STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2018AP000216CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KRISTY L. MALNORY, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, AND ORDER DENYING POSTCONVICTION RELIEF, IN THE WOOD COUNTY CIRCUIT COURT, THE HONORABLE GREGORY J. POTTER PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

Did Malnory receive ineffective assistance of counsel in that trial counsel failed to object at trial to the admissibility of a "Blood/Urine Analysis" form which was purportedly signed by a "person acting under the direction of a physician" who did not testify at trial, on the basis that the admission of such form violated Malnory's right to confrontation under the 6th Amendment to the United States Constitution, Article I, Section 7 of the Wisconsin Constitution, **Crawford v. Washington**, 541 U.S. 36 (2004), **Bullcoming v. New Mexico**, 564 U.S. 647 (2011), and **Melendez-Diaz v. Massachusetts**, 557 U.S. 305 (2009)?

The trial court answered: no.

Did Malnory receive ineffective assistance of counsel in that trial counsel failed to move to strike the testimony of an analyst from the Wisconsin State Hygiene Laboratory on grounds that such testimony was inadmissible under Wis. Stat. Sec. 343.305(5)

because the State had not established that Malnory's blood had been drawn in compliance with Sec. 343.305(5)?

The trial court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel would welcome oral argument should this court determine that such argument would be helpful in addressing the issues presented in this brief.

Counsel believes that publication will not be warranted as this appeal involves the application of well-established legal principles to a particular set of facts.

STATEMENT OF THE CASE

The State charged Malnory with operating a motor vehicle while intoxicated (Count One) and operating with a prohibited alcohol concentration (Count Two) both as second offenses. 3:1-2. A jury found Malnory guilty of both charges. 36:18-19. The

circuit court sentenced Malnory on the operating with a prohibited alcohol concentration charge to 22 days in jail. 22:1. The circuit also imposed a fine and costs totaling $1505.00 as well a 15 month period of license revocation and 15 month period of ignition interlock. 22:1. The circuit court also denied a motion by Malnory to stay the sentence pending appeal. 75:10. Malnory timely filed a notice of intent to pursue postconviction relief, 19:1-2, pursuant to which the State Public Defender appointed the undersigned counsel. By and through counsel, Malnory filed a motion for new trial. 24:1-9. After an evidentiary hearing, the circuit court denied the motion. 77:1-12; 66:1. Malnory filed a notice of appeal, 29:1, and these proceedings follow.

STATEMENT OF FACTS

Facts pertaining to trial

At trial, the State introduced the testimony of Stephanie Weber, an analyst with the Wisconsin State Hygiene Laboratory, who testified regarding the analysis of a sample of Malnory's blood

collected and submitted by law enforcement. 35:155-162. In particular, Weber testified that Malnory's blood alcohol content was .184 grams of ethanol per 100 milliliters of blood. 35:162. The results of the analysis done by Weber were contained in her official report introduced at trial as Exhibit No. 7. 35:173; App.101.

The State also introduced a State of Wisconsin "Blood/Urine Analysis" form. 35:118,173; App.100. Under the heading of "Agency Information," the form lists "DEP/DEPU Eric Marten" of the "Wood County Sheriff's Dept." App.100. Under the heading of "Subject Information," the form lists Malnory's name, address, dated of birth, and sex. App.100. Under the heading of "Specimen Collection," the form contains a box with a hand-written "x" on it indicating that the specimen collected was blood. App.100. A "collection date" of "06-30-15" is hand-written on the form as was a collection time of "0104." App.100. A notation of "a.m." is circled. App.100. Under the heading of "Specimen Collected by," the form contains a box with a hand-written "x" next to the reference "Person acting under the direction of a Physician." App.100. On a

line within the same section, the name "Precious H. Pulham" is hand-written, and on the signature line, the name "Precious H. Pulham" is again hand-written. App.100.

