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

Appeal No. 2020AP001848

CITY OF CEDARBURG,
Plaintiff-Respondent,

-vs.-

KATHERINE D. YOUNG,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON SEPTEMBER 29, 2020,
THE HONORABLE SANDY A. WILLIAMS, PRESIDING,
IN THE OZAUKEE COUNTY CIRCUIT COURT.
OZAUKEE COUNTY CASE NO. 2019CV000424

DEFENDANT-APPELLANT'S BRIEF

Respectfully submitted by:

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STATEMENT OF THE ISSUES

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Despite the municipal court finding Young not guilty and dismissing her citation, the circuit court found Young guilty of Operating While Under the Influence of an Intoxicant (OWI) (1st Offense). The circuit court thus found the evidence sufficient.

II. Whether the circuit court committed plain error by denying Young's motion to dismiss when it was clear that her constitutional right to confront her accuser was violated by the prosecution refusing to make the complaining police officer available at trial?

The circuit court found no constitutional violation and denied Young's motion to dismiss.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Young would welcome oral argument.

Young believes this Court's opinion in this case warrants consideration for publication because this case presents unique questions of law that may have far-reaching precedential implications. Young has been unable to locate any controlling case law that directly addresses the questions raised in this case.

STATEMENT OF THE CASE

I. Procedural History and Preservation of Issues for Appeal

On January 24, 2019, Defendant-Appellant Katherine Young received Citation No. AD919952-5 in the mail, alleging that on December 12, 2018, she had operated a motor vehicle while under the influence of an intoxicant, contrary to Wis. Stat. § 346.63(1)(a). (R.4.)

This was the first and *only* notice Young received alerting her of the fact that an incident at work *forty-three days earlier* had come to the attention of law enforcement.

Cedarburg Police Officer Bradley Meyer issued the citation, and it alleged that at 11:31 a.m. on December 12, Young had operated her vehicle on Evergreen Boulevard in Cedarburg while under the influence of an intoxicant. (*Id*.)

No officer, including Officer Meyer, ever contacted Young to investigate the allegations that led to the issuance of the citation.

Young entered a Not Guilty Plea on January 31, 2019. (R.6:3.) Mid-Moraine Municipal Court, the Honorable Christine E. Ohlis, presiding, held a bench trial on September 12, 2019. (R.5:2.) The court heard from multiple witnesses—*including Officer Meyer*. (*Id.*)

The court, in an oral decision, found Young not guilty and dismissed her citation on October 1, 2019. (R.5:12, 6.)

The City requested a new trial under Wis. Stat. § 800.14(4), (R.1), and the Ozaukee County Circuit Court, the Honorable Sandy A. Williams, presiding, so ordered, (R.8).

Young moved to dismiss, raising numerous legal objections to the procedure of being cited for OWI without police investigation on the day of the alleged infraction. (R.14:17.) The circuit court heard the motion on July 27, 2020. (R.33:1.) Young argued that "without any sort of police involvement or expert involvement in the investigation of the OWI itself, that … they can't proceed as a matter of law." (R.33:2.) Young also noted that there was no "reliable information that would allow a court to find that at the time of

the driving that [her] abilities were impaired by an intoxicant or alcohol." (R.33:3.)

The court found the motion to dismiss "premature" because, as a matter of law, the court could not dismiss when there was "no evidence before the Court right now." (R.33:6.) The court thus denied Young's motion. (R.17; R.33:7.)

The circuit court held a bench trial on September 29, 2020. (R.34:1.)

Officer Meyer did not participate in the circuit court trial. (R.34:2.) No law enforcement officer testified. (*Id.*)

The City presented testimony from most of the same witnesses that appeared at the municipal court trial, with the notable exception of Officer Meyer or any other law enforcement officer. (R.34:2.)

At the close of the City's case-in-chief, Young moved to dismiss for lack of evidence. (R.34:105). Specifically, Young noted:

> What we have here is, essentially, a citizen tip that was never followed up on. We haven't heard from a police officer. We haven't heard about an arrest. We haven't heard about standard field sobriety exercises which are tools that law enforcement uses to determine whether or not they have probable cause to arrest. … [T]here's no chemical testing of blood or breath within three hours of the time Ms. Young allegedly drove.

