Austin ordered Mr. Mueller to stop, and he complied immediately, driving forward a "couple feet" before stopping. (55:69, 88).

Officer Austin testified that Mr. Mueller seemed distracted while he was stopped, but he did not observe any indications that Mr. Mueller was intoxicated. (55:70, 71, 91). He further acknowledged that Mr. Mueller was alert during their interaction and did not appear "sleepy" or "lethargic." (55: 91, 92).

The officer then returned to his squad car and checked Mr. Mueller's license and registration, which showed that Mr. Mueller was a 58-year-old man who had no driving restrictions. (55:90). While he was in his squad car, Officer Austin radioed for a second vehicle because he wanted to conduct field sobriety tests. (55:92).

Officers Carr and Bornemann responded. (55:72). Officer Austin explained his observations and his decision to conduct field sobriety testing. (55:72). While the officers were conversing, Mr. Mueller yelled out his window that his van had "stalled." (55:93). Officer Austin observed that the vehicle was running, and did not investigate claims that the van was stalling any further. (55:95–96).

The officers then returned to Mr. Mueller's vehicle and asked him to step out of the vehicle for field sobriety testing. (55:72). Mr. Mueller exited his vehicle without incident and was escorted to the back of his vehicle to conduct field sobriety tests on the road. (55:72). Officer Austin testified that Mr. Mueller seemed "antsy to get going" when he exited the vehicle, (55:72), but he nonetheless appeared to understand the instructions. (55:100). However, Officer Austin also testified that Mr. Mueller expressed concern

multiple times that he needed to get home quickly to care for his mother, who was sick and on an oxygen tank. (55:106).

The officers observed zero clues of impairment from Mr. Mueller during the horizontal gaze nystagmus (hereinafter "HGN") test. (55:75). Officer Austin testified that the HGN test is designed for alcohol, but it will also detect impairment due to "some drugs." (55:74).

After he completed the HGN test, Mr. Mueller mentioned that he had ruptured a disc in his back. (55:101). Officer Austin acknowledged that a physical impairment or injury might affect how an individual performs on a test, and that an officer can administer alternative tests due to physical impairments. (55:101). Despite Mr. Mueller's stated back problems, Officer Austin continued with the standard field sobriety tests. (55:101).

Officer Austin conducted the walk-and-turn test. (55:75). He observed four of eight clues of impairment while administering this test. (55:78). Specifically, the officer said that Mr. Mueller started the test early, failed to touch heel to toe on several steps, turned the wrong way, and raised his arms past six inches from his side for balance. (55: 78).

During the one-leg stand test, the officer observed Mr. Mueller "swaying and using his arms for balance above the six inches [from his side]," which showed two of four clues of impairment. (55:79).[1]

[1] The State published a portion of Exhibit 5, which was a DVD with the squad cam recording of Mr. Mueller's stop, to the jury. (26). Specifically, the jury observed the video from 16:29:58 to 16:34:04, which depicted Mr. Mueller performing the walk-and-turn and one-leg-stand tests. (55:86; 26). This portion of the recording was published without audio. (55:86).

Officer Austin testified that the field sobriety tests he administered were developed by the National Highway and Traffic Safety Administration (hereinafter "NHTSA") to detect whether a person might be under the influence of alcohol. (55: 103). Two or more clues on either the walk-and-turn or one-leg-stand tests were indications that an individual's blood-alcohol concentration was above 0.08. (55:103).

Officer Austin attempted to classify the field sobriety tests administered in this case as general tests for "impairment," which could include impairment by drugs. (55:103). However, he testified that there are additional field tests that are specifically administered by a "drug recognition expert" (hereinafter "DRE") to detect impairment from drugs, such as the Romberg balance test and "the ABC test." (55:105; 116–17). Officer Austin is not a DRE, and neither he nor any of the other officer conducted drug-specific tests on Mr. Mueller that day. (55:105).

On re-direct examination, Officer Austin testified that Officer Carr was a DRE. (55:117). However, he testified that Officer Carr "got sent to another call while we were wrapping up." (55:117). He did not testify to any drug-specific observations Officer Carr made.

At the conclusion of the field sobriety tests, Officer Austin asked Mr. Mueller if he had used any prescription drugs. (55:81). Mr. Muller responded that he took Clonazepam, which he had been taking "for awhile" at four pills a day. (55:81).

Officer Austin then placed Mr. Mueller under arrest "based on the series of tests and the clues he had exhibited." (55:81). After placing Mr. Mueller in his squad car, Officer Austin discussed the situation with another officer and

suggested that "maybe Mr. Mueller wasn't taking the field sobriety tests seriously." (55:102).

After Officer Austin arrested Mr. Mueller, he read him the Informing the Accused form. (55:81). Mr. Mueller agreed to submit to a blood draw. (55:82).

Mr. Mueller was transported to a hospital shortly thereafter and complied with a blood draw. (55:82, 112). While they were at the hospital, Mr. Mueller was alert and asked the officer appropriate and coherent questions—such how he could be issued a citation when he was not drunk, when his court date would be, and how long he would have to stay in jail. (55:111). Mr. Mueller also correctly instructed the officer that he was innocent until proven guilty. (55:12). Mr. Mueller's speech was clear throughout this encounter, and he did not appear lethargic or drowsy. (55:112).

After the blood draw, Officer Austin took Mr. Mueller to his squad car and conducted a search incident to arrest, during which he discovered a pill bottle for prescription Clonazepam with Mr. Mueller's name on it. (55:113). He could not recall how many pills per day were prescribed, or how many pills were in the bottle at the time. (55:114).

Trial Testimony of Michael Knutsen

The state called Michael Knutsen, a senior chemist at the Wisconsin State Lab of Hygiene, to testify via telephone about the results of Mr. Mueller's blood test. (55:119).

