STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2020AP1218-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN R. ANKER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN COLUMIBA COUNTY CIRCUIT COURT, THE HONORABLE TODD J. HEPLER, PRESIDING

BRIEF A OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Officer Scott Anderson unlawfully administer Standardized Field Sobriety Tests to John Anker without reasonable suspicion that Mr. Anker had been committing the crime of operating a motor vehicle while intoxicated as a third offense?

The trial court answered no.

This Court should answer no.

2. Was evidence that Anker refused to submit to an evidentiary chemical test of his blood admissible evidence to demonstrate consciousness of guilt for operating a motor vehicle while intoxicated?

The trial court answered yes.

This Court should answer yes.

3. Prior to admitting evidence that Anker refused to submit to an evidentiary chemical blood test, did the trial afford Anker sufficient process so as to ensure that Anker was advised of the requirements of the implied consent law and that Anker refused to submit to the test?

The trial court answered yes.

This Court should answer yes.

4. Were any errors in admitting the "refusal evidence" harmless?

The trial court did not address this question.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying the facts of this case to well-established precedent.

INTRODUCTION

STATEMENT OF THE CASE

Nature of the Case

In this case John Anker appeals from an OWI 3rd conviction entered after a jury trial and verdict. Mr. Anker appeals from the denial of a suppression motion and an order permitting the State to introduce evidence that Mr. Anker refused to submit to an evidentiary chemical test of his blood.

Statement of Facts

On November 10, 2018 Scott Anderson was on duty, working as a police officer for the Village of Poynette. R. 68 at 119. At approximately 8:23 pm Officer Anderson observed a silver Jetta traveling westbound on County Road CS. R. 68 at 120. This Jetta did not have a front license plate. R. 68 at 120.

Officer Anderson turned his squad car around and conducted a traffic stop of the Jetta. R. 68 at 120. "Upon making contact right away" Officer Anderson noticed a strong odor of intoxicants emitting from the vehicle. R. 68 at 122-123. The driver of the vehicle, John Anker, had glassy and bloodshot eyes. R. 68 at 123. Mr. Anker's speech appeared to be slow and slurred. R. 68 at 123. Officer Anderson asked Mr. Anker how much he had had to drink. R. 68 at 124. Mr. Anker eventually answered that he had had one drink approximately 30 minutes prior to driving. R. 68 at 124.

Officer Anderson returned to his squad car to conduct a records check and learned that the Defendant had two prior OWI convictions. R. 67 at 12.

Officer Anderson reapproached the Jetta and asked Mr. Anker to step out of that car to perform Standardized Field Sobriety Tests. R. 68 at 126. The Defendant performed three different tests, the Horizontal Gaze Nystagmus test, the Walk

and Turn test, and the One Leg Stand test. R. 68 at 126. Mr. Anker's performance of each of those tests was consistent with how an intoxicated person would be expected to perform those tests. R. 68 at 130, 134, 135-136.

Officer Anderson then asked Mr. Anker if Mr. Anker knew what the "legal limit" for the State of Wisconsin was. R. 68 at 136. Mr. Anker stated that he knew that the legal limit was .08. R. 68 at 136. Officer Anderson asked Mr. Anker where he (Mr. Anker) was in relation to that legal limit. R. 68 at 136. Mr. Anker said that he thought he would be right around that. R. 68 at 136.

Officer Anderson placed Mr. Anker under arrest and read the Informing the Accused form to Mr. Anker. R. 68 at 138, 283. Officer Anderson concluded his reading of the form with the question "Will you submit to an evidentiary chemical test of your blood?" R. 68 at 139. Mr. Anker responded that he wanted to speak with an attorney. R. 68 at 139. Officer Anderson asked Mr. Anker if he (Mr. Anker) was consenting or not and that he (Officer Anderson) needed a "yes" or "no." R. 68 at 140.

Ofc. Anderson: Will you submit to an evidentiary chemical test of your blood?

Anker: Umm. I just want to. Probably like to have an attorney.

Ofc. Anderson: So, I want to make sure, that's a "no" correct? It's a yes or no answer and I want to confirm that's a "no."

Anker: Well, if I say… If I say I want an attorney..

