

RECEIVED**12-20-2019**

STATE OF WISCONSIN
C O U R T O F A P P E A L S

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Appeal Case Nos. 2018AP001553
2018AP001554

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CHRISTANN SPANNRAFT,

Defendant-Appellant.

On Notice of Appeal to review the Judgment of Conviction entered on July 20, 2018, in the Circuit Court for Milwaukee County, the Honorable Kashoua Kristy Yang, presiding, finding Spannraft guilty of OWI-1st and operation without required lamps lighted

BRIEF OF PLAINTIFF-RESPONDENT

John Chisholm
District Attorney
Milwaukee County

Kimberly D. Schoepp
Assistant District Attorney
State Bar No. 1056780
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	2
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	2
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	4
ARGUMENT	4
I: The Circuit Court correctly excluded testimony regarding the procedure used to administer the preliminary breath test § 343.303 makes the use of such tests at trial impermissible.....	5
II: The Circuit Court correctly considered the evidence of the standardized field sobriety tests and correctly exercised its discretion by determining Officer Spittlemeister was credible.....	7
III. The Circuit Court permissibly exercised its discretion in finding Spannraft's testimony regarding the events surrounding the intoximeter testing was not credible.	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES CITED

	Page
<i>City of West Bend v. Wilkens</i> 2005 WI App. 36 278 Wis. 2d 643, 693 N.W.2d 324.....	7,8
<i>Lessor v. Wangelin</i> , 221 Wis. 2d 659, 586 N.W.2d 1, (Ct. App. 1998).	4,7,8
<i>State v. Eison</i> , 2011 WI App 52, 332 Wis. 2d 331, 797 N.W.2d 890.....	6
<i>Weborg v. Jenny</i> , 2012 WI. 67, 341 Wis. 2d 668, 816 N.W.2d 191.....	4
<i>Wurtz v. Fleischman</i> , 97 Wis. 2d 100, 293 N.W.2d 155, (1980).....	4

WISCONSIN STATUTES CITED

Wis. Stat. § 343.303	2,5,6,7
Wis. Stat. § 805.17(2).....	4
Wis. Stat. § 809.19 (8) (b) and (c).....	10
Wis. Stat. § 809.19(3)(a)2	2
Wis. Stat. § 809.19 (12).....	10
Wis. Stat. (Rule) 809.22(1)(b).....	2
Wis. Stat. § 809.23(1)(b)4	2
Wis. Stat. § 904.01	6,7
Wis. Stat. § 904.02	6

STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I

Appeal Case Nos. 2018AP001553
2018AP001554

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
CHRISTANN SPANNRAFT,
Defendant-Appellant.

On Notice of Appeal to review the Judgment of Conviction
entered on July 20, 2018, in the Circuit Court for Milwaukee
County, the Honorable Kashoua Kristy Yang, presiding,
finding Spannraft guilty of OWI-1st and operation without
required lamps lighted

BRIEF OF PLAINTIFF-RESPONDENT

John Chisholm
District Attorney
Milwaukee County

Kimberly D. Schoepp
Assistant District Attorney
State Bar No. 1056780
Attorneys for Plaintiff-Respondent

ISSUES PRESENTED

1. Did the circuit court err in excluding from testimony the procedure used to administer the Preliminary Breath Test?

The trial court found that the Preliminary Breath Test was not admissible under Wisconsin Statute 343.303.

2. Did the circuit court err in admitting the results of the Field Sobriety Tests?

The trial court found that the Field Sobriety Tests were properly conducted and that Deputy Spittlemeister was credible.

3. Did the circuit court err in its findings of fact surrounding the Intoximeter testing?

The trial court found that Officer Prodzinski followed the proper procedure during the Intoximeter testing and found Spannraft's contradicting testimony not credible.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

Due to the nature of the recitation of the facts in Spannraft's brief, the state believes it is necessary to briefly restate the trial court's findings of fact. As respondent, the State exercises its option to present an additional statement of the case. *See* Wis. Stat. § 809.19(3)(a)2.