(*Id.*) Young again raised the issue of the lack of Officer Meyer's presence during closing argument, noting:

> [T]here is not a single case in this Country where … there is a conviction for OWI without police involvement….The police are the people who investigate crimes. They are the ones that do the investigation, not teachers and school liaisons, assistant principals. They are not trained. They don't have the capacity to make this determination. *And the City itself failed to even call the officer who issued the ticket in this case*.…[W]e don't even have testimony to get us to police involvement….She was never interviewed. She was never pulled over. She was never spoken to. This was an OWI ticket that was mailed to her. If there had been predicate offenses, we could be talking about a felony offense, in theory, where the State would be asking the jury to convict on these facts. And it's just not plausible….

> It's effectively a citizen's arrest without an arrest in this case which there is no statutory authority that allows that in Wisconsin.

(R.34:11718) (emphasis). Young also noted a "police liaison officer" was present on campus at the time, but that officer "had no involvement" in this investigation. (*Id*.)

Because of the lack of any law enforcement participation at trial, the City never produced evidence of whether and how Officer Meyer was invited to investigate, whether and how he corroborated the opinions of the lay witnesses, or whether and how the citation was even served on Young. Indeed, Officer Meyer's name was never even mentioned at trial. At no point did the City demonstrate how Young came to be under the jurisdiction of the court.

Young's other primary argument for dismissal was the lack of evidence for a key element of the charged offense:

> [E]ven if the Court were to believe all the witnesses, that she was intoxicated *when she was at school*, we can't get to the driving in this case. And so I don't believe that even looking at the evidence in light … most favorable to the City, that there's clear, convincing evidence that *at the time of driving* Ms. Young was intoxicated.

(R.34:107) (emphasis). Young renewed this line of reasoning at closing argument:

> And so taking everything that the City even says still never gets you to *at the time of the driving* and that's what we're talking about. And so she can stink like alcohol, she could be falling down, which clearly she isn't in the video, but it still doesn't get us to the fact of, *what was her condition at the time of driving*.

(R.34:11819) (emphasis).

Young noted that between the municipal court's finding of not guilty and the new trial before the circuit court, the City had "not produced any additional evidence that would support a conviction." (R.34:119.)

The court denied the motion to dismiss, concluding that the City had "shown a prima facie case." (R.34:109.)

In an oral decision, the circuit court found Young guilty. (R.34:129.)

As to police involvement, the court "d[id]n't know" if "the law requires law enforcement to be the ones enforcing

OWIs," noting that the defense "ha[d]n't cited anything" to that effect. (R.34:122.) The court found "having the person perform field sobriety tests or taking a breathalyzer" is "just not required." (*Id.*)

The court stated: "I've been ticketed through the mail when an officer never saw me, but it was on camera." (R.34:12829). At no point did the court acknowledge that OWI infractions carry potential criminal collateral consequences that speeding tickets cannot. Nor did the court elaborate on the process by which even a speeding ticket can be issued in Wisconsin without any law enforcement involvement whatsoever, much less an OWI citation or criminal complaint.

As to driving, the court had "no problem saying she was driving the vehicle even at 11:31 or 11:30." (R.34:126.) The court was convinced "that she was under the influence of an intoxicant … within a half hour of that driving." (*Id.*)

As to intoxication, the court stated: "I don't think there's any question that she was under the influence of an intoxicant as recent as *11:31 when the first witness made an observation of her*, … and was under the influence of an intoxicant *when she was operating that motor vehicle* when she came into the school parking area." (R.34:127) (emphasis).

As detailed below, *no one observed* Young until *after 11:34 a.m.*, some minutes after she allegedly drove into the school parking lot at 11:31 a.m. (*See* R.34:82, 108.)

After rendering its judgment, the court inquired, "As to the penalty, that was already done in municipal court or not?" (R.34:129.) At municipal court, Young was found not guilty, and her citation was dismissed. (R.5:1.)

The court imposed a $ 911.00 forfeiture, six-month revocation, AODA assessment, and a one-year IID. (R.34:131, 133.)

Young timely appealed. (R.22, R.27.)

