STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP2300 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KARI E. MRAVIK,

Defendant-Appellant.

Appeal from a Judgment of Conviction
Entered in the Circuit Court for La Crosse County,
the Honorable Elliott M. Levine Presiding
Circuit Court Case No: 2017CT111

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. Was Mravik entitled to have the jury instructed that "under the influence of an intoxicant" element of operating while intoxicated is defined as "materially impaired" in accordance with the statutory definition in Wis. Stat. § 939.22(42)?

Trial Court Answered: No.

II. Was the evidence before the jury sufficient to support a conviction of operating with prohibited alcohol concentration?

Trial Court Answered: The court accepted the jury's guilty verdict but did not enter judgment on this count. (34:428; App.112)

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

This is an appeal from the Judgment of Conviction entered on May 25, 2018, in the Circuit Court for La Crosse County, the Honorable Elliott M. Levine presiding, wherein

the Court entered judgment[1] on a jury verdict finding Kari E. Mravik guilty of one count of operating while intoxicated (2nd), contrary to Wis. Stat. § 346.63(1)(a), and operating with prohibited alcohol concentration (2nd), contrary to Wis. Stat. § 346.63(1)(b). (22; App. 101-02.)

Before trial, Mravik requested the court amend the standard jury instruction for operating while intoxicated, JI-CRIM 2663, by including the word "materially" before "impaired" in accordance with the statutory definition of "under the influence of an intoxicant" found in Wis. Stat. § 939.22(42). (17) The court denied Mravik's proposed jury instruction. (34:4-8; App.104-08.) Mravik again objected to the standard jury instruction definition of "under the influence of an intoxicant" during the jury instruction conference. (*Id.* at 363-64; App.109-10.) The court ruled against Mravik for the same reasons it had earlier stated. (*Id.* at 364; App.110.)

The court sentenced Mravik on Count 1 to eight days jail, 12 months revocation of her driver's license and 12 months ignition interlock device. (22; App. 101-02.)

Mravik filed a timely notice of appeal. (35.) This appeal addresses whether the circuit court erred by not using "materially impaired" when instructing the jury on the elements of operating while intoxicated, and whether the jury had sufficient evidence to convict Mravik of operating with a prohibited alcohol concentration.

[1] The court accepted the jury's guilty verdicts on both counts but only entered a judgment of conviction on Count 1, operating while intoxicated. (34:428; App.112) *See* Wis. Stat. § 346.63(1)(c).

STATEMENT OF FACTS

The following is a summary of the evidence and testimony at trial.

Shortly before 3:00 a.m. on March 5, 2017, La Crosse County Sherriff Deputy Michael McAuliffe was on patrol duty, parked on a turn off from Highway 16 in La Crosse to read radar on traffic. (34:44, 46-47.) McAuliffe had been an officer for only four months at the time, having started with the La Crosse Sheriff's Department in November 2016. (*Id.* at 91.) In fact, that night he was still doing field training and had another deputy riding in the squad with him as his supervisor. (*Id.* at 103, 140.) Prior to March 5, 2017, he had only conducted standard field sobriety tests approximately five times. (*Id.* at 80.)

Mravik was driving home after an evening of working at a restaurant and then socializing with friends. (*Id.* at 202, 212-20.) She had worked as a hostess from 5:00 p.m. until after 10:00 p.m. on March 4, 2017. (*Id.* at 212.) After she completed her shift, Mravik drank approximately one third of a cocktail. (*Id.* at 214) Around 11:00 p.m., Mravik met friends at a bar to hear live music. (*Id.* at 217.) Between 11:00 p.m. and midnight, Mravik drank two 22-ounce beers estimated at 5% alcohol. (*Id.* at 218.) Throughout the night, she ate several slices of pizza and two baskets of popcorn. (*Id.* at 213, 218-20, 249.) She did not consume any alcohol between midnight and around 2:15 a.m. (*Id.* at 220-21.) At that point in time, no longer feeling any effects of the drinks she had earlier, Mravik drank one bottle of beer. (*Id.* at 221.)