This case arose from a traffic stop that occurred on July 2, 2018 on I-43 southbound in Milwaukee County. (R48:20) It

was dark out and Spannraft was stopped for not having her headlights illuminated by Deputy Nathan Spittlemeister of the Milwaukee County Sheriff's Office. *Id.* Deputy Spittlemeister made contact with Spannraft and observed her to have "a strong odor of alcohol, red, glassy eyes, and slurred speech." *Id.* Further, Spannraft admitted to drinking two-and-a-half glasses of wine earlier in the evening. (R48:21)

Deputy Spittlemeister then had Spannraft conduct standardized field sobriety tests. *Id.* Spannraft was unable to perform the Horizontal Gaze Nystagmus due to unequal tracking of her pupils, however she exhibited four out of eight clues of intoxication on the Walk and Turn test and three out of four clues on the One Leg Stand test. (R48:20-21) The ground where the field sobriety tests were performed was flat and even, although it had some small pebbles. (R48:21) Deputy Spittlemeister arrested Spannraft based on his observations that she was driving without headlights, had a strong odor of alcohol, slurred speech, red, glassy eyes, her admission to drinking, and her poor performance on the two field sobriety tests that she was able to perform. *Id.* The circuit court found that Deputy Spittlemeister's testimony, which relayed the above information, was credible. *Id.*

Spannraft was transferred to the Criminal Justice Facility, where Officer Scott Prodzinski administered the Intoximeter. *Id.* Officer Prodzinski observed Spannraft for the twenty minutes that the test was performed, during which time the defendant was not allowed to put anything in her mouth. *Id.* The circuit court did not find Spannraft's testimony that she had used her inhaler during the twenty minutes that the Intoximeter was performed to be credible. (R48:21-22) Spannraft knew she was not allowed to put anything in her mouth during the administration of the Intoximeter. (R48:22) Further, Deputy Spittlemeister told Spannraft that she was not allowed to use her inhaler. *Id.* Between 4:20 AM and 4:25 AM that evening, Spannraft blew into the Intoximeter, producing two measurements of alcohol in her breath. (R48:22-23) The result of the Intoximeter showed defendant's breath had an ethanol content of 0.14. (R48:23) The circuit court further found that the Intoximeter was in good working order. *Id.*

Based upon the above findings of fact made by the circuit court, Spannraft was found guilty of OWI-1st, operating with a prohibited alcohol concentration, and operating without required lamps lighted. *Id.*

STANDARD OF REVIEW

This case requires this court to review the findings of fact of the circuit court, which were based primarily upon the credibility of the witnesses presented at trial. “Findings of fact shall not be set aside unless clearly erroneous.” Wis. Stat. § 805.17(2) It is not the function of the appellate court to assess the weight of testimony and credibility of witnesses, and those determinations will not be reversed simply because more than one reasonable inference may be made from the credible evidence. *Lessor v. Wangelin*, 221 Wis. 2d 659, 667, 586 N.W.2d 1, 4 (Ct. App. 1998). When acting as a factfinder, the trial judge is considered to be the “ultimate arbiter of the credibility of a witness,” and his findings of fact shall not be questioned unless they are “based upon caprice, an abuse of discretion, or an error of law.” *Id.* at 668

This case also requires this court to review the circuit court’s decision to admit or exclude certain evidence. Appellate courts are not to “disturb a circuit court’s decision to admit or exclude evidence unless the circuit court erroneously exercised its discretion.” *Weborg v. Jenny*, 2012 WI 67, ¶ 41, 341 Wis. 2d 668, 816 N.W.2d 191. An exercise of discretion was erroneous if the circuit court applied an improper legal standard or made decisions that were not reasonably supported by the facts on the record. *Id.*

Further, this court is precluded “from making any factual determinations where the evidence is in dispute.” *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107, 293 N.W.2d 155, 159 (1980).

ARGUMENT

Spannraft’s brief raises several concerns that were not raised at trial and were not preserved for appeal. This court should not disturb the circuit court’s findings of fact because Spannraft has not proven them to be clearly erroneous.

