

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2019AP000448-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CHRISTOPHER DREW HELWIG,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
NOVEMBER 8, 2018, IN THE CIRCUIT COURT
FOR JEFFERSON COUNTY,
THE HONORABLE BENNETT J. BRANTMEIER PRESIDING.

Respectfully submitted,

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STATEMENT OF THE ISSUES

- I. DID THE CIRCUIT COURT ERR WHEN IT ADMITTED HEARSAY AT TRIAL?
- II. DID THE CIRCUIT COURT VIOLATE THE DEFENDANT'S RIGHT TO CONFRONTATION BY ALLOWING EVIDENCE OF THE BLOOD DRAW AT TRIAL WITHOUT TESTIMONY OF THE PERSON WHO DREW THE BLOOD?

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Consequently, publication is not requested.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

On June 19, 2018, at approximately 5:45 p.m., a village of Palmyra police officer, as well as two deputies with the Jefferson County Sheriff's Department, responded to County Highway E and Hooper Road in Palmyra for a reported vehicle in a ditch.¹

Following field sobriety testing, Deputy Brandenburg of the Jefferson County Sheriff's Department arrested Mr. Helwig for operating while under the influence of an intoxicant.² Mr. Helwig submitted to a test of his blood under Wisconsin's Implied Consent Law.³ Mr. Helwig's blood was drawn at the Fort Atkinson Memorial Hospital.⁴ The blood samples were sent in and analyzed at the State of Wisconsin Hygiene Lab.⁵

The parties then litigated a pretrial motion which is not an issue on this appeal⁶.

On August 31, 2018, the Order for Continuance signed by Judge Brantmeier set the trial date for October 5, 2018.⁷ At a hearing on October 1, 2018, Judge Brantmeier addressed procedural issues

¹ R.3 at 2.

² R.3 at 3.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ The issue was substantially similar to that raised and now decided in *State v. Randall*, 2019 WI 80, 2017AP1518-CR.

⁷ R. 17.

prior to trial.⁸ The State, by Assistant District Attorney Monica Hall, indicated that the individual who drew the defendant's blood was under subpoena, but that the "Watertown Hospital proposed to us an alternative to have the Court rule on the admissibility of the blood test result based on the qualifications of the individual who drew the blood."⁹ The Court clarified that "would just be, is this person qualified to give the - - testify as to the blood draw?"¹⁰ The State indicated it may argue that is a matter of judicial determination pretrial and can be made based on hearsay because it is a matter to be determined at pretrial.¹¹

The defense then indicated that an additional factual finding that the blood draw was done according to the person's training would be required, not simply whether the person was qualified to perform a blood draw under the statute.¹² The Court agreed, saying "I didn't mean to indicate otherwise, but yes, the issue is was the blood drawn properly by a qualified individual."¹³

⁸ R. 68, p. 8-15.

⁹ *Id.* at 12-13.

¹⁰ *Id.* at 13.

¹¹ *Id.*

¹² *Id.* at 14.

¹³ *Id.*

PRE-TRIAL RULING OF THE COURT

The following day, October 2, 2019, three days before the trial date, the State filed a letter and a theory of admissibility of blood test result with attachments.¹⁴ The State indicated it intended to demonstrate compliance with § 343.305(5)(b) without the testimony of the registered nurse.¹⁵ The State attached the Blood/Urine Analysis form to its filing.¹⁶ The form was signed by “Amanda Ranchel,” who checked the box for “R.N.” on the form.¹⁷ The State also attached a Wisconsin Department of Safety and Professional Services Credential/Licensing Search showing a Ranchel, Amanda as a registered nurse with credential/license number 221484-30.¹⁸ The State indicated it would provide testimony from the Deputy who was present for the blood draw to show the blood was drawn in an appropriate manner.¹⁹

On October 3, 2018, Mr. Helwig filed a letter response to the State’s filing on its intention not to call the registered nurse at trial.²⁰ Mr. Helwig argued he had the right to confront witnesses against

¹⁴ R. 25 and 26.