The State offered the "Blood/Urine" analysis form through the testimony of Deputy Eric Martens of the Wood County Sheriff's Department. 35:118. Martens testified that he completed portions of the form, 35:119, and that the person who drew Malnory's blood also completed portions of it. 35:119. Martens testified that such person was "Precious H. Pulham." 35:119. Martens testified that he observed Pulham complete her signature on the form and draw a sample of Malnory's blood. 35:119.

After Weber testified, trial counsel objected to the admission of Exhibit No. 7, Weber's report, and the "blood results," on the basis that the State had not established that Malnory's blood draw conformed with Wis. Stat. Sec. 343.305(5).[1] 35:170-171. Trial

[1] Blood may be withdrawn from the person arrested for violation of s. 346.63 (1), (2), (2m), (5), or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a local ordinance in conformity with s. 346.63 (1), (2m), or (5), or as provided in sub. (3) (am) or (b) to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog, or any other drug, or any combination of alcohol, controlled substance, controlled substance analog, and any other drug in the blood *only by a physician, registered nurse, medical technologist, physician assistant,*

counsel also objected to the admission of Exhibit No. 4. 35:173,174.[2]

The circuit court denied Malnory's objections and received Exhibit Nos. 4 and 7 into evidence. 35:173,174. In doing so, the circuit court found that the State introduced Weber's testimony "out of order" and prior to the anticipated testimony of the person who drew Malnory's blood. 35:171. The idea was that the person who drew the blood would testify after Weber. 35:171. The circuit court found that the State had subpoenaed that person but the person failed to show up for trial. 35:171. The circuit court stated that it was going to rely on Exhibit No. 4 in determining that Malnory's blood had been collected by a person acting under the direction of a physician and in compliance with the statute. 35:173.

Facts pertaining to postconviction motion

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phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician. Wis. Stat. Sec. 343.305(b*).* Italics added.

[2] Trial counsel did not specify a particular legal basis for the objection.

Malnory's motion for new trial alleged that trial counsel was ineffective in failing to object to the admission of Exhibit No. 4, the "Blood/Urine Analysis" form on confrontations grounds. 24:1. Malnory's motion similarly alleged that trial counsel was ineffective by not moving to strike Weber's testimony on grounds that such testimony was inadmissible under Wis. Stat. Sec. 343.305(5). 24:1.

Facts pertaining to hearing on motion for new trial

Trial counsel testified at the hearing. 38:6-19. Trial counsel testified that at the time of trial, she did not consider Exhibit No. 4 to be testimonial. 38:9. Trial counsel testified that she did not object to Exhibit No. 4 on confrontation grounds because she believed that the "statute governing how blood draws are to be brought in at trial covered that issue so I did not make that separate objection." 38:9. Trial counsel testified that she believed Weber's report, Exhibit No. 7 was the pivotal piece of evidence by the State. 38:10. Trial counsel testified that she believed it was

improper for the State to have admitted the report without the testimony of the phlebotomist. 38:10. Trial counsel agreed that she did not move to strike Weber's testimony or move for a mistrial. 38:11. Trial counsel testified that she thought she had moved for a mistrial and that she agreed that that was something that should have been done. 38:11. Trial counsel testified that the defense in the case "was a drinking after driving defense so we were not so much attacking the alcohol results as much as we were attacking—or saying when she consumed the alcohol. So the – results of the blood were not as important as the timing of it was." 38:11.