Ofc. Anderson: Then I'll take that as a "no" okay?

Anker: I didn't say "no." Because if you say "no" it's automatic, right?

Ofc. Anderson: Like I said, it's a "yes" or "no." I'm going to take an attorney as a "no" and we'll go through a warrant process.

Anker: Well, say "yes" I'll take the test, but I want an attorney.

Ofc. Anderson: Would you like me to reread the form?

Anker: I mean, I don't want to get incriminate myself.

Ofc. Anderson: Okay.

Anker: I mean, this is bad enough the way it is.

Ofc. Anderson: Okay.

Anker: And I know… How about this? Yes, I'll take some additional tests, but I want an attorney

R. 43 at 34:20-35:51.

Officer Anderson did not believe that he had Mr. Anker's consent for a blood draw, so he processed paperwork for a refusal, obtained a search warrant and, thereby, a obtained a sample of Mr. Anker's blood. R. 68 at 141. The Wisconsin State Laboratory of Hygiene analyzed the sample of Mr. Anker's blood and determined that the blood contained .114 grams of alcohol per milliliter of blood. R. 68 at 203.

Procedural History

Leading up to trial, Mr. Anker moved to suppress all evidence obtained after Officer Anderson asked Mr. Anker to exit his Jetta. R. 13. Mr. Anker did not argue that Officer Anderson lacked probable cause to place him under arrest. R. 13. Mr. Anker also moved to dismiss the refusal case filed against him, but that motion is not a part of this record.

On May 10, 2019 the circuit court held an evidentiary hearing where it took evidence on both Mr. Anker's motion to suppress and the motion to dismiss the refusal. R. 67 at 3-4. During the hearing, the parties agreed that Anker's motion to

suppress was limited to the expansion of the original traffic stop into an OWI investigation. R. 67 at 12-13. Significantly, Mr. Anker did not argue that Officer Anderson lacked probable cause to place him under arrest. R. 67 at 12-13, 28-30. The Court orally denied Mr. Anker's motion to suppress premised on a lack of reasonable suspicion on the record during the May 10, 2019 hearing. R. 67 at 31-32.

On August 20, 2019 the Circuit Court rendered a written decision denying another one of Mr. Anker's motions to suppress based on the Wisconsin Supreme Court's opinion in State v. Randall, 2019 WI 80. R. 22. In the same order the circuit court denied Mr. Anker's motion to dismiss the refusal case. R. 22. In its order, the Court explicitly found that Mr. Anker "was properly advised about the results of his actions and his noncommittal statements constituted a refusal to submit to chemical testing." R. 22 at 2.

This case was tried before a jury on February 20, 2020. R. 68. The Jury found Mr. Anker guilty of operating a motor vehicle while intoxicated and guilty of operating a motor vehicle with a prohibited alcohol concentration. R. 68 at 353.

STANDARD OF REVIEW

Whether evidence should be suppressed is a question of constitutional fact. The circuit court's findings of fact are reviewed under the clearly erroneous standard. But the circuit court's application of the historical facts to constitutional principles is reviewed de novo State v. Floyd, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560.

Ordinarily, a trial court's decision to admit evidence is discretionary. State v. Brecht, 143 Wis. 2d 297, 320, 421 N.W. 2d 96, (1988). However, whether a state action constitutes a violation of due process presents a question of law that the Court of Appeals decides independently of the trial court. State v. Neumann, 2013 WI 58, ¶ 32, 832 N.W. 2d 156.

ARGUMENT

I. The police did not extend Anker's traffic stop until they had reasonable suspicion that Anker was committing the crime of O.W.I.

A. Controlling legal principles.

The first issue Anker raises in this case is a common Fourth Amendment question: Did the police have sufficient reasonable suspicion for the administration of the field sobriety tests?

B. Law on reasonable suspicion for field sobriety tests.

An officer may request a driver to perform field sobriety tests when the officer has reasonable suspicion that the driver is impaired. Cty. of Jefferson v. Renz, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). An officer has reasonable suspicion that a driver is impaired if the officer is able to point to specific and articulable facts which, taken together with rational inferences from the facts, reasonably warrant the intrusion. State v. Post, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. The question of what constitutes reasonable suspicion is a common-sense one; under the facts and circumstances would a reasonable police officer, in light of his training and experience, suspect that a particular driver was under the influence of an intoxicant. State v. Colstad, 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 659 N.W.2d 394. The police are not required to rule out the possibility of innocent behavior in their reasonable suspicion calculus. State v. Waldner, 206 Wis. 2d 51, 59, 556 N.W.2d 691 (1996).