Prior to the start of trial, Mr. Mueller filed a ***Daubert***[2] motion to exclude certain testimony from Mr. Knutsen. (16). The motion sought to exclude any testimony regarding the

[2] ***Daubert v. Merrell Dow Pharmaceuticals***, 509 U.S. 579 (1993).

effects that the prescriptions in Mr. Mueller's system would specifically have on his ability to drive safely. (16:1, 2).

The court held a hearing on Mr. Mueller's ***Daubert*** motion. (55:3). At the conclusion of that hearing, the court held that Mr. Knutsen was permitted to "describe[] in general the effects of the drugs on the general population or people and not be specific as to how it impacts specifically Mr. Mueller." (55:12).

At trial, the state offered a copy of the lab report summarizing the analysis of Mr. Mueller's blood. (55:122; 29:2). Mr. Knutsen testified that no alcohol was detected in Mr. Mueller's blood sample. (55:122; 29:2). The drug screens conducted on Mr. Mueller's blood sample detected the presence of two prescription drugs: Clonazepam and Zolpidem. (55:122–23; 29:2).

Mr. Knutsen testified that prescription drugs have a "therapeutic range," which is "the amount you would expect in someone's body if [the prescription drug is] taken as prescribed." (55:127). Mr. Knutsen testified that he would expect a person to show signs of impairment from a prescription drug if they were in the therapeutic range. (55:136). The therapeutic range for Clonazepam is 20 to 80 nanograms per milliliter, and the therapeutic range for Zolpidem is 80 to 150 nanograms per milliliter. (55:127). The drug screens conducted on Mr. Mueller's blood sample showed 16 nanograms per milliliter each of Clonazepam and Zolpidem. (55:122–23; 29:2).

Mr. Knutsen testified that Clonazepam is a central nervous system depressant commonly prescribed to treat anxiety. (55:126). Some of the side effects of Clonazepam

might be impaired judgment, impaired vision, impaired muscle coordination, increased confusion, and increased drowsiness. (55:126).

Mr. Knutsen explained that Zolpidem is also a central nervous system depressant which is often taken as a sedative. (55:127). It is prescribed to help treat insomnia, and it can cause dizziness, confusion, and a decrease in concentration. (55:127). Those who take Zolpidem are instructed to do so before they go to bed because it enters the blood and metabolizes quickly in order to produce the sedative effect. (55:137, 138).

Mr. Knutsen testified that taking both of the prescription drugs found in Mr. Mueller's system could have an "additive effect on impairment." (55:128). He said that an impairment caused by Zolpidem can be added onto the impairments caused by Clonazepam, making the overall impairment worse. (55:128). He opined that the drugs in Mr. Mueller's blood could have caused impairment. (55:129).

On cross examination, Mr. Knutsen acknowledged that both drugs found in Mr. Mueller's blood tested below their respective therapeutic ranges. (55:131). He also acknowledged that "every person is different with respect to the effect the drug will have." (55:131). Factors such as gender, age, and how long someone has been taking a medication affect how a body responds to the drug. (55:132). With respect to Clonazepam, Mr. Knutsen testified that tolerance was a "big factor," and that someone talking Clonazepam regularly and at the same dosage "can develop a tolerance where they no longer have the impairing side effect." (55:132, 135–36).

Based on the levels of each drug found in Mr. Mueller's blood sample, Mr. Knutsen acknowledged that he "couldn't render an opinion regarding [Mr. Mueller's] ability to safely drive." (55:135). He acknowledged that there was no legal limit for the amount of either drug that could be in one's system when driving. (55:134). He also testified that someone with only 16 nanograms per milliliter of both Clonazepam and Zolpidem in their system might not be impaired at all. (55:134, 135). With regard to Zolpidem specifically, Mr. Knutsen testified that he could not conclude that Mr. Mueller was "under the influence of Zolpidem" based on the low levels detected in his blood sample. (55:139).

Trial counsel for Mr. Mueller offered Exhibit 1, which contained Mr. Mueller's prescription records from Walgreens pharmacy and included an affidavit from the pharmacy's custodian of records. (55:149; 27). The records showed prescriptions for Clonazepam and Zolpidem, which were refilled regularly from January 1, 2016, through May of 2017. (55:149; 27). Exhibit 1 was received without objection. (55:149).

After the jury was excused to deliberate, they submitted a question to the circuit court which asked: "Did the medicine bottles have the warning label that states do not operate [a] motor vehicle?" (55:181, 32). The court responded that "it is not in evidence." (55:181, 32).

B. Legal Principles and Standard of Review

A conviction based upon insufficient evidence cannot constitutionally stand. ***Jackson v. Virginia***, 443 U.S. 307 (1979). The United States and Wisconsin Constitutions protect the accused from a criminal conviction "except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged." ***In re Winship***, 397 U.S. 358, 365 (1970); *accord* ***State v. Smith***, 117 Wis. 2d 399, 415, 344 N.W.2d 711 (Ct. App. 1983). The evidence 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." ***State v. Poellinger***, 153 Wis. 2d 493, 502, 451 N.W.2d 752 (1990).

Furthermore, jury verdicts must be based on evidence, not "conjecture and speculation." ***Herbst v. Wuennenberg***, 83 Wis. 2d 768, 774, 266 N.W.2d 391 (1978). Facts may be established by reasonable inferences in addition to direct evidence, but an inference is only reasonable if can be fairly drawn from the facts in evidence. ***In re Paternity of A.M.C.***, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988). A proper inference is one drawn from logic and proper deduction. ***Id.*** While "a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation." ***Piaskowski v. Bett***, 256 F.3d 687, 693 (7th Cir. 2001); ***Yelk v. Seefeldt***, 35 Wis. 2d 271, 280–81, 151 N.W.2d 4 (1967).