II. Factual History

On December 12, 2018, Katherine Young was a teacher at Cedarburg High School. (R.34:6.) She arrived shortly after 7:00 a.m. and began her day as usual. (R.34:54.) Her day began without incident, and no one had any suspicions about Young's behavior. (*See, e.g., id.*) At 9:48 a.m., Young left in a red

vehicle to go to the hospital for a pre-arranged blood draw related to a recent miscarriage. (R.34:5556, 87.) After the blood draw, Young went home briefly to heat up enchiladas for lunch. (R.34:56.)

At 11:31 a.m., surveillance video recorded a red vehicle driving on Evergreen Boulevard, pulling into the parking lot, and parking in what was allegedly Young's reserved parking space. (R.34.77.) While witnesses could only visually identify one driver and no front-seat passenger, all agreed that it was impossible to tell (a) who was driving the vehicle, or (b) whether there were any passengers in the vehicle, which is obscured by tinted windows. (*See, e.g.,* R.34:8283.) It was also impossible to read a license plate and, obviously, no way to ascertain the VIN. (R.34:9293.)

While on camera, the red vehicle could not be observed violating any traffic laws, driving erratically, crashing, or doing anything that would lead anyone to believe the driver was under the influence. (R.19, "NE Lot Evergreen Drive Return 11.30.5211.35.32.") No one alleged having observed the red vehicle being operated in a manner that would demonstrate the driver was "less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." WIS JI-CRIMINAL 2633.

Because of a gap in video footage, no person or persons could be seen exiting the red vehicle. (R.34:7879.) Also, no witness personally observed Young—or anyone else—exiting the red vehicle, (*see, e.g.*, R.34:8284), contrary to the court's factual finding, (R.34:127).

At 11:34 a.m., a different camera recorded Young entering the school. (R.34.11.) There are no visual recordings and no personal observations of Young herself from approximately 9:48 a.m. to 11:34:10 a.m. (R.19, "Door 48 Lobby Return 11.34.0911.34.28"; R.34:37.)

Five lay witnesses testified that through various interactions with Young between *11:34* a.m. and approximately 1:15 p.m., each came to believe Young had been drinking alcohol *at some point*. (R.34:2.) They described smelling alcohol (R.34:8, 34, 48, 66, 98); and alleged that Young struggled to open the entrance door (R.34:17); swayed and struggled to walk straight (R.34:2223, 40); braced herself against a doorway (R.34:32); sat in a "non-professional"

manner (R.34:48, 52); slurred her speech (R.34:32, 41, 66, 98); seemed flushed and had discolored legs (R.34:66, 85); failed to put "semicolons" [*sic*] in her written timeline for the day (R.34:71); and became increasingly agitated and responded "inappropriately" when the administration called Young's mother to come pick her up (R.34:51).

On cross-examination, Young's counsel raised questions concerning Young's night-job as a bartender (as an alternative explanation for the odor of alcohol) (R.34:57, 104); elicited agreement that Young had her hands full while entering the building (as an alternative explanation for allegedly struggling to open the door) (R.34:18); demonstrated that the associate principal had no trouble understanding Young's speech while she told her about her medical issues (R.34:8788); and confirmed that none of the witnesses had any formal training in law enforcement or medical sciences that granted them the expertise to assess Young's level of intoxication (if any) as it related to her ability to control a vehicle, or to rule out alternative explanations for the other apparent indicia of intoxication (such as fasting for and undergoing a blood draw, or other medical issues) (R.34:2829, 36, 5758, 6061, 84, 103).

Over Young's objection, the circuit court allowed testimony regarding the principal asking Young to take a preliminary breath test (PBT), the results of which were inadmissible. (R.34:46; *see* Wis. Stat. § 343.303). Young noted that the parties had stipulated that a PBT would not be admissible and thus discussion thereof lacked foundation and was irrelevant. (R.34:46.) Nevertheless, the court allowed the testimony to proceed (*id.*), and the City noted Young's reaction to being asked to take a PBT as evidence of her intoxication during its closing argument. (R.34:122.)

At no point did a law enforcement officer ask Young to submit to a chemical test of her breath or blood, and no such admissible test ever occurred, a point Young raised at trial. (R.34:105.)

Despite the presence of a Cedarburg Police School Resource Officer (SRO) on campus, at no point did anyone involve the SRO, or any other law enforcement, in the purely layperson "investigation" of Young's condition on December 12. (R.34:5960.) Principal Adam Kurth testified:

Q Police don't ever arrest her, correct?