The circuit court determined that trial counsel was deficient in not moving to strike Weber's testimony but not deficient in failing to object to Exhibit No. 4. 77:7; App.109. The trial court found that trial counsel did object to Exhibit No. 4 on the basis of "chain of custody grounds" and on confrontation grounds. 77:7; App.109. The circuit court found that trial counsel had made an "implied" confrontation grounds argument. 77:7; App.109. As to

trial counsel's failure to move to strike Weber's testimony, the circuit court determined that such failure was deficient but not prejudicial. 77:7; App.109. The circuit court determined that "whether the phlebotomist was acting under the direction of a physician was not relevant to the defendant's defense" that "she drank after parking the car." 77:10; App.112. The circuit court similarly determined that "the defendant was able to present a defense that they wanted to" and that "[t]he presentation of the defense was not hampered by not having the phlebotomist testify." 77:10; App.112. The circuit court found that trial counsel's error was harmless. 77:10; App.112[3]

ARGUMENT

I. Malnory is entitled to a new trial because she received ineffective assistance of counsel.

A. Standard of review

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant alleging ineffective assistance of counsel must show that

[3] The entirety of the circuit court's oral ruling appears in the Appendix at 13-113.

counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687. To meet the deficiency prong, the defendant must show that counsel's conduct fell below an objective standard of reasonableness. *State v. Thiel*, 2003 WI 111, ¶19, 264 Wis.2d 571, 665 N.W.2d 305. To satisfy the prejudice aspect of *Strickland*, the person seeking relief must demonstrate that the lawyer's errors were sufficiently serious to deprive the person of a fair proceeding and reliable outcome, *Strickland*, 466 U.S. at 687, and "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. Stated otherwise, prejudice exists when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985). A claim of ineffective

assistance of counsel presents a mixed question of law and fact. See *State v. Thiel*, 2003 WI 111 at ¶21. This court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." *Id.* Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which the court reviews de novo. *Id.*

Whether the admission of evidence violates a defendant's right to confrontation is a question of constitutional law subject to independent review. See *State v. Mattox*, 2017 WI 9, ¶19, 373 Wis.2d 122, 890 N.W.2d 256.

B. *The "Blood/Urine Analysis" form contains testimonial statements which, as admitted into evidence at trial, violated Malnory's right to confrontation.*

Both the Sixth Amendment to the United States Constitution and the Wisconsin Constitution guarantee a criminal defendant the right to confront witnesses who testify

against him at trial. See U.S. Const. amend. VI; Wis. Const. art. 1, §7.[4] Wisconsin courts generally apply United States Supreme Court precedent when interpreting these clauses. See *State v. Mattox*, 2017 WI 9 at ¶20. In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that "[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. See *Crawford*, 541 U.S. at 59. The Supreme Court in *Crawford* did not define "testimonial" but it identified three formulations of testimonial statements:

> [E]x parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or *similar pre-trial statements that declarants would reasonably expect to be used prosecutorily*.
>
> ---
>
> [E]xtrajudicial statements …contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.

[4] The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…" Article I, Section 7 of the Wisconsin Constitution states: "In all criminal prosecutions the accused shall enjoy the right…to meet the witnesses face to face…"

[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the *statement would be available for use at a later trial.*

Italics added. See *Crawford*, 541 U.S. at 51-52. In subsequent decisions, the Supreme Court fleshed out with more particularity what it means for a statement to be "testimonial." In *Ohio v. Clark*, 135 S.Ct. 2173 (2015), the Supreme Court held that a statement is "testimonial" if it was given with the primary purpose of creating an out-of-court substitute for trial testimony. See *id*. at 2183. The court similarly couched the test as whether the statement was made with the primary purpose of "establishing," "gathering," or "creating" evidence for the defendant's prosecution. See id. at 2181-2183. Some factors relevant in the primary purpose analysis include: 1)the formality/informality of the situation producing the out-of-court statement; 2)whether the statement was given to a law enforcement or a non-law enforcement individual; 3)the age of

the declarant; and 4)the context in which the statement was given. See *Ohio v. Clark*, 135 S.Ct. at 2180-2182. Our state supreme court recently drew upon *Ohio v. Clark* in deciding *State v. Mattox*, supra. In *Mattox*, the court found that a toxicology report was not "testimonial" because its "primary purpose" was to assist the medical examiner in determining the cause of death rather than to create a substitute for out-of-court testimony or to gather evidence against the defendant for prosecution. See *State v. Mattox*, 2017 WI 9 at ¶37.