A criminal defendant may challenge the sufficiency of the evidence on appeal regardless of whether or not he specifically raised the issue at trial. ***State v. Hayes***, 2004 WI 80, ¶4, 273 Wis. 2d 1, 681 N.W.2d 203. An appellate court does not substitute its judgment for the factfinder, but instead asks whether the evidence, viewed in the light most favorable to the state, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***Id.***, ¶56. If the reviewing court concludes that the evidence was insufficient, the conviction must be reversed and the matter must be remanded to the circuit court

for entry of a judgment of acquittal. ***State v. Wulff***, 207 Wis. 2d 143, 144–45, 557 N.W.2d 813 (1997) (citing ***Burks v. United States***, 437 U.S. 1, 18 (1978)).

C. The state presented insufficient evidence to prove beyond a reasonable doubt that the low levels of prescription drugs in Mr. Mueller's system impaired him to an extent that he could not drive safely.

Taking a prescription drug before driving is not illegal in Wisconsin; what is illegal is: (1) "driving a motor vehicle on a highway," while (2) "under the influence [of a drug] to a degree which renders [one] incapable of safely driving." Wis. Stat. § 346.63(1)(a); WIS-JI CRIM 2666. The jury was informed of each of these elements at trial. *See* (55:153).

The elements of driving under the influence of a drug are distinguishable from driving under the influence of alcohol, and that distinction is important. When alcohol is involved, the jury is to determine whether a person's "ability to operate a vehicle is impaired." WIS-JI CRIM 2663. However, for alleged impairment due to a prescription drug, the jury instructions committee explains:

> The Statute [for operating a motor vehicle while under the influence of a drug] requires not only operating while "under the influence" but also that the defendant be under the influence "to a degree which renders him or her incapable of safely driving." The "incapable of safely driving requirement appears to be more restrictive than "the ability to operate is impaired" standard that is part of the uniform definition of "under the influence."

WIS-JI CRIM 2666, n.7; *see also* **State *v. Hubbard***, 2008 WI 92, 52, 313 Wis. 2d 1, 752 N.W.2d 839 (affirming the jury instructions committee's reasoning).

In addition to the added "incapable of safely driving" component of the second element, the prosecutor cannot simply prove impairment by submitting the results of a blood test. The jury instructions for impairment due to alcohol provide that a jury "may find from [an admitted blood test showing an alcohol concentration of .08 or more] alone that the defendant was under the influence . . . at the time of the alleged driving." WI-JI CRIM 2663. The instructions for impairment due to a drug contain no such provision. *See* WI-JI CRIM 2666. Thus, the state must prove both the presence of a drug in the driver's system *and* impairment by that drug to the higher "incapable of safely driving" degree. WIS-JI CRIM 2666, n.7.

The state relied on the following evidence at trial: (1) Mr. Mueller's field sobriety test performance and his behavior prior at the time of the stop; and (2) Mr. Knutsen's testimony about the effects of Clonazepam and Zolpidem on the general population. This argument will address each of these categories in turn to show that the state did not meet its evidentiary burden.

1. Mr. Mueller's performance on the field sobriety tests was of limited probative value because (1) the results of those tests are not dispositive, absent additional indicia of impairment, and (2) the tests conducted in this case were designed to detect impairment due to alcohol, not prescription drugs.

The state focused on Mr. Mueller's performance on field sobriety tests to argue that he was impaired and unable to drive safely. In its closing argument, the state walked the jury through each clue of impairment that Officer Austin

observed during the walk-and-turn and one-leg-stand tests, (55:157–59), and it emphasized that those observed clues formed the basis for Officer Austin's suspicion that Mr. Mueller was impaired. (55:159). Considering the lack of additional articulable clues of impairment due to drugs, Mr. Mueller's performance on these tests was not dispositive, nor did his performance on these tests eliminate all reasonable hypotheses of innocence to lead a jury to find him guilty beyond a reasonable doubt.

It is important to note that field sobriety tests are "not scientific" or conclusive evidence of impairment. ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶17, 278 Wis. 2d 643, 693 N.W.2d 324. They are "observational tools, not litmus tests that scientifically correlate certain types or numbers of 'clues' to various blood alcohol concentrations." ***Id.*** Field sobriety tests are largely based on an officer's "subjective evaluation" of the test subject, and therefore "should be 'placed in the same category of other signs of impairment, such as glassy or bloodshot eyes, slurred speech, staggering, flushed face, labile emotions, odor of alcohol, or driving patterns.'" ***Id.***, ¶20 (citing ***State v. Meador***, 674 So.2d 826, 831–32 (Fla. Dist. Ct. App. 1996)).

Under the framework provided in ***Wilkens***, the results of the standardized field sobriety test in this matter were of limited probative value. As mere "observational tools" akin to other signs of impairment, those observations are of less evidentiary value without additional observed drug-specific clues to support a conclusion of impairment. The only other testimony about Mr. Mueller's demeanor offered at trial that was even remotely suggestive of impairment was that Mr. Mueller appeared "distant" at the time of the stop and admitted to taking Clonazepam per his prescription. (55:71, 81). The officer did not observe any driving conduct that put

others on the road at risk, nor did he receive any complaints about Mr. Mueller's driving. (55:89). Officer Austin arrested Mr. Mueller "based on the series of tests and the clues he exhibited." (55:81). That performance alone—without other specific, articulable clues of impairment—is not sufficient for a jury to jury to conclude that he was impaired by prescription drugs to the extent that he was incapable of driving safely beyond a reasonable doubt.

The evidentiary value of Mr. Mueller's performance on the field sobriety tests is further limited because the jury heard two reasonable explanations offered for Mr. Mueller's performance on those tests. Officer Austin testified that Mr. Mueller appeared "antsy to get going" before the field sobriety tests, and that he explained multiple times that he needed to get home quickly to care for his sick mother. (55:72, 106). That evidence reasonably explained why Mr. Mueller would have started the walk-and-turn test early, or why it appeared he "wasn't taking the field sobriety tests seriously." (55:102).