Mravik left the bar around 2:30 a.m. (*Id.* at 220, 222.) She walked for approximately five minutes to her vehicle and began to drive the 10- to 15-minute route to her home. (*Id.* at 223-24.) At no point during the walk to her vehicle and her

drive home, did Mravik feel intoxicated or unable to drive. (*Id.* at 223-24.)

Because of previously being pulled over for speeding on her route home, Mravik had a habit of setting the cruise control on her vehicle to between 45- and 48- miles per hour on this drive. (*Id.* at 225.) She was using cruise control that night before being pulled over. (*Id.* at 225-26.)

McAuliffe testified that the passenger headlight in Mravik's vehicle was out and that she "seemed to be traveling slower than other vehicles for that period of time." (*Id.* at 44, 96.) Mravik testified that it was her driver side headlight that was not working the night of the incident. (*Id.* at 229.) Mravik did not notice that the light was out that night because her driver side headlight did not aim properly as a result of a previous car accident. (*Id.* at 229-30.) She later had her driver side headlight repaired. (*Id.*)

Although he had the ability to do so, McAuliffe did not radar Mravik's vehicle to determine her speed. (*Id.* at 95.) The speed limit in that area was 45 miles per hour. (*Id*.) After Mravik's vehicle passed McAuliffe began following it to catch up, having to reach a speed of 50 miles per hour in order to do so. (*Id.* at 46, 95.) McAuliffe caught up to Mravik's vehicle as she slowed at an intersection with a stoplight. (*Id.* at 48.)

Mravik did not come to a complete stop at the stoplight, but slowed to a rolling stop then turned right. (*Id.* at 48.) Mravik testified that she did not stop completely because there were no other cars around, given the late hour and because the road she was turning onto was a dead end. (*Id.* at 226.) McAuliffe activated his lights in the middle of Mravik's turn and Mravik stopped her vehicle. (*Id.* at 48-49, 98, 228.)

Mravik was about a half mile from her home when she was pulled over. (*Id.* at 228.)

McAuliffe made contact with Mravik at her vehicle. (*Id.* at 49.) Mravik told McAuliffe that she had had one drink, a beer, approximately 30 to 45 minutes prior. (*Id.* at 59, 61.) Mravik testified she only told McAuliffe about one beer because of the length of time between finishing the other drinks earlier in the evening and the fact she was no longer feeling any effect from those drinks, not because she was trying to hide the fact of the other drinks. (*Id.* at 233, 251.)

McAuliffe's contact with Mravik lasted less than one minute before he returned to his squad car. (*Id.* at 102.) McAuliffe testified that during this brief contact he noticed a strong odor of intoxicant coming from Mravik's vehicle, and that Mravik seemed flustered, was speaking "pretty quickly" and her speech seemed slurred. (*Id.* at 54.) Squad video indicated that when McAuliffe returned to the squad car, the field training deputy asked him what indications of impairment he had observed and McAuliffe only responded the "bad turn." (*Id.* at 104-05.) Then, when asked directly about Mravik's eyes and speech, McAuliffe told his training officer that her eyes were "a little glossy," and her speech was, "ooo, iffy, really poor at the start, but got a lot better when she started talking to me." (*Id.* at 105-06.)

McAuliffe returned to Mravik's vehicle and asked Mravik to step to perform field sobriety tests. (*Id.* at 59.) McAuliffe testified that Mravik seemed slightly unsteady on her feet. (*Id.* at 60.) On cross, McAuliffe elaborated that Mravik, "seemed just slightly unsteady. As though she was unsure of her footing. Just the way she's stepping, she just does not look confident I guess in her walk." (*Id.* at 110.) Mravik was wearing a dress with only a sweater over it and

high-heeled boots. (*Id.* at 69, 109, 235.) Mravik testified that the heels on her boots were two-and-a-half to three inches high, and it was sometimes hard to walk in them. (*Id.* at 236.)

The weather that night was clear and cold, with temperatures in the low 30's. (*Id.* at 109, 235.) McAuliffe did not offer to conduct the standard field sobriety tests in another location out of the cold, despite Mravik wearing only a sweater. (*Id.* at 112.) Nor did he ask if Mravik had any physical conditions that may impact her performance on the tests. (*Id.* at 111-12.)