In this case, the primary purpose of the "Blood/Urine Analysis" form and Pulham's purported statements on it was to gather, collect, and create evidence to be used in a criminal prosecution.[5] The form itself explicitly references "Wisconsin Statute 343.305(3)" as part of its heading or title. App.100. The form also specifically identifies Malnory as the subject as well as the offense at issue, Wis. Stat. Sec. 346.63(1)(a). App.100. The form identifies law enforcement, specifically the Wood County

[5] Pulham's statements include her notations as to the collection date, the collection time, the type of specimen collected, and most importantly, as to her status as a "person acting under the direction of a physician."

Sheriff's Office, as the agency requesting the analysis. App.100. The form identifies the specimen to be collected, blood, and identifies the person purportedly collecting the specimen, Precious H. Pulham. App.100. In this regard, the form itself expressly serves to initiate and document compliance with Sec. 343.305(3), the statute which authorizes the collection of certain biological evidence, specifically breath, blood or urine, to be used in the prosecution of certain enumerated offenses. As such, the form itself plainly depicts that its primary purpose is the collection and documentation of evidence for a future prosecution. In accordance with the form itself, Martens testified at trial that the "Blood/Urine Analysis" form is "the standard form that is used" when a blood draw is taken from a suspected drunk driver. 35:154. Pulham's notation on the form that she is a "[p]erson acting under the direction of a [p]hysician," was made in furtherance of law enforcement's effort to collect, gather and document specific evidence to be used against Malnory in a specific prosecution, one for operating while under the influence of an intoxicant.

Specifically, such notation by Pulham served to facilitate the admissibility of such evidence by documenting that she was a "person acting under the direction of a physician" as required by Sec. 343.305(5)(b). For the above reasons, Pulham's statements on the form must be considered "testimonial" not only under the "primary purpose" test but under *Crawford* as well. After all, *Crawford* provides that testimonial statements include "*pre-trial statements that declarants would reasonably expect to be used prosecutorily*," and "[s]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the *statement would be available for use at a later trial."* See *Crawford*, 541 U.S. at 51-52. Italics added. Pulham's statements within the "Blood/Urine Analysis" form plainly fall within these categories.

This case involves a fact pattern similar to those presented in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). In *Melendez-Diaz,* the defendant was charged with distributing and trafficking

cocaine. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 at 308. At trial, the prosecution placed into evidence bags containing the purported cocaine along with certificates of analysis from the state crime lab showing the results of the forensic analysis performed on the seized substances. *Id.* The certificates stated the purported weight of the bags of cocaine seized and that the bags "[h]a[ve] been examined with the following results: the substance was found to contain: Cocaine." *Id.* The analysts conducting the tests of the purported cocaine and drafting the certificates did not testify at trial. The Supreme Court concluded as follows:

> *In short, under our decision in* ***Crawford****, the analyst's affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that the petitioner had a prior opportunity to cross-examine them, petitioner was entitled to " 'be confronted with' " the analysts at trial.* ***Id.*** *at 311. (Internal citation omitted).*

Like the analysts' affidavits in *Melendez-Diaz*, the "Blood/Urine Analysis" form and the data written on it, constituted testimonial statements. Like the analysts, Pulham also was a "witness" for purposes of the Sixth Amendment and Article I, Section 7.