Among the factors that point to reasonable suspicion of impairment are: (1) the defendant's driving, (2) the officer's experience, (3) the time of night, and (4) the defendant's prior

record of drunk driving. State v. Lange, 2009 WI 49, ¶¶ 24–33, 317 Wis. 2d 383, 766 N.W.2d 551.

C. Officer Anderson had reasonable suspicion to deviate from the traffic stop and launch an O.W.I. investigation.

At the point Officer Anderson completed his computer inquiries, there was nothing more to explore concerning the license plate violation. Thus, the State must show a justification for why Anker was not allowed to leave, and, why the license plate stop was transformed into an OWI investigation stop. The State meets this burden by pointing to the totality of circumstances formulating police reasonable suspicion that Anker was violating O.W.I. laws. Six factors support Officer Anderson's objectively reasonable suspicion: (1) the "strong" odor of intoxicants emitting from Anker, (2) the bloodshot and glossy appearance of the Anker's eyes, (3) the slow and slurred manner in which Anker spoke, (4) Anker's admission that he had consumed an alcoholic beverage prior to driving, (5) the apparent discrepancy between the "strong" odor of intoxicants and the minimal amount of drinking claimed by the Defendant, and (6) Anker's driving history of two previous O.W.I. convictions.

Any one of the above described factors might not by itself constitute reasonable suspicion, but in the aggregate they paint a compelling picture justifying the police decision not to end the traffic stop and to initiate an O.W.I investigation. Officer Anderson gleaned all of these factors during a time period entirely justified by the traffic stop.

Anker argues that the original traffic stop was unlawfully extended when he was commanded to exit the vehicle and to perform the field sobriety tests. Specifically, Anker contends that at "the moment the officer told [Anker] to step out of the vehicle" there were insufficient facts for

Officer Anderson to draw an objectively reasonable inference that Anker was driving while impaired. (Anker's Br. at 15).

To make this argument, Anker attempts to explain away or ignore the facts that gave rise to an objectively reasonable suspicion that he was intoxicated. So it is useful to consider each factor in turn.

First, Officer Anderson almost immediately noticed "a strong odor of intoxicants" emitting from Mr. Anker's vehicle. R. 67 at 8. Of course, the odor of intoxicants coming from a vehicle is a factor that can increase the suspicion that the driver of that vehicle may have had too much alcohol to be driving safely. See, County of Jefferson v. Renz, 231 Wis. 2d 293, 317, 603 N.W.2d 541; State v. Colstad, 2003 WI App 25, ¶ 20, 260 Wis. 2d 406, 659 N.W. 2d 394; State v. Goss, 2011 WI 104, ¶ 26, 338 Wis. 2d 72, 806 N.W. 2d 918. There could be an innocent reason why Mr. Anker's vehicle smelled so strongly of intoxicants, but Officer Anderson was not required to accept that premise. State v. Waldner, 206 Wis. 2d at 59.

Second, Officer Anderson observed that the Defendant's eyes appeared to be "glossy and bloodshot." R. 67 at 8. Again, glossy and bloodshot eyes is a common indicator that a person has consumed too much alcohol that has been cited by numerous courts as a factor that strengthens a reasonable officer's suspicion that a person is intoxicated. "We reaffirm that a law enforcement officer may consider bloodshot and glassy eyes to be one of several indicators of intoxication, even though such eye descriptors may have an innocent explanation." State v. Tullberg, 2014 WI 134, ¶ 35, 359 Wis. 2d 421, 441, 857 N.W.2d 120, 130. Thus, Mr. Anker does not diminish the reasonable suspicion found in this case when he argues "[t]he bloodshot eyes were acknowledged to have multiple potential causes." Anker's Br. at 16

Third, and similarly, Officer Anderson's observation that Anker's speech was "slow and slurred" added to a

reasonable suspicion that Anker was operating a motor vehicle while intoxicated. State v. Kennedy, 2014 WI 132, ¶ 22, 359 Wis. 2d 454, 86 N.W.2d 454 ("In other cases, factors sufficient to support a finding of probable cause have included bloodshot eyes, an odor of intoxicants, and slurred speech, together with a motor vehicle accident or erratic driving."). Mr. Anker apparently ignores this factor.