A Correct. We didn't ask for police involvement in my office.

Q Police don't administer any tests, correct, in the school while you're there?

A Don't or did not?

Q Did not.

A They did not, correct.

Q You never … asked for the resource officer to investigate, correct?

A Correct.

Q You never even called the police, correct?

A We don't call the police. We refer to our resource officer when needed.

Q But you didn't do that … on the day in question, correct?

A Correct.

(R.34:5960.)

According to the record on appeal, the circuit court never heard—nor asked to hear—about *any* investigation by law enforcement into the events giving rise to Young's case. As far as the circuit court was concerned, this was an entirely lay-led and lay-executed investigation, which the court affirmed by finding Young guilty.

The principal called Young's mother to come and take her home. (R.34:51.) When Young's mother arrived, the principal escorted Young out of the building. (R.34:52.) Young subsequently walked home. (R.34:53.)

No one ever observed Young drive her vehicle after she was alleged to have consumed alcohol—in person or on video.

Young received a citation in the mail *forty-three days later*. (R.4.) The citation charged her with violating local ordinance 10-1-1(A), adopting Wis. Stat. § 346.63(1)(a). (*Id.*)

That was the first time Young became aware of any legal issues related to a work-related incident forty-three days earlier.

ARGUMENT

I. THE CITY DID NOT PRESENT CLEAR AND CONVINCING EVIDENCE AT TRIAL THAT YOUNG OPERATED A VEHICLE WHILE IMPAIRED TO THE REQUISITE DEGREE.

A. Legal standards governing a sufficiency of the evidence review

In reviewing a bench trial, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Wis. Stat. § 805.17(2). The task of the reviewing court "is limited to determining whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met." *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). "The test for determining sufficiency of the evidence is whether a reasonable trier of fact could be convinced of the defendant's guilt to the required degree of certitude by the evidence which it had a right to believe and accept as true." *Id.* at 21.

The burden of proof in a municipal ordinance case involving acts made criminal by statute is "clear, satisfactory, and convincing evidence." *Id.* at 22.

This Court views facts "in the light most favorable to sustain the verdict, and where more than one inference might be drawn from the evidence presented at trial" this Court must accept the inference drawn by the factfinder below. *State v. Forster*, 2003 WI App 29, ¶ 2, 260 Wis. 2d 149, 659 N.W.2d 144. On appeal, "the standard of review is the same whether the conviction relies upon direct or circumstantial evidence." *State v. Mertes*, 2008 WI App 179, ¶ 11, 315 Wis. 2d 756, 762 N.W.2d 813.

To successfully challenge the sufficiency of the evidence on appeal, a defendant must show that the evidence, even when "viewed most favorably to the state and 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 guilt" to the required degree of certitude. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "The ultimate test is the same whether the

trier of the facts is a court or a jury." *Krueger v. State*, 84 Wis. 2d 272, 282, 267 N.W.2d 602 (1978).

Finally, if this Court concludes the evidence was insufficient, it must reverse the conviction with a remand to the circuit court for entry of a judgment of acquittal. *State v. Wulff*, 207 Wis. 2d 143, 14445, 557 N.W.2d 813 (1997) (citing *United States v. Burks*, 437 U.S. 1, 18 (1978)).

B. The City did not present clear and convincing evidence at trial that Young was under the influence of an intoxicant.

To sustain a conviction, the City had to satisfy the court to a reasonable certainty by evidence that was clear, satisfactory, and convincing that Young (1) operated a motor vehicle while (2) under the influence of an intoxicant (3) to a degree which rendered her incapable of safely driving. Wis. Stat. § 346.63(1)(a).

As to "under the influence," the model jury instructions explain that "[n]ot every person who has consumed alcoholic beverages is 'under the influence'… 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*." WIS JI-CRIMINAL 2633, pg. 2 (emphasis).