Mravik testified she was "rattled, overwhelmed, [and] confused" about why she was being asked to step out of her vehicle. (*Id.* at 234.) Once outside of her vehicle, Mravik was further overwhelmed by the flashing red and blue lights and the squad car's headlights and spotlight shining on her. (*Id.* at 235.) She was also surprised to see another two officers on the scene. (*Id.*) Given how close Mravik was to her home, she was also embarrassed and worried that someone from her building may drive by and see her. (*Id.* at 236.)

Mravik believed her overwhelming feelings of confusion, worry, and embarrassment all impacted her performance of the field sobriety tests. (*Id.* at 236, 239-40, 259-60.) Additionally, Mravik was diagnosed with periodic limb movement disorder, a sleep disorder that prevents her from feeling as rested as a normal person would from the same amount sleep. (*Id.* at 206). She believed that feeling tired as a result of this health issue also impacted her performance on the field sobriety tests. (*Id.* at 259-60.)

McAuliffe conducted the horizontal gaze nystagmus ("HGN") test on Mravik. (*Id.* at 62.) McAuliffe testified that he then observed Mravik's eyes were glossy and bloodshot.

(*Id.* at 64.) McAuliffe testified he observed four of six clues on the HGN test. (*Id.* at 67-68.)

McAuliffe then conducted the walk and turn test. (*Id.* at 68.) McAuliffe testified that he was trained that heels may impact an individual's ability to perform the test and that such persons should be offered the opportunity to perform without heels, however he did not raise the issue with Mravik. (*Id.* at 117-18.) Prior to beginning the test, while McAuliffe was still given her the instructions, Mravik asked to change out of her heels and into flat shoes she had in her car. (*Id.* at 69, 236, 238.) McAuliffe allowed her to change her shoes. (*Id.* at 70.) Mravik walked to the trunk of her car to change out of her boots, doing so standing up with no difficulty. (*Id.* at 119.) McAuliffe testified that Mravik walked fine from the trunk of her car back to where the field sobriety tests were being conducted. (*Id.* at 120.)

McAuliffe testified he observed five clues on the walk and turn test. (*Id.* at 74-75.) Specifically, the officer said Mravik started the test early, missed a heel to toe step, stepped off the line on one step, and turned incorrectly by planting both feet and pivoting instead of taking a series of small steps. (*Id*. at 75-76.) However, when McAuliffe was instructing her on the turn, Mravik asked if she should pivot and he said yes. (*Id.* at 123, 239.) Further, Mravik asked to change her shoes during McAuliffe's instructions for this test, and although there were no additional instructions after she changed her shoes, McAuliffe considered it a clue when Mravik then began the test. (*Id.* at 121, 238-39.)

McAuliffe then administered the one-leg stand test and observed three clues. (*Id.* at 77-78.) McAuliffe testified Mravik put her foot down early, raised her arms, and was swaying to keep her balance. (*Id.* at 79.) McAuliffe also asked

Mravik to recite the alphabet and to count backwards. (*Id.* at 79.) Mravik made one error when counting backwards but was otherwise able to complete these tasks. (*Id.* at 80.)

McAuliffe then placed Mravik under arrest. (*Id.* at 81.) Mravik was cooperative after being placed under arrest. (*Id.* at 126-30, 241-43.) At the same time, Mravik had questions and felt the officers were not explaining to her what was happening and why she was being arrested. (*Id.* at 241-44.)

Mravik was transported to Mayo Health Systems in La Crosse for a blood draw. (*Id.* at 83.) When they arrived at the hospital, McAuliffe remained with Mravik in the squad car for several minutes before read the Informing the Accused statement to Mravik while still in his vehicle. (*Id.* at 83-85, 132.) During this time, Mravik remained handcuffed and cold in the backseat. (*Id.* at 134.) She was also confused as to what was happening. (*Id.* at 244-45.)