The jury also heard that Mr. Mueller was a 58-year-old man, (55:90), who suffered from back problems. (55:101). Officer Austin acknowledged that physical impairment such as a back injury might affect how someone performs on a test, but he did not determine the extent of those injuries or offer alternative tests to account for that injury. (55:101). Instead, he simply proceeded with regular sobriety tests as planned. (55:101). Because the results of these tests were so crucial to the state's case against Mr. Mueller, his back issues—which offer a reasonable explanation for some of the clues observed during his field sobriety tests—were significant and thereby reduced the probative value of his test performance. Accordingly, the evidence of impairment offered via Mr. Mueller's field sobriety test results was not "so

sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence." ***Poellinger***, 153 Wis. 2d at 503.

The probative value of the field sobriety tests was further reduced because the two tests that produced clues of impairment were designed to detect impairment due to alcohol. The Wisconsin Court of Appeals explained that the NHTSA developed the field sobriety tests administered in this case as a means of "predicting unlawful [blood alcohol contents]," and it made no mention of impairment due to drugs. ***Wilkens***, 278 Wis. 2d 643, ¶19 (alteration in original). Testimony to this degree was elicited at trial by Officer Austin, who said that the threshold number of clues observed on each of the three tests he administered increased the likelihood that an individual's blood-alcohol concentration was above the legal limit. (55:103). Furthermore, Officer Austin testified that the HGN test was the only test of the three conducted that might detect "some drugs," and Mr. Mueller exhibited zero clues on that test. (55:74–75).

Officer Austin attempted to qualify the clues observed on the walk-and-turn and one-leg-stand tests by noting that the tests administered were designed to detect "impairment" generally. (55:103–04). However, Officer Austin testified that he is not a DRE and he did not receive the requisite training or certification to identify impairment due to drugs. (55:104–05). Additionally, he identified several specific tests designed to detect impairment due to drugs, but acknowledged that none of those tests were performed by a DRE at any time. (55:105). Practically speaking, if the array of tests Officer Austin employed were sufficient to detect all kinds of impairment, why would the police department train and employ drug recognition experts and implement special tests to evaluate suspected impairment from drugs?

Officer Austin testified that Officer Carr had to leave "while [they] were wrapping up," but that does not plausibly explain the lack of any drug-specific field tests or testimony from a DRE in this matter. The state argued in rebuttal that Officer Carr never suggested that Officer Austin "should stop [the field sobriety tests]," and thereby assented to the conclusion that Mr. Mueller was impaired. (55:176). However, that line of argument invites speculation not supported by evidence. *See* ***Piaskowski*****,** 256 F.3d at 693. This evidentiary deficiency should not be faulted to the defendant, and the state should have been held to its burden to prove beyond a reasonable doubt that Mr. Mueller was under the influence of prescription drugs to an extent that rendered him incapable of safely driving.

When viewed in the light most favorable to the state, the evidence presented simply would not support a reasonable inference that Mr. Mueller was unable to drive safely due to impairment from the low levels of prescription drugs in his system. There was a dearth of evidence of impairment to support impairment beyond Officer Austin's observations during field sobriety tests, and those observations were suggestive of impairment due to alcohol, not prescription drugs.

2. Evidence of Mr. Mueller's conduct at the scene did not comport with the evidence the state presented regarding the general side effects of Clonazepam and Zolpidem.

As noted at the outset of this argument, the state cannot prove that an individual's ability to drive safely is impaired solely by offering the results of a blood test. In an attempt to show that Mr. Mueller was impaired to an extent

that he was incapable of safely driving, it elicited testimony from Mr. Knutsen. However, the circuit court ruled that Mr. Knutsen was only allowed to "describe[] the general effects of [Clonazepam and Zolpidem] on the general population," and it prohibited testimony about how those drugs "impact[ed] specifically Mr. Mueller . . . ." (55:12).

In accordance with the circuit court's order, Mr. Knutsen testified generally about the potentially impairing effects of either drug. (55:126–29). He stated that someone who takes a combination of Clonazepam and Zolpidem *could* be impaired with regard to their driving ability. (55:126–29). But he also acknowledged that each drug detected in Mr. Mueller's blood was below its respective therapeutic range, and he could not render an opinion regarding whether Mr. Mueller was incapable of safely driving. (55:135).

Because Mr. Knutsen did not render a definitive conclusion about impairment or Mr. Mueller's ability to drive safely, it was the state's burden to establish that Mr. Mueller exhibited the impairments that Mr. Knutsen testified someone might experience from either drug. Mr. Knutsen testified that Clonazepam can cause increased confusion or drowsiness, and that it can impair judgment, vision, and coordination. (55:126). With respect to Zolpidem, he testified that the sedative effect of that drug can cause dizziness, confusion, and a decrease in concentration. (55:127).

The state did not present evidence that Mr. Mueller was exhibiting the side effects Mr. Knutsen testified to. Notably, Officer Austin testified that Mr. Mueller did not appear groggy, sleepy, or lethargic. (55:91, 92). He also testified that Mr. Mueller appeared to understand instructions given to him on field sobriety tests, that he was responsive to

questions, and obeyed the officers' commands. (55:79, 92, 100). Mr. Mueller asked Officer Austin appropriate and relevant questions throughout their encounter, and his speech was not slurred or abnormal. *See* (55:111). There was no indication that his vision was impaired during the HGN test or at any other time. *See* (55:75). There was no testimony that Mr. Mueller had trouble exiting his vehicle so as to suggest impaired coordination. *See* (55:72). Nor was there any other evidence that he was dizzy, confused, or otherwise not oriented to time, person, and place. In total, the state failed to prove that Mr. Mueller exhibited any of the symptoms that someone impaired by Clonazepam or Zolpidem would exhibit.