Fourth, when Officer Anderson asked Mr. Anker if he had been drinking, Mr. Anker admitted to drinking. R. 67 at 9. Specifically, Mr. Anker admitted to drinking one beer approximately 30 minutes prior to driving. R. 67 at 10. This admission of alcohol consumption also naturally strengthens an objectively reasonable suspicion that Anker had been driving while intoxicated. "[E]vidence of intoxicant usage — such as odors, an admission, or containers — ordinarily exists in drunk driving cases and strengthens the existence of probable cause." State v. Lange, 2009 WI 49, ¶ 37, 317 Wis. 2d 383, 766 N.W.2d 551.

Fifth, the circuit court found that an objectively reasonable officer's suspicion would be increased because Mr. Anker's confession that he had consumed only one beer was contradicted by the strength of the physical indications that Anker was intoxicated. R. 67 at 32 Though it is true the Officer Anderson did not testify that this factor *subjectively* increased his suspicion that Anker was driving while intoxicated, reasonable suspicion is an objective standard. State v. Rose, 2018 WI App 5, ¶ 15, 379 Wis. 2d 663, 907 N.W.2d 463. It was not, therefore, misguided for the court to rely on this factor that Officer Anderson did not specifically testify to. See, Anker's Br. at 15.

Rather than attempt to explain away the sixth factor supporting reasonable suspicion, Anker completely ignores the fact that by the time Officer Anderson asked Anker to step out of his vehicle Officer Anderson already knew that Anker

had two prior O.W.I convictions. This driving history raises the inference that a person with such a propensity for committing this type of violation is committing the offense again. The law clearly allows for an officer to consider this fact. See Lange, 317 Wis. 2d 383, at ¶ 33; Goss, 338 Wis. 2d 72, at ¶ 27.

The unpublished case cited and relied on by Mr. Anker is sufficiently factually different from the present case so as to provide no assistance to Mr. Anker.

When considered in the totality of the circumstances these factors provide ample specific and articulable facts for an objectively reasonable officer to suspect that Anker was intoxicated as he drove his motor vehicle down South Street on November 10, 2018. The Court did not err when it denied Anker's motion to suppress evidence. This Court should deny Anker's appeal

II. The Court properly admitted evidence that Anker refused to provide an evidentiary chemical test of his blood.

Anker next argues that the circuit court erred when it allowed the State to elicit testimony that the he refused to permit an evidentiary chemical test of his blood during the jury trial.

A. Controlling Legal Principles

It is difficult to discern the precise nature of the Anker's argument. At times Anker appears to argue that State v. Bolstad, 124 Wis. 2d 576, (1985), State v. Crandall, 133 Wis. 2d 251 (1986), and State v. Zielke, 137 Wis 2d 39 (1987) are incorrect because those cases analyze this issue in the context of due process claims. Anker's Br. at 27. Yet, Anker argues "commenting on the invocation of the right to decline a warrantless blood test and using that invocation at trial to

show consciousness of guilt violates due process." Anker's Br. at 25.

The State readily admits that the Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. U.S. Const. amend. IV. But the issue raised by Mr. Anker concerns the use of one of Mr. Anker's statements at trial, not evidence obtained by a search or a seizure. See, Anker Br. at 26. To that end, the State contends that a proper analysis of this issue *must* focus on whether admission of this statement at trial was an impermissible due process infringement of the Defendant's fourth amendment rights. See, State v. Levanduski, 2020 WI App 53, ¶ 8, 393 Wis. 2d 674, 948 N.W.2d 411.