¹⁵ R. 26 at 1.

¹⁶ *Id.* at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 5.

¹⁹ R. 25.

²⁰ R.27.

him.²¹ The registered nurse must appear because she was a necessary State's witness, which subjected her to confrontation (and cross-examination) by the defendant.²² Second, Mr. Helwig argued the State could only benefit from the automatic admissibility of the test result if it demonstrated that Mr. Helwig's blood was drawn properly and by a qualified individual.²³ Otherwise, the circuit court could not instruct the jury on the *prima facie* presumption of the blood result indicating a person is under the influence.²⁴

In a supplemental filing, the State argued the registered nurse was not a necessary witness and Mr. Helwig consequently did not have the right to confront her in court.²⁵ In addition, the State argued the implied consent law did not require any testimony on whether the blood was drawn correctly as the statute says "absolutely nothing" about the blood being drawn correctly.²⁶ As it believed the only issue was whether the registered nurse was qualified to draw blood, the State argued it could establish this through hearsay and without her testimony.²⁷

²¹ *Id.* at 1.

²² *Id.*

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ R.28 at 1.

²⁶ *Id.*

²⁷ *Id.*

The defense responded by filing a letter arguing that the person who drew blood was a necessary witness and that it is an issue at trial whether the blood draw was performed correctly.²⁸ Attached to that letter were instructions included in the blood draw kit indicating that the direction for drawing blood for implied consent purposes – Wis. Stat. § 343.305 and the Baraboo EMS - Legal Blood Drawn Training as an example.²⁹

On October 5, 2018, the court presided over a jury trial in this matter.³⁰ Before trial began and outside the presence of the jury, the court ruled on the issue raised by the State. The court found, based on the documents presented that the blood was drawn by a qualified person, a Registered Nurse.³¹ It further stated "that person is not a necessary witness. If that person was a necessary witness for the defense, the defense had have (sic) ample opportunity to subpoena and bring that witness to trial here today."³² The court concluded the State was allowed to show that person was a nurse through submissions and the defendant did not challenge that fact.³³

²⁸ R. 29.

²⁹ *Id.* at 3-24.

³⁰ R.69.

³¹ R.69 at 10.

³² *Id.*

³³ *Id.* at 11.

JURY TRIAL

The first State witness, Adam Schook, testified about his observations as a citizen witness who came upon a truck stuck in a ditch.³⁴ When he spoke to Mr. Helwig, Schook noted that Mr. Helwig had slurred speech, so he called the police.³⁵ On cross-examination, Schook acknowledged he did not see Mr. Helwig drive on the road.³⁶ He also acknowledged that he did not know how long Mr. Helwig had been maneuvering his truck in the ditch.³⁷ Schook testified he only had ten seconds of contact with Mr. Helwig.³⁸ He did not ask Mr. Helwig if he had anyone else coming to help him.³⁹

Deputy Heggie was the next witness at trial.⁴⁰ Deputy Heggie testified that the vehicle looked as though it had been driven off the road.⁴¹ The vehicle was stuck on a rock pile on the left shoulder.⁴² It was not running.⁴³ When she made contact with Mr. Helwig, she noted an odor of intoxicants on his breath, slurred speech, and that he repeated himself.⁴⁴

³⁴ R.69 at 53-61.

³⁵ *Id.* at 56.

³⁶ *Id.* at 59.

³⁷ *Id.*

³⁸ *Id.* at 60.

³⁹ *Id.*

⁴⁰ R.69 at 63.