By the time McAuliffe finally read the Informing the Accused form to her, Mravik was upset that she continued to ask questions without receiving any response from the officer. (*Id.* at 244-45.) Mravik stated she was not refusing to provide a blood sample. (*Id.* at 85, 245.) McAuliffe asked her if she would consent and Mravik again stated she was not refusing. (*Id.* at 86.) McAuliffe testified Mravik never said yes, despite his request for affirmative consent. (*Id.* at 86-87.) However, Mravik never said "no," or told McAuliffe that she would not provide a sample. (*Id.* at 133-34.) Mravik asked a number of questions about the form and blood draw, but McAuliffe did not answer any of her questions. (*Id.* at 134.) Mravik testified, "I kept telling them I'm not refusing, and so to me that's giving them permission to draw my blood without giving them their yes, because I was upset with them for not answering my questions." (*Id.* at 246.) She was not thinking

about what her blood alcohol concentration would be at that time, nor did she have any concerns as to being impaired. (*Id.* at 246-47.) Mravik had questions about what was happening and what her rights were, but those questions were not answered. (*Id.* at 264.) It was for this reason, not to prevent the officers from obtaining her blood sample, that she did not give a yes or no answer. (*Id.* at 263-65.)

Ultimately, McAuliffe deemed Mravik's response a refusal and sought a warrant for the blood draw. (*Id.* at 87.) Mravik cooperated during the blood draw. (*Id.* at 247.) Mravik's blood was drawn by phlebotomist Ashley Mezera at 4:26 a.m. on March 5, 2017. (*Id.* at 162, 167.) Stephanie Weber, a senior chemist at the State Lab of Hyiene, tested Mravik's blood sample for the presence of alcohol. (*Id.* at 179.) Based on her training and experience, Weber concluded that Mravik's blood alcohol concentration was .09 grams of ethanol per 100 milliliters of blood when her blood was drawn at 4:26 a.m. (*Id.* at 179-81.)

Weber acknowledged the test result did not show what Mravik's blood alcohol concentration was at the time she operated the vehicle or whether it was above or below .08. (*Id.* at 181, 185-86.) Weber stated she had the ability to calculate an estimated range of blood alcohol concentration if provided assumptions. (*Id.* at 185-86, 191-92.) Weber did not testify to any such calculation or provide an estimated range for Mravik's blood alcohol concentration at the time of driving. (*Id.* at 185-94.)

Mravik offered the expert testimony and report of Dr. Stephen Oakes, a pharmacology professor, regarding the likelihood that her blood alcohol concentration was below .08 at the time of the traffic stop. (*Id.* at 286.) Oakes calculated that Mravik's blood alcohol concentration was around .072 or

.073, but could have been as low as .07 when she was last driving the vehicle. (*Id.* at 294; 18:76-77.) Oakes therefore concluded that, to a reasonable degree of scientific and pharmacological certainty, Mravik's blood alcohol concentration was actually below .08 at the time of the traffic stop. (34:289, 294, 321-22; 18:76-77.)

Oakes also testified that certain observations made about Mravik, including slurred speech, glassy eyes, unsteadiness, and her performance on field sobriety tests were not reliable proof of intoxication or impairment. (34:311, 321-22; 18:72-73.) Oakes was not aware of any fact that would scientifically support Mravik being unable to safely operate a vehicle at the time of the traffic stop, based on the observations and standardized tests that were run. (34:322-23.)

Over Mravik's objection, the court read the standard jury instruction for operating while intoxicated, JI-CRIM 2663. (*Id.* at 363-64, 373; App.109-111.) The jury found Mravik guilty of operating while intoxicated and operating with prohibited alcohol concentration. (*Id.* at 426-27.)

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT MODIFYING THE STANDARD JURY INSTRUCTION FOR OPERATING WHILE INTOXICATED IN ACCORDANCE WITH THE STATUTORY DEFINITION OF "UNDER THE INFLUENCE" FOUND IN WIS. STAT. § 939.22(42)

Prior to trial, Mravik sought an amendment to the standard jury instruction for operating while intoxicated, JI-CRIM 2663, to define the element of "under the influence of

an intoxicant" as "materially impaired" rather than "impaired." The trial court denied Mravik's request and overruled her objection to the standard instruction. Mravik argues that, because this is a criminal case, the trial court erred by not instructing the jury in accordance with the definition of under the influence found in Wis. Stat. § 939.22(42).