B. Law on the Use of a Chemical Test Refusal during an OWI Trial.

In any event, the circuit court did not err on this point. The great weight of legal precedent affirms that one of the "evidentiary consequences" of refusing to permit an evidentiary chemical test of one's blood is the introduction of that fact during a jury trial. "[T]he fact of the defendant's refusal to submit to a test may be introduced at trial on the substantive drunk driving offense as a means of showing consciousness of guilt." State v. Zielke, 137 Wis. 2d 39, 49-50, 403 N.W.2d 427 (1987).

Most recently, the Court of Appeals reaffirmed this well-established principle in State v. Levanduski, 2020 WI App 53, 393 Wis. 2d 674, 948 N.W. 2d 411. In that case the defendant argued that the "Informing the Accused" form illegally threatened "[i]f you refuse to take any test that this agency requests...the fact that you refused testing can be used against you in court." Id. at ¶ 2. The Defendant in Levanduski, like Anker here, argued that she had a Fourth Amendment constitutional right to refuse to submit to a

warrantless blood draw. Id. at ¶ 6. And, according to the defendant, it would be an unconstitutional infringement on that Fourth Amendment right to permit the evidence of the invocation of the right to be used as evidence of consciousness of guilt. Id at ¶ 14. Thus, according the defendant's reasoning, the Informing the Accused made a false and empty threat that induced her to consent to an evidentiary chemical test of her blood. Id. at ¶ 6.

The Levanduski closely court parsed the meaning of Birchfield v. North Dakota, U.S. , 136 S. Ct. 2160, 195 L. Ed 2d 560 (2016) and State v. Dalton, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120. Levanduski 2020 WI App 53 at ¶¶ 12-15. In the end, the Levanduski court held that the Informing the Accused form *is* correct. Id. ¶ 15. The fact that a suspect refused testing can be used at trial as evidence of consciousness of guilt. Id. at ¶ 9. Indeed, the Court of Appeals held that "the rule [allowing a suspect's refusal to submit to a blood draw to be used against the suspect at trial as consciousness of guilt] has been reinforced." Id. at ¶ 10.

C. The Circuit Court did not Err When it Admitted the Refusal Evidence

Anker's attempts to escape ramifications of the Levanduski opinion are unavailing. Anker recognizes, of course, that "[i]n State v. Levanduski, the Court of Appeals decided the same issue as Mr. Anker's." Anker's Br. at 26. Anker does not appear to recognize the precedential value of the Levanduski opinion. This court is not at liberty to ignore the law announced in Levanduski. See, Cook v. Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). ("published opinions of the court of appeals are precedential; litigants, lawyers and circuit courts should be able to rely on precedent;.... [O]nly the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.").

So, whereas Anker faults the legal reasoning set forth in Levanduski and argues that the opinion contains "no support" to use the refusal to submit to the blood test in the OWI trial, this Court should apply the precedent of Levanduski and deny Anker's appeal.

III. The Trial Court provided Anker with all the procedure that was due before allowing the State to introduce evidence that Anker refused to permit an evidentiary chemical test of his blood.

Finally, Anker argues that the evidence that he refused to submit to an evidentiary chemical test should not have been introduced at trial because the circuit court did not "perform a meaningful review of the alleged refusal." Anker Br. at 30. Anker's argument is factually unsupported, legally undeveloped, and wrong.

A. Controlling Legal Principles on What Process is Due Prior to the Admission of Refusal Evidence

In State v. Zielke, 137 Wis. 2d 39, 403 N.W. 2d 427 (1987), the Wisconsin Supreme Court cautioned that due process considerations dictate that the fact of an evidentiary chemical test refusal should not be admitted at trial unless it is determined that police provided the defendant the warnings set forth in Wis. Stat. § 343.305. Those warnings are found on the Informing the Accused form. R. 44.

In State v. Donner, 192 Wis. 2d 305, 531 N.W.2d 369, (Ct. App. 1995), the Wisconsin Court of Appeals clarified that "Zielke, however, does not hold that the inquiry must necessarily be conducted within the context of a formal revocation hearing under the implied consent law." Donner, 192 Wis. 2d at 313. Instead, a court can satisfy the Zielke due process requirements by examining whether a defendant was properly advised of the implied consent law during pre-trial

proceedings. In particular, in Donner, the Court of Appeals stated:

> Here, the question of whether Donner was properly informed under the implied consent law was explored both at the motion in limine hearing and during the trial. Thus, Donner received the equivalent of an implied consent hearing within the context of the pretrial and trial proceedings. As such, Donner was accorded the protections guaranteed by Zielke before evidence of his refusal was used against him. Therefore, pursuant to Bolstad, the trial court properly admitted evidence of Donner's refusals

Donner, 192 Wis. 2d at 314.