⁴¹ *Id.* at 65.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

Mr. Helwig repeatedly told law enforcement officers that his friend Al drove off the road, got the pickup stuck, and then left the scene to retrieve a shovel.⁴⁵ Mr. Helwig told officers he was a passenger in the truck.⁴⁶ Deputy Heggie testified at trial that the passenger seat of the pickup was full of items and acknowledged that the crushed food containers and water bottles in the passenger seat could have been sat upon.⁴⁷

Deputy Heggie also testified Mr. Helwig told her that Al was headed back to Mr. Helwig's farm.⁴⁸ He did not state the distance to the farm.⁴⁹ Deputy Heggie told Mr. Helwig the police were not interested in speaking to Al.⁵⁰ Deputy Heggie at trial stated she believed the police were not ever able to contact Al.⁵¹ Deputy Heggie also acknowledged that she herself never made any effort to find or contact Al, following the incident.⁵²

Deputy Steinbach was the third State witness.⁵³ He responded that evening with Deputy Brandenburg, as Deputy Steinbach was the

⁴⁵ *Id.* at 66.

⁴⁶ *Id.* at 67.

⁴⁷ R.69 at 70; 71; 72.

⁴⁸ *Id.* at 72.

⁴⁹ *Id.*

⁵⁰ *Id.* at 80.

⁵¹ *Id.* at 81.

⁵² *Id.* at 82.

⁵³ R.69 at 84.

training officer for Deputy Brandenburg.⁵⁴ He acknowledged that he did not get into contact with Al and that Al did not appear on scene.⁵⁵ On cross-examination, the deputy could not recall, but acknowledged that it was possible that Mr. Helwig said on video that he left his wallet at the farm.⁵⁶ He also acknowledged that Mr. Helwig may have said “I don’t want to throw [Al] under the bus” when asked for specific information.⁵⁷ Deputy Steinbach did not try to contact Al.⁵⁸ On redirect, the deputy stated he did not because he “already had enough . . . to arrest [Mr. Helwig] for OWI.”⁵⁹ He also stated that Mr. Helwig did not admit to driving down the roadway—just trying to remove the vehicle from the ditch.⁶⁰ The deputy acknowledged that the vehicle did not move after it was stuck in the rocks.⁶¹

The last law enforcement officer to testify was Deputy Brandenburg.⁶² He testified that this was one of his first OWI investigations while working for the Sheriff’s Office.⁶³ Brandenburg testified that when he made contact with Mr. Helwig, he noted a strong

⁵⁴ *Id.* at 85.

⁵⁵ *Id.* at 91.

⁵⁶ *Id.* at 98.

⁵⁷ *Id.*

⁵⁸ *Id.* at 100.

⁵⁹ *Id.* at 102.

⁶⁰ *Id.* at 104.

⁶¹ *Id.* at 105.

⁶² *Id.*

⁶³ R.69 at 107.

odor of what he perceived to be intoxicants.⁶⁴ Mr. Helwig told Brandenburg that Al had gotten a phone call and they ended up in the ditch.⁶⁵ Brandenburg stated it would have been “very, very difficult for somebody to be sitting in the passenger seat” of the vehicle.⁶⁶ Following field sobriety testing, Mr. Helwig was arrested for operating under the influence of an intoxicant.⁶⁷

Deputy Brandenburg testified that Mr. Helwig was asked and he said yes, that he would submit to a legal blood draw.⁶⁸ After saying yes, Mr. Helwig was transported to the Fort Atkinson Memorial Hospital for the legal blood draw.⁶⁹ Deputy Brandenburg indicated there is a specific room they go into and inform the hospital that the Sheriff's Office is there for the blood draw.⁷⁰ Deputy Brandenburg testified they exchange paperwork for the Sheriff Office's purposes as well as for the record keeping for the hospital and then they do the blood draw.⁷¹ Deputy Brandenburg stated when ready he turned on his body cam to record the blood draw.⁷²

⁶⁴ *Id.* at 109.

⁶⁵ *Id.* at 109–10.

⁶⁶ *Id.* at 110.

⁶⁷ *Id.* at 124.

⁶⁸ *Id.* at 125.

⁶⁹ *Id.* at 125.

⁷⁰ *Id.* at 126.