The state argued in rebuttal that Mr. Mueller's performance on the walk-and-turn test—specifically when he started early—indicated confusion. (55:174). But, as argued in the preceding subsection, Mr. Mueller's performance in that respect was reasonably explained by his restlessness and statements that he needed to get home to care for his sick mother. (55:106). Absent any other testimony that Mr. Mueller appeared confused, this conclusion is more reasonable than the speculative one invited by the state.

The state also argued in rebuttal that Mr. Mueller's performance on the balance-related portions of the field sobriety tests indicated that his coordination was impaired. (55:177). However, Officer Austin acknowledged that Mr. Mueller was an older man who said he was having back problems, and that those back problems could have affected his performance on field sobriety tests. (55:101). Officer Austin merely disregarded that statement and continued with regular tests, and the state should not benefit at trial for ignoring this reasonable explanation.

The jury heard that factors such as age, gender, and tolerance affect the way either drug affects a person. (55:132). Mr. Knutsen specifically testified that tolerance was "a big factor" for Clonazepam, and that someone who took it regularly and consistently could develop a tolerance where they no longer experienced any impairing side effects. (55:135–36). The evidence offered by the defense established that Mr. Mueller had been on Clonazepam since at least seven months prior to the incident, and that he refilled his one-month prescription on a monthly basis. (55:149; 27:1–5). Based on Mr. Mueller's regular use of his prescribed Clonazepam, combined with the lack of any testimony that Mr. Mueller exhibited side effects of impairment from that medication, a jury could reasonably conclude that he had developed a tolerance for Clonazepam.

Finally, Mr. Knutsen testified that he could not conclude that someone with only 16 nanograms of Zolpidem in their system—which is significantly below the therapeutic range of 80 to 150 nanograms—was under the influence of Zolpidem. (55:139). That testimony, combined with evidence that strongly suggested Clonazepam tolerance and the lack of any other probative testimony that Mr. Mueller was impaired, supports a reasonable hypothesis that Mr. Mueller was not, in fact, impaired by either drug to an extent that he was incapable of safely driving.

As the defense argued at closing, there is a significant difference between having prescription medication in your system and being under the influence of said medication to the extent that you are incapable of driving safely. (55:162). The jury's question to the circuit court, in which it asked if there were driving restrictions on Mr. Mueller's prescription label, (32), further suggests that the jury understood this

distinction and was looking for more evidence that Mr. Mueller's ability to drive safely was impaired by his prescription.

In this case, the state presented evidence that Mr. Mueller had low levels of prescription drugs in his system, that he was acting oddly, that he exhibited clues of impairment due to alcohol use, and that someone taking either Clonazepam or Zolpidem *could* be impaired. The state did not, however, sufficiently connect that evidence in a way that would prove, beyond a reasonable doubt, that Mr. Mueller's ability to drive safely was impaired due to the prescriptions in his system. Because the state failed to meet its high evidentiary burden in this matter, this court should reverse the conviction due to insufficient evidence.

II. Police Violated Mr. Mueller's Fourth Amendment Right Against Unreasonable Seizures, and the Evidence Obtained as a Result of That Seizure Must Be Suppressed.

A. Introduction and Relevant Facts

1. Introduction

If this court holds that the state presented sufficient evidence for the jury to convict Mr. Mueller, then it should remand to the circuit court with direction to suppress all evidence derived from the unlawful seizure and arrest of Mr. Mueller. If this court determines that the state presented insufficient evidence to convict, then it need not decide this issue.

Officer Austin's initial contact with Mr. Mueller—during which he inquired why the vehicle was stopped in the road and asked for Mr. Mueller's driver's license—was not

improper under the Fourth Amendment. However, the officer subsequently extended the scope and duration of that seizure by conducting field sobriety tests, and the state failed to prove that reasonable suspicion existed to justify such an expansion. Furthermore, the state failed to prove that probable cause existed to arrest Mr. Muller for driving under the influence of a drug.

As explained in Section I, it is not illegal to take a prescription drug and drive in Wisconsin; it is only illegal if that prescription impairs "to a degree which renders [a person] incapable of safely driving." Wis. Stat. § 346.63(1)(a); WIS JI-CRIM 2666. The facts presented by the state at the suppression hearing did not establish reasonable suspicion that Mr. Mueller was impaired to an extent which rendered him incapable of safely driving. Nor did those facts support probable cause to arrest Mr. Mueller for this offense.

If this court finds that the police lacked reasonable suspicion to conduct field sobriety tests, it need not address probable cause.

2. Relevant Facts

Officer Austin's testimony at the suppression hearing was largely consistent with his trial testimony. He was on duty on July 31, 2016, at approximately 4:11 p.m., driving northbound on Business Highway 51 in Wausau. (53:5; App. 105). He observed a vehicle the westernmost northbound lane "about 150 feet away from the stop lights," which were green at the time. (53:5–6; App. 105–6). He did not see any vehicles in front of the stopped vehicle. (53:6; App. 106).

Officer Austin turned around and pulled behind the stopped vehicle, which was in the easternmost lane and 75 feet from the stop lights. (53:6; App. 106). Officer Austin

activated his emergency lights as he approached, and informed dispatch that he believed the vehicle was disabled. (53:6–7; App. 106–7). The officer did not receive any complaints about Mr. Mueller's driving prior to the stop. (53:15; App. 115).

The officer approached the vehicle and spoke with Mr. Mueller. (53:7; App. 107). Mr. Mueller's head was down, and he was writing on a piece of paper. (53:13; App. 113). The officer asked Mr. Mueller why his vehicle was stopped in a lane of traffic. (53:7; App. 107). Mr. Mueller responded that he was waiting for the light to turn green. (53:7; App. 107). When Officer Austin informed him that the light was green, Mr. Mueller thanked him and attempted to drive away. (53:7–8; App. 108). By the time Mr. Mueller attempted to drive away, the light had turned red. (53:14; App. 114). Officer Austin then directed Mr. Mueller to stop, and Mr. Mueller complied immediately. (53:8; App. 108). Mr. Mueller then told the officer that his vehicle was stalling on him. (53: 13–14; App. 113–14).