Neither Zielke nor Donner hold that a court must conduct a full evidentiary hearing concerning the defendant's refusal or that the issues at such a "due process" hearing would include whether an officer had probable cause to place the defendant under arrest in the first place.

Nevertheless, Anker argues that he would have argued that Officer Anderson did not have probable cause to arrest him and that Officer Anderson did not properly advise him under the implied consent law. Anker Br. at 33.

B. Anker's argument is factually unsupported

First, Anker's allegation that Officer Anderson failed to properly advise him under the implied consent law is puzzling given the extensive proof in this record that Officer Anderson properly fulfilled his duties in this regard. During the May 10, 2019 evidentiary hearing Officer Anderson testified that he read the Informing the Accused form to the Defendant verbatim. R. 67 at 22. The Informing the Accused form was introduced as an exhibit at trial. R. 44. Even Mr. Anker testified at trial that Officer Anderson read the form "verbatim word for word." R. 68 at 283.

Anker also argues that this Court should take judicial notice of the procedural posture in Columbia County Circuit Court Case #: 2018 TR 6069R. Anker's Br. at 32. To the extent Anker's argument depends on this fact, the State contends that "[i]t is the appellant's responsibility to provide a complete record as to all the issues [he or she] raises on appeal." Joseph Hirschberg Revocable Living Tr. v. City of Milwaukee, 2014 WI App 91, ¶ 12 n.5, 356 Wis. 2d 730, 855 N.W. 2d 699. This court should not rely on facts outside of the record before it.

C. Anker's argument is legally undeveloped

Anker argues that "State v Donner does not control here" because it was decided prior to the United States Supreme Court's decision in North Dakota v. Birchfield and the Wisconsin Supreme Court decision in State v. Dalton. Anker's Br. at 32. However, Anker does not explain how or why any particular aspect of those decisions have any bearing on the rule of law announced in State v. Donner. As such, this Court should reject Anker's argument as inadequately developed. See, State v. Pettit, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). (The Court of Appeals may decline to review issues inadequately briefed).

D. Anker's Argument is wrong

In North Dakota v. Birchfield, the United States Supreme Court noted that its prior opinions referred approvingly to the general consent of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who do not comply with evidentiary testing. Birchfield 136 S. Ct. at 2185. "Nothing we say here should be read to cast doubt on them." Id.

While the Wisconsin Supreme Court has decided that the fact of a refusal is an improper factor to enhance a

criminal sentence, nothing the State v. Dalton touches on what "evidentiary consequences" follow from an implied consent refusal or the process that must be due before a refusal can be introduced at evidence. See, Dalton at 2018 WI 85.

State v. Levanduski, makes it clear that binding precedent permits the introduction of an improper refusal as evidence of consciousness of guilt. State v. Donner allows for pre-trial motion hearings as well as motions in limine to afford a defendant due process before the introduction of refusal evidence at trial. Donner at 192 Wis. 2d at 314.

In this case, Anker challenged the reasonable suspicion for his continued detention to complete field sobriety tests. Anker did *not* argue that the officer lacked probable cause to arrest him. More than eight months before the jury trial, the circuit court held an evidentiary hearing and took testimony concerning the alleged refusal and its circumstances. That evidence demonstrated that Officer Anderson properly informed Anker of the consequences of refusing to submit to an evidentiary chemical test of his blood. Six months before the jury trial, the circuit court ruled that "the Court concludes that Mr. Anker was properly advised about the results of his actions and his noncommittal statements constituted a refusal to submit to chemical testing." R. 22 at 2. The Court again explored the issue concerning the refusal in ruling on motions in limine on the morning of trial. R. 68 at 15-21. Mr. Anker was afforded due process prior to his refusal being admitted at trial as evidence of his guilt.