A. Legal Principles and Standard of Review

Wisconsin law prohibits the operation of a motor vehicle while "[u]nder the influence of an intoxicant." Wis. Stat. § 346.63(1)(a). For a second offense or higher, violations of Wis. Stat. § 346.63(1)(a) are criminalized. Wis. Stat. § 346.65(2)(am). Wisconsin's Traffic Code does not define under the influence of an intoxicant. However, this phrase is defined in the Criminal Code: "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle…is materially impaired because of his or her consumption of an alcohol beverage…." Wis. Stat § 939.22(42).

The terms "under the influence" in sections 346.63(1)(a) and 939.22(42) are equivalent. ***State v. Hubbard***, 2008 WI 92, ¶ 44, 313 Wis.2d 1, 752 N.W.2d 839 (discussing ***State v. Waalen***, 130 Wis.2d 18, 386 N.W.2d 47 (1986)). It was not error for a trial court to decline to give a previous version of JI-CRIM 2663 that included the word "materially," where that instruction defined "materially" as "substantially." ***Waalen***, 130 Wis.2d at 27.

The current version of the standard jury instruction states:

> "Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was

> impaired because of consumption of an alcoholic beverage.
>
> Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consume a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

JI-CRIM 2663.

A trial court has broad discretion in instructing the jury, but must exercise its discretion in order to fully and fairly inform the jury of the applicable rules of law. ***State v. Ziebart***, 2003 WI App 258, ¶ 16, 268 Wis. 2d 468, 673 N.W.2d 369. A challenge to jury instructions warrants relief where the reviewing court is persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury. ***Id.*** Courts employ a de novo standard of review for jury instruction issues that involve definitions of statutory words. ***State v. Harmon***, 2006 WI App 214, ¶ 8, 296 Wis.2d 861, 723 N.W.2d 732. A jury decision is considered tainted if a jury charge is given in such a manner that a reasonable juror could misinterpret the instructions to the detriment of the defendant's due process rights. ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107 (1988).

B. The Trial Court Should Have Instructed the Jury that Mravik's Ability to Operate a Vehicle Must be "Materially" Impaired in Order to Find Her Under the Influence of an Intoxicant

Prior to trial, Mravik submitted proposed jury instructions that modified JI-CRIM 2663 by including the word "materially" before the word "impaired." (17.) Mravik argued this modification was necessary to include the correct statutory definition of "under the influence of an intoxicant," citing Wis. Stat. § 939.22(42) and ***State v. Hubbard***, 2008 WI 92, ¶ 43, 313 Wis.2d 1, 752 N.W.2d 839. (*Id.*)

The trial court addressed Mravik's motion prior to selecting the jury and declined to change the instruction to include "materially." (34:4-7; App.104-107.) The court relied on JI-CRIM 2600, stating "I'm going to leave the jury instruction as it is because that's what the jury instructions committee suggests." (*Id.* at 4; App.104.) The court noted that the committee found,

> They say there's confusion done by at this point in time by using the word material. It's pretty clear that, especially in jury instruction 2600, where they say specifically, Committee concluded that the use of material by a definition that could not be helpfully defined without running afoul of legislative attempt recognizing –
>
> …
>
> I'm looking at 2600 Page 26, it's under C, I think it's 8 C, which is the -- 2600 is the over all instructions for the -- … for the impaired driving.

(34:5; App.105.) Mravik had cited ***Hubbard*** in her request for the modified instruction, but the court distinguished the case stating, "Hubbard really doesn't help you much. It's

really more about confusion that comes in with using the word material," rather than mandated the inclusion of "material" in the instruction. (*Id.*; App.105.)

Mravik noted her ongoing objection for the record. (*Id.* at 8; App.108.) The court stated, "I understand. …but as they say material is confusing that's why, and I don't like confusing jury instructions." (*Id.*; App.108.)

The trial court ultimately instructed the jury:

> Definition of under the influence of an intoxicant.
>
> Under the influence of intoxicant means that the Defendant's ability to operate a vehicle was impaired because of the consumption of an alcoholic beverage.
>
> Not every person who has consumed alcoholic beverages is under the influence as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. While it is required that a person's ability to safely control the vehicle be impaired.

(34:373; App.111.)