Officer Austin asked Mr. Mueller if he had anything to drink that day. (53:8; App. 108). Mr. Mueller responded in the negative. (53:8, 15; App. 108, 115). The officer then collected Mr. Mueller's identification in order to run his driving record and registration. (53:8; App. 108). Officer Austin did not observe any other signs of impairment that would raise suspicion of intoxication. (53:15; App. 115).

Officer Austin returned to his squad car and "requested that another officer respond because he believed there could have been possible intoxication." (53:8; App. 108). He ran Mr. Mueller's license and registration, both of which were current and valid. (53:16; App. 116). Mr. Mueller's driving records revealed that he had prior convictions for operating

while intoxicated (hereinafter "OWI"). (53:8, 23; App. 108, 123). Officer Austin did not testify to any of the dates or details regarding the prior OWIs.

While waiting for another officer to respond, Officer Austin called Officer Kevin Cornell and explained that he wanted to administer field sobriety tests on Mr. Mueller because "something feels off." (53:18; App. 118). During that call, Officer Carr responded to the scene and Officer Austin ended his call with Officer Cornell. (53:18–19; App. 118–19). Approximately eight minutes passed between Officer Austin reviewing Mr. Mueller's driving records and Officer Carr arriving. (53:19; App. 119).

Officer Austin explained to Officer Carr that he planned to conduct field sobriety tests. (53:19; App. 119). The officers then re-approached Mr. Mueller and asked him if he had taken any illegal drugs. (53:19–20; App. 119–20). Mr. Mueller denied taking any illegal drugs, and Officer Austin asked him to step outside of the vehicle to conduct field sobriety tests. (53:20; App. 120). Mr. Mueller complied and exited his vehicle. (53:20; App. 120). Prior to conducting any tests, Mr. Mueller told the officers that he recently injured his ankle. (53:20; App. 120).

Once outside the vehicle, but prior to any field sobriety testing, Officer Austin asked Mr. Mueller if he took any prescription drugs. (53:20;App. 120).[3] Mr. Mueller responded

[3] On direct examination, Officer Austin testified that he asked about prescription drugs before he asked Mr. Mueller to submit to field sobriety tests. (53: 8; App. 108). However, on cross-examination, he acknowledged that he asked about "illegal drugs" and field sobriety tests while Mr. Mueller was still inside his vehicle, and that he asked about prescription drugs after requesting field sobriety testing and "while

that he took Clonazepam, for which he had a prescription. (53:21; App. 121). Officer Austin testified that he was familiar with Clonazepam, and knew it was a central nervous system depressant that can "act like alcohol." (53:9, 22; App. 109, 122).

Mr. Mueller completed the HGN test and exhibited zero clues of intoxication. (53:10; App. 110). The officers then administered the walk-and-turn test, followed by the one-leg stand test. (53:10–11; App. 110–11). During these tests, they observed, respectively, four of eight and two of four clues of impairment. (53:11–12; App. 111–12).

Based on Mr. Mueller's performance on field sobriety tests, Officer Austin arrested Mr. Mueller. (53:20; App. 120). When Mr. Mueller said he was not intoxicated, Officer Austin told Mr. Mueller that he could be intoxicated from Clonazepam. (53:22;App. 122). Officer Austin acknowledged that he is not a DRE and Mr. Mueller was not subjected to drug-specific tests to determine impairment. (53:23–24; App. 123–24).

After he was arrested, handcuffed, and placed in a squad car, Mr. Mueller took a preliminary breath test. (53:23; App. 123). The test showed a 0.00 alcohol concentration. (53:13; App. 113).

The circuit court denied Mr. Mueller's motions to suppress. (53:28–31; App. 128–31). With respect to the expansion of the stop, the circuit court stated: "[U]nder the totality of the circumstances, with someone driving like that in broad daylight, stopping twice from an intersection on a busy street, it needs to be investigated and some explanation

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[they] were talking outside [the vehicle]," which occurred "a bit later." (53:20; App. 120).

found." (53:29; App. 129). The circuit court acknowledged no odor of alcohol, but noted "you usually don't get an odor of intoxicants if it's other types of impaired driving." (53:29; App. 129). The court also concluded that Mr. Mueller's statements regarding Clonazepam supported an inference of intoxication. (53:29; App. 129).

The circuit court noted that "[t]he officer maybe took more time than a routine [stop]," but justified the extended duration because "[Officer Austin] was taking phone calls asking for more senior advice" due to the "unusual circumstance[s]" he encountered. (53:28–29; App. 128–29).

With respect to probable cause, the circuit court stated:

> [Officer Austin] had a reason, the odd driving, and it was at four in the afternoon, that he could then ask [Mr. Mueller] to do the field sobriety tests. And he did two field sobriety tests which indicated impairment, and that, combined with the driving, the impairment, the admission of using a depressant, even though it was prescribed, is sufficient . . . for probable cause to arrest him.

(53:30–31; App. 130–31).

Mr. Mueller subsequently filed a motion which asked the circuit court to reconsider its suppression order. (12). The motion emphasized that Officer Austin had already decided to conduct field sobriety tests before he re-approached Mr. Mueller's vehicle, and his primary articulable support for that decision was "something feels off." (12:2–3). The circuit court denied Mr. Mueller's motion for reconsideration at a later hearing. (54).