In *Bullcoming*, the defendant was charged with operating a motor vehicle while intoxicated. *Bullcoming v. New Mexico,* 564 U.S. at 651. At trial, the state introduced into evidence a forensic laboratory report showing the results of a gas chromatography test of the defendant's blood sample. *Id.* at 653-655. The state introduced the report through testimony of a scientist who did not sign the certification or perform or observe the test reported on the certification. *Id.* at 655. The Supreme Court concluded that the state's introduction of the non-testifying expert's certification violated the defendant's right to confrontation. *Id.* at 663. In rendering such holding, the Supreme Court indicated that statements made by the non-testifying expert regarding the receipt and condition of the sample, the nature of the testing procedures, and the documentation of the process, were ripe for cross-examination. *Id.* at 660. This was especially true given that the government had never asserted that the expert was "unavailable," but only conveyed that he was on uncompensated leave. *Id.* at 661-

662. In this regard, the court recognized that with the expert on the stand, counsel for Bullcoming could have asked questions designed to reveal whether incompetence, evasiveness or dishonesty accounted for his removal from his work station. *Id.* at 662. Pulham's absence from Malnory's trial takes on a similar stature. The State never asserted that Pulham was "unavailable." In fact, the State apparently intended to call her as a witness. 35:171. As discussed in the Section D. below, Pulham's absence is problematic given the significant role her statements played in Malnory's prosecution.

C. *Trial counsel was deficient in failing to object to the admission of the "Blood/Urine Analysis" form on confrontation grounds.*

At the time of trial, *Crawford*, *Melendez-Diaz*, *Bullcoming*, and *Clark*, were well-established precedent. Counsel should have known that she had a viable confrontation objection under existing 6th Amendment law and made such objection. She did not and instead allowed the "Blood/Urine Analysis" form and Pulham's statements within it to be admitted without proper challenge.

Such omission by trial counsel was objectively unreasonable and deficient.

Nonetheless, the circuit court determined that trial counsel was not deficient in failing to object to the "Blood/Urine Analysis" form on confrontation grounds. 77:7. In this regard, the circuit court found that trial counsel had made an "implied" confrontation grounds argument. 77:7. Such finding by the circuit court is clearly erroneous. The record fails to reveal any objection by trial counsel that could even remotely be considered an objection on confrontation grounds. At the postconviction hearing, trial admitted that she did not make such objection. 38:9. Trial counsel testified that at the time of trial, she did not consider the "Blood/Urine Analysis" form to be testimonial. 38:9. Trial counsel also testified that she did not object to the admission of the form on confrontation grounds because she believed that the "statute governing how blood draws are to be brought in at trial covered that issue so I did not make that separate objection." 38:9. Trial counsel was wrong. The form itself was testimonial and more

importantly, so too were Pulham's statements on it. Further, the statute pertaining to "how blood draws are to be brought in at trial," Sec. 343.305(5)(e), did not "cover" the issue of Malnory's ability to confront Pulham concerning her statements, particularly that which indicated that she was a "person acting under the direction of a physician."

D. Trial counsel was deficient in failing to move to strike Weber's testimony.

Wis. Stat. Sec. 343.305(5) establishes the statutory framework regarding "[t]ests for intoxication." With respect to the admissibility of the results of a blood test, Sec. 343.305(5)(e) provides that in order to be admissible, the test must be "in accordance" with the protocol established within Sec. 343.305:

> [a]t the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while having a detectable amount of a restricted controlled substance in his or her blood, the results of a blood test administered *in accordance with this section* are admissible on any issue relating to the presence of a detectable amount of a restricted controlled substance in the person's blood. Test results shall be given the effect required under s. 885.235. Wis. Stat. Sec. 343.305(5)(e). Italics added.

In turn, Sec. 343.305(5)(b) provides in relevant part that blood may be withdrawn "only by a physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician." Wis. Stat. Sec. 343.305(5)(b).[6] In this case, based upon the State's failure to establish that Malnory's blood had been drawn by a "physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician," evidence regarding the results of the testing of Malnory's blood was not admissible. Trial counsel had a factual and legal basis to challenge the admission of Weber's written report, Exhibit No. 7, and her testimony regarding it. Nonetheless, trial counsel objected only to the written report. In assessing trial counsel's objection, the circuit court noted that Weber had already testified and informed the jury that Malnory's blood alcohol content level was .184. 35:171. The circuit court, as discussed earlier in this