⁷¹ *Id.*

⁷² *Id.*

The State played Brandenburg's body camera recording from the point at which the blood draw began.⁷³ Brandenburg testified that the State of Wisconsin provides a Styrofoam box or kit with two vials that the blood goes into, some packaging material, and some stickers to place on the box.⁷⁴ Brandenburg testified that he brought the kit in himself.⁷⁵ Brandenburg testified that the individual who performed the blood draw used the swab provided in the kit.⁷⁶ Brandenburg also testified that this was the first encounter he had with the registered nurse.⁷⁷

On cross-examination Brandenburg testified he did not know the hospital's policy as far as how their personnel is trained in legal blood draws or the protocol they follow.⁷⁸ Deputy Brandenburg further testified he did not know the correct cleaning procedure to follow prior to drawing blood or proper handling methods for the blood tubes after the blood is drawn.⁷⁹ Brandenburg specifically testified, "I don't know what the nurse's training and procedures are regarding the handling of the blood."⁸⁰

⁷³ *Id.* at 126.

⁷⁴ *Id.* at 127.

⁷⁵ *Id.* at 127.

⁷⁶ R.69 at 132.

⁷⁷ *Id.* at 133.

⁷⁸ *Id.* at 138.

⁷⁹ *Id.* at 139.

⁸⁰ *Id.*

The last witness at trial was the analyst from the State Laboratory of Hygiene, Michael Knuteson.⁸¹ Over defense counsel's objections, the State introduced the blood alcohol content results through the analyst.⁸² The State also published the lab report to the jury over defense objection.⁸³ On cross-examination, the analyst acknowledged that his lab prepares and provides the Styrofoam kits which are sent out for legal blood draws.⁸⁴ There are also protocol for the people who do the collection of the blood.⁸⁵ Part of that is that they follow the protocol of the hospital or agency they work for.⁸⁶ The analyst testified that from examining the blood tubes received he could not know whether all of the protocols had been properly followed.⁸⁷ For example, there is a particular method used to clean the site of the blood draw, and he has no way to know whether that was followed.⁸⁸ Similarly, the analyst did not know whether the person who drew blood inverted the tubes to dispense the preservative immediately following the blood draw.⁸⁹ The analyst acknowledged that had the registered nurse not cleaned the site *and* properly inverted

⁸¹ R.69 at 144-161.

⁸² *Id.* at 149.

⁸³ *Id.*

⁸⁴ *Id.* at 151.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 151-152.

⁸⁹ *Id.* at 151; 153.

the tubes, bacteria could raise the blood alcohol level in Mr. Helwig's samples.⁹⁰

As part of closing, the State played Brandenburg's body camera footage of the blood draw.⁹¹ While playing the video, the State commented on what could be seen on the video.⁹²

The jury convicted Mr. Helwig of operating under the influence of an intoxicant and operating with a prohibited alcohol concentration, both as second offenses. On November 8, 2018, the court sentenced Mr. Helwig.⁹³ Mr. Helwig subsequently appealed his conviction to this Court.⁹⁴

⁹⁰ R.69 at 159–60.

⁹¹ *Id.* at 168.

⁹² *Id.*

⁹³ R.49; 50; 52.

⁹⁴ R.64.

ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY ADMITTED HEARSAY AT TRIAL.

A. Standard of Review.

Evidentiary issues are in the trial court's discretion and upon review "the question is whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of the record."⁹⁵ When an evidentiary issue requires the application of a statute to a set of facts, a question of law is presented and review is *de novo*.⁹⁶ When construing a statute, the first resort is the language of the statute itself, and it must be interpreted on the basis of the plain meaning of its terms.⁹⁷ The application of a statute to an undisputed set of facts presents a question of law subject to review without deference to the trial court.⁹⁸

B. The Blood/Urine Analysis Form Admitted at Trial was Hearsay.

At the jury trial in this matter, the State elicited testimony from the person who analyzed the blood sample – the lab analyst.⁹⁹ During

⁹⁵ *State v. Jagielski*, 161 Wis. 2d 67, 467 N.W. 2d 196, 198 (Wis. App. 1991), citing *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983).