First, Spannraft argues that the circuit court committed clear error in excluding testimony regarding the procedure used to administer the preliminary breath test. This position is at-odds with Wis. Stat. § 343.303, which unambiguously disallows the introduction of the results of preliminary breath tests at trial. Spannraft attempts to avoid this issue by pointing out that it was the *results* and not the *procedures* that were inadmissible, however this position ignores the fact that the procedures are only being sought to be introduced to cast doubt on the validity of the results. The circuit court understood this and correctly determined that the procedures were irrelevant since the results themselves were inadmissible. (R47:45-46)

Second, Spannraft argues that the circuit court erred in finding that the field sobriety tests were administered according to NHTSA standards. Spannraft raises several studies regarding field sobriety tests generally, as well as regarding an eye condition that she suffers, neither of which were introduced at trial. The circuit court made a finding of fact that Deputy Spittlemeister was credible, and this court should not disrupt that finding of fact because it was not erroneously made. (R48:21)

Third, Spannraft argues that the circuit court committed clear error in its findings of fact surrounding the Intoximeter testing. Again, Spannraft introduces several studies that were not introduced at trial; the circuit court determined that Spannraft's testimony at trial was not credible and Officer Prodzinski's testimony was credible. (R48:21-23) This court should not disrupt those findings of fact because they were not erroneously made.

I. THE CIRCUIT COURT CORRECTLY EXCLUDED TESTIMONY REGARDING THE PROCEDURE USED TO ADMINISTER THE PRELIMINARY BREATH TEST BECAUSE § 343.303 MAKES THE USE OF SUCH TESTS AT TRIAL IMPERMISSIBLE.

Relevant evidence is "evidence having any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable that

it would be without the evidence.” Wis. Stat. § 904.01 (emphasis added). Further, evidence that is not relevant is inadmissible. Wis. Stat. § 904.02. It is within the discretion of the trial court to determine whether evidence is relevant. *State v. Eison*, 2011 WI App 52, ¶ 10, 332 Wis. 2d 331, 797 N.W.2d 890. Finally, the results of preliminary breath tests “shall not be admissible in any action or proceeding.” Wis. Stat. § 343.303.

Here, the procedures used to administer the preliminary breath test were not relevant to the determination of the trial. Wis. Stat. § 343.303 makes the use of the results of a preliminary breath test impermissible at trial. Therefore, the procedures used to obtain the results of the test are not relevant because even if the procedures produced a bad preliminary breath test result, evidence of the bad result would not be able to be produced at trial.

Spannraft argues that the procedures were used for a permissible purpose under § 343.303 because the procedures speak to whether the officer had probable cause to arrest her, which would be a permissible use of those results. This assertion, however, is not supported by the record. First, by Spannraft’s attorney’s admission, the procedures by which the preliminary breath test results were obtained were sought in order to “establish that there was knowledge on the part of the sheriff’s department that [Spannraft] was inhaler dependent, and that could have an effect on the *later Intoximeter readings*.” (R47:41) This directly contradicts Spannraft’s assertion in her brief that the procedures and results of the preliminary breath test were being offered to prove lack of probable cause to arrest. (Brief of Defendant-Appellant, p. 11-12)

Second, the results of the preliminary breath test were not considered by the court in its findings of fact. (*See* R48:20) Among the reasons that the court determined the arrest was justified was that Spannraft was driving without lights, had a strong odor of alcohol, slurred speech, red, glassy eyes, admitted to drinking, and exhibited clues on the standardized field sobriety tests. *Id.* Further, the court determined that Deputy Spittlemeister’s testimony was credible. (R48:21) The circuit court correctly applied the facts that were presented and

chose not to violate § 343.303 by considering the procedures surrounding the administration of the preliminary breath test.

The procedures surrounding the preliminary breath test were not “of consequence to the determination of the action,” as required for evidence to be relevant under Wis. Stat. § 904.01, therefore the circuit court did not erroneously exercise its discretion by rejecting the admission of those procedures into evidence.

II. THE CIRCUIT COURT CORRECTLY CONSIDERED THE EVIDENCE OF THE STANDARDIZED FIELD SOBRIETY TESTS AND CORRECTLY EXERCISED ITS DISCRETION BY DETERMINING OFFICER SPITTLEMEISTER WAS CREDIBLE.

It is not the function of appellate courts to review the credibility of witnesses. *Lessor*, 221 Wis. 2d at 667. Rather, that function is reserved to the trier of fact, and the trier of fact’s determination will stand even where “more than one reasonable inference can be drawn from credible evidence.” *Id.* Findings of fact by the trier of fact will not be disturbed unless those findings were “based upon caprice, an abuse of discretion, or an error of law.” *Id.* at 668.