[6] Also see *State v. Kozel*, 2017 WI 3, 373 Wis.2d 1, 889 N.W.2d 423.

brief, denied Malnory's objection. 35:173. Trial counsel was deficient in only objecting to the admission of Weber's written report and in failing to move to strike her testimony. Trial counsel should have recognized that since Weber's testimony regarding Malnory's .184 BAC was already before the jury, the exclusion of her written report would have no value. For the same reason, trial counsel should have recognized that her objection to the written report alone would be wholly unpersuasive. After all, it would make little sense for the court to grant the objection to Weber's written report when her testimony had already been introduced before the jury. In short, any challenge under Sec. 343.305(5) was only meaningful to the extent that it encompassed both Weber's written report and her testimony. Trial counsel was deficient in only challenging the former. Although the circuit court denied Malnory's postconviction motion on other grounds, the circuit court did find that trial counsel was deficient in not moving to strike Weber's testimony. 77:7. This court should make the same finding.

E. *Trial counsel's deficient performance caused Malnory prejudice*.

Trial counsel's failure to object to the "Blood/Urine Analysis" form on the basis of confrontation was prejudicial. Quite simply, trial counsel's failure to object on this ground allowed the State to establish a basis under Sec. 343.305(5) for the admission of Weber's written report, Exhibit No. 7, and her testimony, when it otherwise could not have done so with the evidentiary record as it then existed. Trial counsel's failure to move to strike Weber's testimonial was additionally prejudicial. The State's case involving Malnory depended substantially if not exclusively on the BAC result. At the postconviction hearing, trial counsel testified that she believed Weber's report was the pivotal piece of evidence by the State. 38:10. Not surprisingly, both the State and defense both repeatedly referred to Malnory's BAC result during closing argument. The State did so no less than five times, 35:205, 206, 207, 209 and 213, and the defense did so at least three times, 35:210, 211 and 212. During closing argument, trial counsel

emphasized that other than the BAC result, the State had little if any other evidence against Malnory:

> We don't have the traditional OWI stuff. We don't have swerving. We don't have speeding. We don't have hitting curbs. We don't have running red lights. We have no idea what her driving was like. We saw her parked, we saw the car parked. We don't have her driving…We haven't even heard of anything of how she was driving as the time she was. 35:212.

Indeed, the State presented no evidence regarding Malnory's operation of the vehicle. Law enforcement encountered Malnory's vehicle only after it had been parked and Malnory had been out of the vehicle for some time period. In this regard, at trial, Martens testified that on June 29, 2015, at about 11:15 he received a dispatch call for a property protection complaint. 35:63. Upon arriving at the scene, Martens saw a minivan parked in a driveway to a business. 35:65. On the passenger side, Martens observed a male who was extremely intoxicated. 35:65. About 16 minutes after arriving at the scene, Martens observed another individual, a female, approach the minivan from a ditch area south of the minivan. 35:67. Martens identified Malnory in court as that female. 35:68. Malnory informed Martens that she had

been looking for a cell phone that had been thrown out the minivan's window. 35:69. Martens testified that based on smelling Malnory and being around her, he could tell that she had been drinking. 35:76. When asked how much she had to drink, Malnory referenced "sips" and "capfuls." 35:76-77. Malnory stated that she had started drinking at 7:00 and had finished at 9:00. 35:81. Malnory's fiancé, Larry Dunn testified that he had thrown Malnory's phone out the window. 35:181. Dunn testified that prior to going to look for her phone, Malnory drank some liquor that Dunn had obtained earlier. 35:181. Dunn testified that up until that point, he was the one who was doing the drinking. 35:180. Law enforcement found a half full bottle of vodka in the vehicle. 35:72. During closing argument, trial counsel argued that Malnory had "chugged the vodka" after parking the vehicle and going to look for her phone. 35:210. Trial counsel argued that the .184 BAC that arose from the blood draw at 1:04 a.m. was not representative of the "sips" Malnory had taken prior to 9:00 that night, 35:211, but rather due to her