⁹⁶ *State v. Pulizzano*, 155 Wis. 2d 633, 643, 456 N.W.2d 325, 329 (1990).

⁹⁷ *State v. Waalen*, 130 Wis. 2d 18, 24, 386 N.W.2d 47, 49 (1986).

⁹⁸⁹⁸ *State v. Penzkofer*, 184 Wis. 2d 262, 516 N.W.2d 774 (Wis. App. 1994), citing *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 417, 280 N.W. 2d 142, 146-47 (1979).

⁹⁹ R. 69, 144-150

that testimony, the State introduced the Blood/Urine Analysis Form and published it to the jury, over the objections of the defendant.¹⁰⁰ That form contained hearsay in the form of the written statement of the person who drew Mr. Helwig's blood. No exception to the general rule that hearsay is inadmissible was advanced by the State at any point in the proceedings. The statute relied upon by the State and the trial court in its ruling that the statement was admissible was Wis. Stat. § 343.305(5)(d).¹⁰¹

C. Wis. Stat. §§ 343.305(5)(b) and (d) Do Not Allow Hearsay to be Admitted at Trial.

Wis. Stat. § 343.305 is the "Implied Consent Law" of Wisconsin. Wis. Stat. § 343.305(5) is titled "Administering the Test; Additional Tests". Wis. Stat. § 343.305(5)(b) states, in pertinent part, "[b]lood may be withdrawn from the person arrested for violation of s. 346.63(1) ... 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. § 343.305(5)(d) then states, as it applies to this case: "[a]t the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to

¹⁰⁰ *Id.* at 149. R. 43

¹⁰¹ R. 25, 26, 28, 69 at 3-11.

have been driving or operating a motor vehicle while under the influence of an intoxicant ... to a degree which renders him or her incapable of safely driving ... the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant ... to a degree which renders him or her incapable of safely driving or any issue relating to the person's alcohol concentration. Tests shall be given the effect required under s. 885.235."

The question then is whether the Implied Consent Law, and specifically, Wis. Stat. § 343.305(5)(b) and (d) allow the hearsay to be admitted at trial. The statute at (b) states that only certain types of persons are allowed to draw blood. The statute does not state that if the correct type of person has drawn the blood that person is not required to testify at a trial. The statute does not state that admissibility of the information is automatic or exempt from the rules of evidence. There is no direct statement in the statute in question, then, that would make hearsay admissible despite the general rule against hearsay.

Wis. Stat. § 343.305(5)(d) does state that the results of the test administered in accordance with the section are admissible. However, again, the statute does not state that the test results are admissible absent testimony from the necessary witnesses. Nor does that portion of the statute authorize hearsay to be admitted at trial.

Further, if we extend the State's argument it would lead to absurd and impermissible results. The argument advanced by the State would allow the test results to be admitted at trial without any testimony from either the person who drew the blood or the person who analyzed the blood. The argument is simply that the State could prove the underlying statutory requirements by submitting documents to the trial court in advance of trial as part of a preliminary question of the admissibility of evidence – without being subject to the rules of evidence. Then, at trial, because the trial court ruled pretrial on the admissibility of the evidence, no witness is required to introduce the evidence.

On their face Wis. Stat. §§ 343.305(5)(b) and (d) set forth requirements for admissibility of the evidence to be made more easily, but not without any testimony and not without adherence to the rules of evidence at trial.