The circuit court was correct that ***Hubbard*** does not mandate the amendment sought by Mravik. However, neither does that case provide support for the circuit court's denial of Mravik's proposed jury instruction. In ***Hubbard***, the propriety of including "materially" in the instruction was not at issue

because the defendant was charged with injury by intoxicated use of a vehicle, in violation of section 940.25(1)(a) of the Criminal Code. ***Hubbard***, 2008 WI 92, ¶ 2. Instead, the court addressed the narrow question of how to define "materially" in response to a jury question. ***Id.*** at ¶ 24.

The issue of whether a defendant charged with operating while intoxicated was entitled to a jury instruction containing the phrase "materially impaired" was addressed in ***State v. Waalen***, 130 Wis.2d 18, 386 N.W.2d 47 (1986). There, the trial court, over the defendant's objection, chose to give an earlier version of the instruction that did not contain the word "materially" instead of the newly revised standard jury instruction that did contain "materially." ***Id.*** at 20-22. The revised instruction at issue in ***Waalen*** included the following, "It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be *materially, that is substantially*, impaired." JI-CRIM 2660 at 25 (quoting JI-CRIM 2663 (1982)) (emphasis added).

It was this definition of "materially" as "substantially," which the ***Waalen*** court found problematic, not the use of the word "materially" itself:

> The committee believed that "materially impaired" was equivalent to "substantially impaired," and concluded that the existing standard instruction had to be revised to make the Motor Vehicle Code consistent with what it perceived to be the Criminal Code's requirement of "substantial impairment." The committee, however, cited no authority for defining "material" as "substantial."

> "Material impairment" should not be given a definition that is inconsistent with the purpose of the statute, which is to foster highway safety. … Requiring "substantial impairment" of an individual's ability to operate a vehicle before that person could be found "under the influence" would be inconsistent with the expressed legislative intent because it would not provide maximum safety for all users of state highways.

Id. at 27. Instead, the court held "material impairment" exists when "a person is incapable of driving safely or is without proper control of all those faculties … necessary to avoid danger to others." ***Id.*** at 27 (internal quotes and ellipses omitted). This clarification demonstrates the court was not rejecting the use of the word "materially," but simply the committee's definition of that word as "substantially":

> The court saw no incompatibility or inconsistency between the term "under the influence" in Wis. Stat. § 346.63(a)(a) (1981-82) and the phrase "materially impaired because of his consumption of an alcohol beverage" in Wis. Stat. § 939.22(42) (1981-82). However, the court was forced to repudiate the notion that "material impairment" meant "substantial impairment," as suggested by the Criminal Jury Instructions Committee, *Waalen*, 130 Wis.2d at 27, 386 N.W.2d 47, because that notion appeared to undermine the purpose of the statute by raising the proof requirement for "under the influence" and because the language had no basis in statutory text or legislative history.

State v. Hubbard, 2008 WI 92, ¶ 44, 313 Wis.2d 1, 752 N.W.2d 839.[2]

This case is distinguishable from ***Waalen*** because Mravik did not seek to instruct the jury that the standard for under the influence was "substantially impaired," as "materially" was defined in the version of JI-CRIM 2663 at issue in that case. Because of this distinction, neither ***Waalen*** nor ***Hubbard*** supports the trial court's denial of Mravik's proposed amendment to the jury instruction.

Because Mravik's charge was a second offense, which subjected her to criminal penalties, she was entitled to have the jury instructed as to the elements of the offense in a manner that satisfied the statutory definition provided in the Criminal Code, Wis. Stat. § 939.22(42). Had she been charged with, for example, injury by intoxicated use of a vehicle, she would be entitled to such an instruction. *See* ***Hubbard***, 2008 WI 92, ¶¶ 8, 11; JI-CRIM 1262. It makes little sense that an individual accused of causing an injury by intoxicated use of a vehicle would be entitled to a higher threshold for impaired driving than someone charged with a garden variety operating while intoxicated.