chugging the vodka before going to look for her phone. 35:211-212. As trial counsel testified at the postconviction hearing, the defense was therefore "drinking after driving." 38:11. Weber's report and testimony significantly hampered such defense. First, such evidence demonstrated that Malnory's blood alcohol content was more than 2 times the legal limit. Second, such evidence added scientific authority to the State's case. Third, and perhaps most significantly, Weber's report and testimony allowed the State to obtain a jury instruction, WIS JI-CRIMINAL 234, "BLOOD ALCOHOL CURVE," which specifically informed the jury that Malnory's blood test result was relevant evidence that she was operating with a prohibited alcohol concentration *at the time of the alleged driving*:

> Evidence has been received that within three hours after the defendant's alleged driving of a motor vehicle, a sample of the defense blood was taken. An analysis of the sample has also been received. This is relevant evidence that the defendant had a prohibited alcohol concentration *at the time of the alleged driving*. 35:196. Italics added.

In this regard, the three hour time reference directly undercut Malnory's argument that her intoxication level was achieved only after parking her car and "chugging the vodka." It did so by

connecting Malnory's prohibited blood alcohol concentration with the time period of her operating the vehicle. The fact that such connection was established via a judicial directive added to its strength. For the above reasons, evidence of Malnory's BAC, as introduced via Weber's report and testimony, was damning evidence. But it was evidence that should have been excluded had trial counsel properly recognized the confrontation issues raised by Pulham's failure to testify. Without Pulham's testimony, the results of Malnory's blood test could not have been properly admitted into evidence and the State would not have been entitled to WIS JI-CRIMNAL 234. While trial counsel recognized the foundational role that Pulham's testimony played in the admission of evidence under Sec. 343.305(5), she did not recognize the proper challenge to make in order to achieve the effect of excluding such evidence. With no confrontation argument made by trial counsel, the circuit court, in the absence of Pulham's testimony, simply relied on the "Blood/Urine Analysis" form to admit the evidence concerning the results of Malnory's blood test.

In denying Malnory's postconviction motion, the circuit court however determined that "whether the phlebotomist was acting under the direction of a physician was not relevant to the defendant's defense" that "(Malnory) drank after parking the car." 77:10. The circuit court similarly determined that "the defendant was able to present a defense that they wanted to" and that "[t]he presentation of the defense was not hampered by not having the phlebotomist testify." 77:10. Such findings by the circuit court are clearly erroneous. For the reasons argued earlier in this section, Malnory's defense was plainly hampered by evidence of the BAC result which came before the jury via Weber's report and testimony. Admission of the "Blood/Urine Analysis" form and the circuit court's reliance upon it allowed the State to introduce compelling scientific evidence regarding Malnory's level of intoxication and afforded the State the benefit of a favorable instruction, WIS JI-CRIMINAL 234. The instruction was especially harmful for Malnory because it expressly advised the jury that because the BAC result was obtained within three hours

of the alleged driving, it was relevant evidence that Malnory had been operating with a prohibited alcohol concentration at the time of the alleged driving. Together, the instruction and evidence admitted through Weber, significantly compromised Malnory's defense. There is a reasonable probability that without this instruction and Weber's report and testimony, the result of the proceeding would have been different.

CONCLUSION

For the above reasons, this court should vacate the judgment of conviction and sentence and remand the case for a new trial.

Dated this _____day of June 2018.

Respectfully submitted,
BY:_____/s/_____

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 5119 words.

Dated this ___day of June 2018

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 the 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 first names and last initials 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.

Dated this _____day of June 2018.

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CERTIFICATION 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 s. 809.19(12). I further certify that:

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

A copy of this certificate has been served upon all opposing parties.

Dated this ___ day of June 2018

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