Standardized field sobriety tests are not scientific; rather, they are based upon the perception of law enforcement officers, “which is necessarily subjective.” *City of West Bend v. Wilkens*, 2005 WI App 36, ¶ 1, 278 Wis. 2d 643, 693 N.W.2d 324. In *Wilkens*, this court faced a situation nearly identical to the one it is presented with in this case. The defendant in *Wilkens* was stopped for speeding, and when the officer approached him, the officer observed the defendant to have red, glassy eyes, slurred speech, and an odor of intoxicants. *Id.*, at ¶ 2. The officer then conducted field sobriety tests, which the defendant performed poorly on. *Id.*, at ¶ 3. The defendant then argued that the court should not allow the admission of the field sobriety tests because they were not scientifically reliable, as determined by the NHTSA. *Id.*, at ¶ 6. In rejecting the defendant’s argument, this court determined that field sobriety tests are not “scientific,” rather, the tests are observational tools that assist an officer in determining whether a person is

intoxicated. *Id.*, at ¶ 17. This court explicitly addressed the NHTSA recommendations, rejecting the notion that following the NHTSA procedures leads officers to scientific conclusions. *Id.*, at ¶ 18. This court came to the ultimate conclusion that the trial court did not erroneously exercise its discretion in determining that the officer's subjective perception of the defendant's performance on the field sobriety tests was credible. *Id.*, at ¶¶ 1, 13.

This case is nearly factually identical to *Wilkins*, and this court should not stray from the conclusion it reached in that decision. Like the officer in *Wilkins*, Deputy Spittlemeister observed Spannraft commit a traffic violation, and then made observations about Spannraft's intoxicated state such as her having an odor of alcohol, slurred speech, and red, glassy eyes. (R48:20) Further, like the officer in *Wilkins*, Deputy Spittlemeister then conducted field sobriety tests and determined that Spannraft performed poorly on those tests. (R:48:21) Like the defendant in *Wilkins*, Spannraft contends that the court should reject the trial court's credibility determination because the tests did not 100% comport with NHTSA requirements. Finally, this court should hold—just as it held in *Wilkins*—that the circuit court did not erroneously exercise its discretion by determining Deputy Spittlemeister's testimony regarding Spannraft's performance on the field sobriety tests was credible.

III. THE CIRCUIT COURT PERMISSIBLY EXERCISED ITS DISCRETION IN FINDING SPANNRAFT'S TESTIMONY REGARDING THE EVENTS SURROUNDING THE INTOXIMETER TESTING WAS NOT CREDIBLE.

To repeat what has already been laid out, it is not the function of appellate courts to review the credibility of witnesses, rather, that is the job of the trial court; the trial court's findings of fact will not be reversed except for in rare and dubious circumstances. *Lessor*, 221 Wis.2d at 667-68. The trier of fact's determinations will stand even where “more than one reasonable inference can be drawn from credible evidence.” *Id.* at 667.

The circuit court weighed the testimony of Officers Prodzinski and Spannraft and made two determinations: (1) That Spannraft's testimony was not credible as to what occurred during the twenty minute Intoximeter testing, and (2) that Officer Prodzinski's testimony was credible. (R48:21-22). Simply because Spannraft has provided this court with an alternative explanation for the events does not mean that the court's findings of fact were erroneously made. The court weighed Officer Prodzinski's testimony that Spannraft was not allowed to put anything into her mouth during the administration of the Intoximeter against Spannraft's testimony that she used her inhaler during that process, and the court, as the trier of fact, simply came to the conclusion that Officer Prodzinski was more reliable than the defendant at that time. (R48:21-22)

This court should not disturb the circuit court's credibility determination because such a holding would erase the stout precedent that findings of fact will not be overturned unless they are clearly erroneous.

CONCLUSION

Spannraft has failed to determine that the circuit court acted erroneously in its use of discretion. The holding of the circuit court should be affirmed.

Dated this ____ day of December 2019.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

Kimberly D. Schoepp
Assistant District Attorney
State Bar No. 1056780

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2470.

Date

Kimberly D. Schoepp
Assistant District Attorney
State Bar No. 1056780

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 Wis. Stat. § 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 with the paper copies of this brief filed with the court and served on all opposing parties.

Date

Kimberly D. Schoepp
Assistant District Attorney
State Bar No. 1056780

P.O. Address:

Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.