Further, the trial court's justification that a jury would be confused by the word "materially" is countered by ***Hubbard's*** holding that "[t]he term 'materially impaired'

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[2] The ***Hubbard*** court held that a trial court was not required to define the word "materially" with the language found in ***Waalen*** 130 Wis.2d at 27 ("exist[ing] when a person is incapable of driving safely, or is without proper control of all those faculties necessary to avoid danger to others,"), as that language merely provided examples of material impairment, not a legal definition of the term. 2008 WI 92, ¶ 53. The court also disagreed with the ***Waalen*** court's interpretation of a 1983 revision to Wis. Stat. § 346.63(1)(a) which is not relevant to the argument in this case. *Id.* at ¶¶ 46-47.

does not have a technical or peculiar meaning in the law," and was a term that could be defined by its ordinary meaning. 2008 WI 92, ¶¶ 58-59. The trial court was not limited by the standard jury instructions or the committee's reasons for excluding the word "materially." *See* ***State v. O'Neil,*** 141 Wis.2d 535, 541 n.1, 416 N.W.2d 77 (Ct.App. 1987) ("while we generally view the work of the Criminal Jury Instructions Committee as persuasive, it is not precedent.")

The trial court's instruction deprived Mravik of a jury deliberation based on the established legal standard for what it means to be "under the influence of an intoxicant" under Section 939.22(42). The trial court's instruction therefore resulted in a tainted jury verdict as well as a violation of Mravik's due process rights as guaranteed by the Wisconsin and United States Constitutions. *See* ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107 (1988).

C. The Trial Court's Erroneous Instruction Was Not Harmless as it Contributed to Mravik's Conviction

Where the trial court incorrectly instructs the jury, the verdict must be set aside unless the error was harmless; that is, unless there is no reasonable possibility that the error contributed to the conviction. ***State v. Ziebart***, 2003 WI App 258, ¶ 26, 268 Wis. 2d 468, 673 N.W.2d 369. The State has the burden of establishing, beyond a reasonable doubt, an error was harmless. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985). A conviction must be reversed, unless the court is certain that the error did not influence the jury. ***Id.*** at 541-42.

Here, the trial court's error deprived Mravik of a jury deliberation based on the correct standard of law. Had the jury been instructed that, in order to find Mravik "under the

influence of an intoxicant," it must find her ability to operate a vehicle "materially impaired," there is a reasonable likelihood that Mravik would not have been convicted. There was little evidence at trial to support an argument that that Mravik's ability to operate her vehicle was impaired in any sense, and certainly not *materially* impaired.

McAuliffe could identify only three problems with Mravik's driving – a burned out headlight, speed that "seemed…slower than other vehicles for that period of time," and a rolling stop before making a right turn at a red light. (34:44, 48, 96.) However, the evidence suggests that Mravik's minor infractions were not likely caused by any level of impairment. Regarding her headlight, Mravik testified that the light aimed differently due to damage from a previous traffic accident, making it hard for the driver to notice when it was not working properly. (*Id.* at 229-30.) In fact, the lamp had previously stopped functioning shortly before the incident and Mravik had not noticed until a friend pointed it out to her. (*Id.* at 231-32.) Mravik testified that she was driving at or near the speed limit, noting her habit of setting her cruise control while on that stretch of road due to previous speeding infractions. (*Id.* at 225-26.) Finally, Mravik testified regarding her rolling stop through a red light that there was no other traffic at the intersection, and she was turning right onto a dead end road. (*Id.* at 226.) Though Mravik acknowledged this as a traffic infraction, her awareness of the lack of traffic and safety of the maneuver demonstrates that it was not due to impairment.

As such, the trial court's erroneous instruction must be considered a contributing factor in the conviction, and therefore was not harmless.

II. THE EVIDENCE AT MRAVIK'S TRIAL WAS INSUFFICIENT TO SUSTAIN HER CONVICTION OF OPERATING WITH A PROHIBITED ALCOHOL CONCENTRATION

A. Legal Principles and Standard of Review

Wis. Stat. § 346.63(1)(b) prohibits driving or operating motor vehicle while a person has a prohibited alcohol concentration. A prohibited alcohol concentration for a person with two or fewer prior convictions is an alcohol concentration of 0.08 or more. Wis. Stat. § 340.01(46m)(a).