IV. Any error in admitting evidence that Mr. Anker refused to submit to an evidentiary chemical blood test was harmless.

Evidentiary errors are subject to a harmless error analysis and an error requires reversal only if the improper

admission of evidence affects the substantial rights of a party. State v. Britt, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996). Errors are harmless when "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty" even without the alleged error. State v. Deadwiller, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W. 2d 362.

In, State v. Alexander, the Wisconsin Supreme Court found that evidence of a defendant's erratic driving, a strong smell of intoxicants about the defendant's person, red eyes and slurred speech, an admission from the defendant that he had been drinking, a statement from the defendant to the arresting officer that "You got me," three failed field sobriety tests, and a breath test showing an alcohol concentration of .24 constituted "overwhelming" evidence that the defendant was guilty of driving while intoxicated. State v. Alexander, 214 Wis. 2d 628, 653, 571 N.W. 2d 662 (1997).

The evidence introduced in Mr. Anker's trial was comparably comprehensive. Officer Anderson testified that a "strong" odor of intoxicants and bloodshot and glassy eyes. R. 68 at 122-123. Mr. Anker's performance of the field sobriety test was consistent with the performance one would expect from an intoxicated person. R. 68 at 130, 134, 135-136. An analysis of Mr. Anker's blood revealed concentration of .114 grams of alcohol per milliliter of blood. R. 68 at 203. Anker admitted to drinking prior to driving and told Officer Anderson that he believed he was "around" the legal limit of .08. R. 68 at 136.

Notably, Mr. Anker testified in his own defense at trial he attempted to clarify and explain his comment that he was "around" the legal limit. Instead, initially testified that he believed that he was *over* the .08 legal limit following the sobriety tests and added significant evidence of his guilt. R. 68 at 286-287. In redirect examination, when being

questioned by his own attorney, the jury heard the following exchange:

> Q And you were asked -- you kept saying right around the legal limit, correct?
>
> A Yes.
>
> Q Where do you think you fell on the legal limit?
>
> A Over.
>
> Q Over?
>
> A Or at what time?
>
> Q At what time? So if the officer said, what do you think you are, you said right around the legal limit?
>
> A Yes.
>
> Q Okay, so where exactly if you are saying right around, do you mean over, under? What do you mean?
>
> A I figured I would be under.

R. 68 at 286-287.

In comparison, while somewhat probative of Anker's consciousness of guilt, the refusal evidence in this case was cumulative. The refusal evidence itself was diminished in strength due to the circumstances surrounding the refusal. Officer Anderson testified that Anker *did* agree to take the evidentiary chemical test, but conditioned that willingness to take the test on the availability of an attorney. R. 68 at 170. Officer Anderson informed Anker that Officer Anderson would take that conditional "yes" as a "no" and again asked Anker if he would submit to testing without reservations. R. 68 at 283-284. Anker continued to condition his submission to the test on the availability of an attorney and Officer Anderson processed that response as a refusal. R. 68 at 170. The jury viewed the video recording of the conversation. R. 68 at 171. Again, while those circumstances are somewhat

indicative of a consciousness of guilt, they are hardly determinative.

In closing arguments, both the State and the Defense discussed Anker's physical symptoms of intoxication (the odor, the bloodshot and glossy eyes). R. 68 at 340, 347. Both the State and the Defense made arguments concerning the field sobriety tests and the conditions in which they were administered. R. 68 at 334-335, 338-339. The parties offered conflicting interpretations of the blood analysis showing a blood alcohol concentration of .114 g/100mL. R. 68 at 331-332, 344. Neither the State nor the Defense made any comment regarding Mr. Anker's refusal to submit to an evidentiary chemical test of this blood. R. 68 at 330-349. During closing arguments, neither the State nor the Defense made any reference to Anker's refusal (or the reasons for his refusal) to submit to the evidentiary blood test. R. 68 at 330-349. Any error in admitting the refusal evidence was harmless.

CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm the trial court's judgment of conviction.

Dated this 16th day of December, 2020.

Respectfully submitted,

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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 length of this brief is **5,406** words.

Dated this 16th day of December, 2020.

Jordan Lippert
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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. § (Rule) 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.

Dated this 16th day of December, 2020.

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Jordan Lippert
Assistant District Attorney