Support of this is found in caselaw. The Court of Appeals in *State v. Wiedmeyer*, examined whether a test result which did not meet the requirements of Wis. Stat. § 343.305(6)(a) was admissible.¹⁰² There the lab analyst testified but could not meet the requirements of Wis. Stat. § 343.305(6)(a). The Court held that test results were not

¹⁰² 2016 WI App 16, 370 Wis. 2d 187, 881 N.W. 2d 805.

admissible under the Implied Consent Law and would not be given *prima facie* effect under Wis. Stat. § 885.235.¹⁰³ The Court specifically ruled: "[t]he obvious, and in our view correct, inference is that validity applies only to 'this section' - § 343.305 – not other statutes."¹⁰⁴ Therefore, admissibility of the test results could be attempted through other means and was not barred entirely because the State failed to meet the statutory requirement laid out in the Implied Consent Law. The statute is not held up as affecting other statutes or the general admissibility of evidence.

Additionally, cases which have directly examined the requirements put forth in Wis. Stat. § 343.305(5)(b) have not held that the testimony of the person drawing the blood was unnecessary. For example, in *State v. Penzkofer*, the Court of Appeals held that the requirements of the statute were satisfied with a showing of general authorization of a physician, specifically stating: "[t]he certified lab assistant followed a written protocol approved and kept current by the pathologist."¹⁰⁵ In that case the person who drew the blood testified about the procedure. In *State v. Kozel*, the Court similarly held that testimony established the statutory requirements were met.¹⁰⁶ Neither

¹⁰³ *Id.* at ¶ 9.

¹⁰⁴ *Id.* at ¶ 8.

¹⁰⁵ *State v. Penzkofer*, 184 Wis.2d 262, 516 N.W.2d 774 (Wis. App. 1994).

¹⁰⁶ *State v. Kozel*, 2017 WI 3, 373 Wis. 2d 1, 889 N.W.2d 423.

case specifically addressed the issue of whether once the statutory criteria were established, testimony of the person drawing blood was or was not necessary at trial. However, no ruling was made that simply meeting the requirement of Wis. Stat. § 343.305(5)(b) meant that hearsay was admissible at trial and in both cases the person who drew blood did testify.

D. The Evidence Does Not Establish the Blood Draw was Performed in Accordance with Wis. Stat. § 343.305(6)(a).

The requirement of Wis. Stat. § 343.305(5)(b) to establish that a proper person drew the blood is not the only statutory requirement – there is further the requirement that under Wis. Stat. § 343.305(5)(d), the test must be administered in accordance with the section, meaning the Implied Consent Law as a whole.

Wis. Stat. § 343.305(6) is titled "Requirements for Tests". Wis. Stat. § 343.305(6)(a) states that "[c]hemical analyses of blood or urine to be considered valid under this section shall have been performed substantially according to the methods approved by the laboratory of hygiene and by an individual possessing a valid permit to perform the analyses issued by the department of health services."

The information offered prior to trial and the testimony at trial did not establish that the blood draw was performed substantially according to the method approved by the laboratory of hygiene.

Specifically, the lab analyst testified that the lab prepares and provides the Styrofoam kits and instructions or protocol for the people who are collecting blood for legal blood draws per Wis. Stat. § 343.305.¹⁰⁷ The instructions include a directive that the specimen be collected "according to your institution's protocol."¹⁰⁸ The analyst testified that by examining the tubes he cannot know whether the protocol were followed.¹⁰⁹ He testified there is a proper method which is to be used to clean the site of the venipuncture and he did not know if that protocol had been followed.¹¹⁰ The analyst further testified he did not know whether the person who drew the blood had followed the proper protocol on inversion of the tubes after drawing the blood or when the mixing of the blood with the additives in the tubes took place.¹¹¹ Additionally, the analyst testified that if the proper protocol for cleaning of the site and inversion of the tubes was not followed, that could increase the ethanol content in the tube.¹¹²

The lab analyst was able to testify about the protocol set by the state lab of hygiene. He was not able to verify that the protocol had been followed. No witness called at trial was able to verify that

¹⁰⁷ R. 69 at 151. The instructions themselves are at R.29 at 3-4.

¹⁰⁸ R. 29 at 3; R. 69 at 151.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 152-3.