B. Legal Principles and Standard of Review

The right to be secure against unreasonable seizures is protected by the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution. *See* ***State v. Post***, 2007 WI 60, ¶10 n.2, 301 Wis. 2d 1, 733 N.W.2d 634 (stating that appellate courts in Wisconsin have "in large part interpreted the protections against unreasonable searches and seizures afforded by the state and federal constitutions coextensively") (internal citations omitted). The state carries the burden of proving that a seizure comports with the Fourth Amendment. ***Id.***, ¶12 (citing ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973)). When the state fails to meet that burden, the police action in question is unconstitutional, and the evidence obtained from that action must be suppressed in accordance with the exclusionary rule. ***State v. Washington***, 2005 WI App 123, ¶10, 284 Wis. 2d 456, 700 N.W.2d 395 (citing ***Wong Sun v. United States***, 371 U.S. 471, 484–85, 487–88 (1963)).

Whether police conduct violated the Fourth Amendment is a question of constitutional fact. ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. A question of constitutional fact is reviewed under a "two-step standard of review." ***State v. Hajicek***, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781. First, the circuit court's findings of historical fact are reviewed under the clearly-erroneous standard. ***Id.*** Second, the circuit court's determinations of constitutional facts are reviewed *de novo*. ***Id.***

C. Police unreasonably expanded the scope of the seizure to conduct field sobriety tests, which violated the Fourth Amendment.

Mr. Mueller does not challenge the initial stop. The officer approached his vehicle on suspicion that it was disabled, and he subsequently effectuated a stop to conduct ordinary police inquiries. The seizure became unconstitutional in its scope and duration when law enforcement conducted field sobriety tests without specific and articulable justification.

In analyzing the constitutionality of a Fourth Amendment seizure, a reviewing court first determines whether it was justified at its inception by either probable cause or reasonable suspicion. ***Terry v. Ohio***, 392 U.S. 1, 20–22 (1968). "Reasonable suspicion" is "suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing, or is about to commit] a crime. An inchoate and unparticularized suspicion or hunch . . . will not suffice." ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). The test for reasonableness is an objective, common sense one. ***Id.*** It asks what a reasonable police officer would reasonably believe under the circumstances, in light of his or her training and experience. ***Id.***

In addition to determining the initial reasonableness of the stop, a reviewing court must determine whether the detention "was temporary [and] last[ed] no longer than was necessary to effectuate the purpose of the stop." ***Florida v. Royer***, 460 U.S. 491, 500 (1983). The investigative means employed by law enforcement must be "the least intrusive means reasonably available to verify or dispel the officer's suspicion." ***Id.***

If law enforcement lawfully seizes an individual, the scope of the officer's inquiry may be broadened beyond the purpose of the stop, or a new investigation may begin, "if . . . the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place." ***State v. Betow***, 226 Wis. 2d 90, 94–95, 593 N.W.2d 499 (Ct. App. 1999). The validity and constitutionality of an expansion is "tested in the same manner, and under the same criteria, as the initial stop." ***Id.***

Before an officer can order a person out of a vehicle to conduct field sobriety testing on suspicion of impairment due to prescription drug, such as Clonazepam or Zolpidem, he must have reasonable suspicion that the person is under the influence to a degree which rendered him "incapable of safely driving." Wis. Stat. § 346.63(1)(a); WIS JI-CRIM 2666.

There was no indication that Mr. Mueller was incapable of driving safely, and the initial basis for the stop in this matter was to check on a suspected disabled vehicle. (53:6–7; App. 106–7). The officer saw Mr. Mueller's vehicle stopped in a lane of traffic, (53:6–7; App. 106–7), but he did not observe Mr. Mueller driving recklessly or erratically, nor did he receive any citizen complaints to that extent. (53:15; App. 115). In fact, Officer Austin's observation of Mr. Mueller's driving was limited to the brief instance in which Mr. Mueller thanked the officer, attempted to drive away, and was ordered to stop. *See* (53:8; App. 108).

At most, a reasonable officer in those circumstances might suspect inattentive driving. *See* Wis. Stat. § 346.89(1) (prohibiting a person from driving a motor vehicle while

"engaged or occupied with an activity, other than driving the vehicle"). When the officer approached him, Mr. Mueller was writing something on a piece of paper, and his head was "down," (53:13; App. 113), which is the natural position one's head would be in while sitting upright and writing something. Once the officer approached the vehicle, Mr. Mueller was alert and responsive to questions, and he stopped his vehicle almost immediately after the officer told him to do so. (53:13–14; App. 113–14). Based on these facts, and absent any additional suspicious indicia, Officer Austin was entitled to conduct the "ordinary inquires" of a traffic stop, such as checking a driving record, determining whether there were outstanding warrants, and deciding whether to issue a traffic ticket. *See* ***State v. Smith***, 2018 WI 2, ¶19, 379 Wis. 2d 68, 905 N.W.2d 353.

Officer Austin did not simply conduct the ordinary inquiries once he returned to his squad car. He had already decided to conduct field sobriety tests, and he impermissibly expanded the scope of the stop by calling other officers and essentially searching for justifications for eight minutes to support his desire to conduct field sobriety tests. (53:8, 18; App. 108, 118). The sole bases he could articulate to other officers were that Mr. Mueller's car was stopped in the road, he was acting abnormally, and that "something feels off." (53:18; App. 118). These minimal observations in light of Officer Austin's conduct amounted to an impermissible expansion under the Fourth Amendment.

During the suppression hearing, there was some dispute as to when exactly Mr. Mueller told Officer Austin that he had taken Clonazepam, and the state attempted to argue that Officer Austin considered that statement by Mr. Mueller to form a reasonable suspicion of impairment. (53:26–27; App. 126–27). However, pinpointing the exact

moment is immaterial for this analysis. Officer Austin acknowledged that he asked Mr. Mueller about prescription drugs once they were outside the vehicle, which was *after* he expanded the stop to request field sobriety tests. (53:20; App. 120). Thus, any of Mr. Mueller's statements regarding Clonazepam were after-the-fact justifications that should be outside the scope of the analysis in this matter.