The United States and Wisconsin Constitutions guarantee that a person accused of a crime is presumed innocent and that the burden of proof is upon the state to establish guilt of every essential fact beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 363-64 (1970); ***State v. Smith***, 117 Wis.2d 399, 415, 344 N.W.2d 711 (Ct. App. 1983). A criminal defendant may challenge the sufficiency of the evidence on appeal regardless of whether the issue was raised at trial. ***State v. Hayes***, 2004 WI 80, ¶ 4, 273 Wis.2d 1, 681 N.W.2d 203.

In order to overturn a conviction on the basis of insufficient evidence, appellate courts must determine whether the evidence, "viewed most favorably to the State and to the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilty beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990). The sufficiency of the evidence is reviewed not simply to determine whether the jury was properly instructed and reached a guilty verdict, but instead whether the evidence of record could reasonably support a

finding of guilt. ***Jackson v. Virginia***, 443 U.S. 307, 318 (1979).

A jury may draw reasonable inferences from facts established by circumstantial evidence, but it may not indulge in inferences wholly unsupported by any evidence. ***State ex rel. Kanieski v. Gagnon***, 54 Wis.2d 108, 117, 194 N.W.2d 808 (1972). A criminal conviction cannot be sustained by inferences from circumstantial evidence which are not supported by facts. ***Id***.

When a reviewing court finds that the evidence was legally insufficient, the only remedy is to direct a judgment of acquittal. ***United States v. Burks***, 437 U.S. 1, 18 (1978); ***State v. Wulff***, 207 Wis.2d 143, 145, 557 N.W.2d 813 (1997).

B. The Evidence Did Not Establish Mravik's Alcohol Concentration Was .08 or Higher at the Time of Driving

The jury did not have sufficient evidence at trial to support its conviction of Mravik for operating with a prohibited alcohol concentration. Although Wis. Stat. § 885.235(1g) provides that a blood sample taken within three hours of a defendant's driving is admissible on the issue of whether a person had a prohibited alcohol concentration at the time of driving, the expert testimony on both sides rebuts any probative value that the test result may have as to Mravik's alcohol concentration at the time of driving. It was undisputed at trial that the blood test result of .09 did not show what Mravik's blood alcohol concentration was at the time of driving.

Mravik was pulled over at around 2:50 a.m. (34:44.) Her blood was drawn at 4:26 a.m. (*Id.* at 162, 167.) A test of Mravik's blood sample showed a blood alcohol concentration

of .09. (*Id.* at 179-81.) The State's analyst admitted that test results did not show Mravik's alcohol concentration was .09 at the time of driving. (*Id.* 181, 85-86.) She testified that, provided enough information, she could calculate an estimated range for what Mravik's alcohol concentration would have been at the time she was pulled over. (*Id.* at 185-86.) However, no such calculation was performed by the State's analyst. Mravik's expert testified that, to a reasonable degree of scientific and pharmacological certainty, Mravik's blood alcohol concentration was actually below .08 at the time of the traffic stop. (*Id.* at 289, 294, 321-22.)

The undisputed testimony of both experts established that Mravik's blood alcohol concentration at the time of driving was not the .09 test result from her blood drawn several hours later. Mravik's expert calculated that her blood alcohol concentration was, to a degree of scientific certainty, in the range of .07 to .073 at the time she was pulled over, (*id.* at 294; 18:72-73), was undisputed by the State. Accordingly, the evidence of Mravik's blood alcohol concentration at the time of driving was not "so sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence." ***Poellinger***, 153 Wis. 2d at 503.

For these reasons, the trial evidence was insufficient as a matter of law to establish beyond a reasonable doubt that Mravik was guilty of operating with a prohibited blood alcohol concentration.

CONCLUSION

For the foregoing reasons, Mravik asks this Court to vacate the Judgment of Conviction and remand this case to the circuit court for a new trial on Count 1, operating while intoxicated. She further requests the Court to enter an order vacating the Judgment of Conviction and directing the trial

court to enter a judgment of acquittal notwithstanding the verdict on Count 2, operating with prohibited alcohol concentration.

Dated this 22nd day of February, 2019.

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 5,924 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 by mail on all opposing parties.

Dated this 22nd day of February, 2019.

Signed:

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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; and (3) 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 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 22nd day of February, 2019.

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