¹¹² *Id.* at 160.

protocol was properly followed. Therefore, the State failed to show that the statutory requirements laid out in the Implied Consent Law were met and that the blood test was admissible pursuant to the statute. Without that showing, the blood analysis is not admissible pursuant to the statute.¹¹³

Absent a finding that the Implied Consent Law allows this hearsay to become admissible, it is quite clear that a report such as this, prepared specifically for use in court, does not fall into categories that are exceptions to the hearsay rule and must be excluded.¹¹⁴ To determine otherwise would allow "the specter of the State submitting its case by means of unchallenged documentary evidence" to appear.¹¹⁵ That is precisely the result advocated for by the State – to allow them to introduce evidence through use of documents only and by introducing hearsay. Should that be allowed, then the Confrontation Clause is implicated and confrontation principles are compromised.

There is no statutory authority to admit the hearsay statement of the person who drew Mr. Helwig's blood and that statement should have been excluded at trial.

¹¹³ *State v. Wiedmeyer*, 370 Wis. 2d 187, ¶14, 881 N.W.2d 805 (Wis. App. 2016).

¹¹⁴ *State v. Williams*, 2002 WI 58, ¶ 49, 253 Wis. 2d 99, 644 N.W.2d 919

¹¹⁵ *Id.* ¶ 47

II. ADMISSION OF HEARSAY VIOLATED THE DEFENDANT'S RIGHT TO CONFRONTATION.

A. Standard of Review.

Whether the admission of evidence violates a defendant's right of confrontation is a question of law subject to independent appellate review.¹¹⁶

B. The Confrontation Clause Bars the Statement Admitted.

The Confrontation Clause bars the introduction of out-of-court testimonial statements unless the declarant is unavailable for trial and the declarant has previously been cross-examined by the defendant.¹¹⁷

A threshold question in examining a defendant's right to confrontation is to determine whether the evidence itself is admissible under the rules of evidence.¹¹⁸ If the evidence does not fit within a recognized hearsay exception it must be excluded. Only after it is admitted does it become necessary to consider confrontation. If the evidence is excluded as hearsay, confrontation would not be reached.¹¹⁹ Here, however, the Court allowed the report to be introduced and so the Confrontation Clause is implicated.

¹¹⁶ *State v. Williams*, 2002 WI 58, ¶ 7, 253 Wis. 2d 99, 644 N.W.2d 919, *citing State v. Ballos*, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999).

¹¹⁷ *Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354 (2004).

¹¹⁸ *State v. Williams*, 2002 WI 58 at ¶ 33, *citing State v. Bauer*, 109 Wis. 2d 204, 210, 325 N.W.2d 857 (1982).

¹¹⁹ *Id.*

Therefore, if the statement admitted is testimonial in nature, the declarant is not unavailable, and the defendant has not previously cross-examined the declarant, it is a violation of the right to confrontation.¹²⁰ A testimonial statement may be open to interpretation in certain cases, but here, the statement admitted was a report generated specifically for the purpose of use as evidence of a crime. There can be no doubt that such a statement is testimonial in nature.¹²¹ Further, the State's claims that because the person is not being called as a witness, then there is no confrontation issue are incorrect – that is the exact issue the Confrontation Clause was designed to prevent.¹²²

The State specifically informed the trial court that the declarant was available was for trial.¹²³ The defendant never cross-examined the witness. The Confrontation Clause was violated.

¹²⁰ *Crawford v. Washington*, 541 U.S. at 61

¹²¹ *Id.* at 52.

¹²² *Id.* at 51.

¹²³ R. 68 at 12.

CONCLUSION

The trial court allowed admission of hearsay evidence in order to allow the blood test results to be placed in evidence at trial. There was no statutory authority to allow the admission of the hearsay evidence. Once admitted that evidence implicated the confrontation rights of the defendant. There was a clear confrontation violation. The trial court's decision to allow the evidence with no statutory authority and in violation of the Confrontation Clause should be overturned and the case remanded for a new trial.

Dated at Madison, Wisconsin, August 8, 2019.

Respectfully submitted,

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