Even if this court were to consider the lower standard of operating under the influence of an intoxicant (as opposed to under the influence of a drug), the state still failed to meet its burden to prove reasonable suspicion. Once Officer Austin approached the suspected disabled vehicle, Mr. Mueller denied drinking, and the officer did not articulate any specific clues of impairment he observed. Instead, he returned to his squad car, called for assistance for field sobriety tests, and explained to another officer that "something feels off." (53:18; App. 118). The state thus failed to meet its burden to justify expanding the scope of this stop.

In sum, an officer's subjective belief that something felt off is not tantamount to reasonable suspicion to believe that a person is impaired and incapable of driving a motor vehicle safely. Thus, Officer Austin restricted Mr. Mueller's liberty by directing him outside of the vehicle to conduct field sobriety tests based on an unparticularized hunch, which thereby violated the Fourth Amendment. As discussed in greater detail below, the exclusionary rule mandates that all evidence obtained as a result of this Fourth Amendment violation must be suppressed. The circuit court therefore erred in not denying the suppression motion.

D. Police arrested Mr. Mueller without probable cause, which violated the Fourth Amendment.

If this court agrees that the police lacked reasonable suspicion to expand the stop and conduct field sobriety tests, it need not address the constitutionality of Mr. Mueller's arrest. Nonetheless, there was insufficient probable cause to arrest Mr. Mueller, and his arrest was therefore unconstitutional.

A warrantless arrest is unlawful unless it is supported by probable cause. ***State v. Lange***, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. Probable cause is a common-sense test, which determined on a case-by-case basis by looking at the totality of the circumstances. ***Id.***, ¶20. The state must show that there was sufficient evidence to lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1992). The belief of guilt must be "more than a possibility." ***Id.***

The state was required to show probable cause that Mr. Mueller was impaired to an extent that he was "incapable of safely driving." Wis. Stat. § 346.63(1)(a); WIS-JI CRIM 2666. In this matter, the state presented insufficient evidence to support probable cause to arrest for driving under the influence of a drug. Notably, the Officer did not observe or learn of any unsafe driving conduct. (53:15; App. 115). Mr. Mueller successfully passed the HGN test, and he provided a reasonable explanation for the clues observed on the other two tests when the told the officer about a recent injury.

As argued above in Section I, the results of the field sobriety tests administered in this matter were of limited probative value. Field sobriety test results are based on an officer's "subjective evaluation" and therefore "should be

placed in the same category of other signs of impairment, such as glassy or bloodshot eyes, slurred speech, staggering, flushed face, labile emotions, odor of alcohol or driving patterns." ***Wilkens***, 278 Wis. 2d 643, ¶20. These observational tools were therefore of limited probative value, due to the lack of other clues of impairment and Mr. Mueller's identified injury.

Officer Austin testified that he suspected impairment due to drugs rather than alcohol, which was supported by the fact that he did not administer a preliminary breath test until *after* he arrested Mr. Mueller. However, this testimony is of limited value because Officer Austin is not a DRE, and he did not conduct any drug-specific field tests to identify impairment. Furthermore, there was no testimony regarding the observations of a DRE to support probable cause for this arrest.

The circuit court concluded that there was probable cause based on "the odd driving . . . [at] four in the afternoon, . . . two field sobriety tests which indicated impairment, . . . [and] the admission of using an depressant." (54:30–31; App. 130–31). Such a conclusion is overly reductive and fails to account for the totality of the circumstances. Notably, Mr. Mueller's car was stopped in the road, but that observation alone—absent any additional observations of bad driving conduct or complaints about unsafe driving—is not sufficient for a reasonable police officer to conclude that an individual was driving while impaired—especially to an extent that made them incapable of safely driving.

The lack of articulable probable cause in this matter is best summarized by Officer Austin's statement that "something feels off." (53:18; App. 118). An officer's subjective impressions of a person's conduct, combined with

the limited and explainable clues observed on field sobriety tests, does not amount to probable cause that the person is incapable of driving safely. Therefore, Mr. Mueller's arrest violated the Fourth Amendment.

E. The evidence obtained during and subsequent to the field sobriety tests must be suppressed.

The remedy for an unconstitutional seizure is to suppress the evidence it produced. ***Washington***, 284 Wis.2d 456, ¶10 (citing ***Wong Sun***, 371 U.S. at 484–85, 487–88) ("we have consistently rejected . . . that a search unlawful at its inception may be validated by what it turns up"); ***Arizona v. Hicks***, 480 U.S. 321, 329 (1987) ("[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all"). Accordingly, any evidence of impairment produced by the unconstitutionally administered field sobriety tests must be suppressed.

The exclusionary rule also extends to derivative evidence obtained as a result of an illegal seizure. ***State v. Carroll***, 2010 WI 8, ¶19, 322 Wis.2d 299, 778 N.W.2d 1. Subsequent to his field sobriety tests and unlawful arrest, a blood test was conducted which revealed the presence of small amounts of Clonazepam and Zolpidem. This evidence was derived as a result of the illegal police action, and it must be suppressed as well.

CONCLUSION

Based on the foregoing arguments, Mr. Mueller respectfully asks this court to reverse his conviction for operating under the influence of a drug and to remand the case to the circuit court to vacate his conviction. If the court finds that there was sufficient evidence to convict, Mr. Mueller respectfully asks that this court reverse the judgment of conviction and remand to the circuit court with direction to suppress all evidence derived from the unlawful extension of the stop and from Mr. Mueller's unlawful arrest.

Dated this 23rd day of March, 2018.

Respectfully submitted,

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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 9,192 words.

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 23rd day of March, 2018.

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CERTIFICATION AS TO APPENDIX

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.

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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