In Wisconsin, "a layperson can give an opinion that he or she believes another person is intoxicated." *State v. Powers*, 2004 WI App 143, ¶ 13, 275 Wis. 2d 456, 685 N.W.2d 869. "A layperson is qualified to give an opinion as to whether a person is under the influence, based upon observations of that person." *Powers*, 275 Wis. 2d 456, ¶ 13 (quoting *Playle v. Commissioner of Public Safety*, 439 N.W.2d 747, 749 (Ct. App. Minn. 1989)). "A layman's opinion of the state of sobriety is competent and entitled to such probative value as the experience of the witness justifies." *City of Milwaukee v. Kelly*, 40 Wis. 2d 136, 138, 161 N.W.2d 271 (1968).

However, nearly every published case in this vein regards layperson opinions as sufficient to develop *reasonable suspicion* for *law enforcement* to execute an investigatory stop. *See, e.g., Powers*, 275 Wis. 2d 456, ¶ 14 ("Where a tip has a high degree of reliability … *and the police independently verify the information before conducting a stop*, the resulting stop is

supported by reasonable suspicion.") (emphasis); *City of Milwaukee v. Johnston*, 21 Wis. 2d 411, 41415, 124 N.W.2d 690 (1963) (noting a "lay witness … may give his opinion whether a person at a particular time was or was not intoxicated" in a case where the accused was observed by *three police officers* with "substantial prior experience in handling and observing persons who were under the influence of intoxicants"); *City of Milwaukee v. Bichel*, 35 Wis. 2d 66, 69, 150 N.W.2d 419 (1967) (citing *Johnston* in a case where an "alcohol test" found .31 BAC and a *police officer* observed the operator driving the wrong way on a one-way street, and, *inter alia*, stumbling, staggering, and slurring his speech); *State v. Burkman*, 96 Wis. 2d 630, 64445, 292 N.W.2d 641 (1980) (citing *Johnston* in a case where *two police officers* testified to their opinions that the defendant was under the influence of an intoxicant, corroborating the allegations of a lay witness).

Layperson opinions regarding intoxication have weight *alongside* opinions by law enforcement. *Kelly*, 40 Wis. 2d at 13738 (finding clear and convincing evidence were layperson's opinions were combined with the "clearly competent and relevant" testimony of the *investigating officer* who arrived on the scene 10 minutes after the accident, smelled alcohol, and elicited comments from the defendant that he had drunk ten to twelve beers and two double-shots of brandy).

Even if layperson opinions can provide reasonable suspicion to *begin* an investigation, expert testimony is crucial for verifying unqualified assumptions. *See, e.g.*, *State v. Myers*, 924 N.W.2d 823, 929 (Iowa 2019) ("[W]itness testimony of impairment does not serve to validate the presence of a controlled substance in a person, at least not without expert testimony that could eliminate causes for the conduct and demeanor other than the effects of a controlled substance.").

Even where chemical evidence is unavailable or excluded, other "competent corroborating evidence" can sustain a conviction. *State v. Burkman*, 96 Wis. 2d 630, 642, 292 N.W.2d 641 (1980). In *Burkman*, breathalyzer results were suppressed, but an *officer* observed "a strong odor of alcohol on [the defendant's] breath" and noted "he was very unstable on his feet, … his speech was slurred," and he failed the "finger-to-nose test." *Id.* at 634. Wisconsin's supreme court found that sufficient.

Even police officers have difficulty detecting OWIs without extensive training. "The difficulty in detecting [OWI] among operators personally contacted by officers has been well documented."[1] A conviction requires establishing operation, control, vehicle, and impairment—and "it is the officer's responsibility to collect and thoroughly document all evidence for use at trial."[2]

Here, laypersons expressed opinions that Young had been intoxicated after returning to work. Young was not alleged to be intoxicated prior to leaving school for a blood draw. No officer independently verified the laypersons' opinions by personal observation, Field Sobriety Tests (FSTs), or chemical tests. Even if the laypersons' observations could have given rise to reasonable suspicion to investigate Young *on December 12*, no officer could have offered expert testimony (from her or his extensive experience and training) to verify the laypersons' suspicions and develop probable cause for arrest and subsequent prosecution—because law enforcement was *entirely uninvolved* in the trial before the circuit court, after also being *entirely uninvolved* on the day in question—and, according to the evidence at trial, *entirely uninvolved* in any way beyond somehow issuing a citation.

While officers may rely on circumstantial evidence for the element of *operating a vehicle* (*see* Part I.C, *infra*), Young has searched in vain for controlling or persuasive case law that allows law enforcement to rely on solely circumstantial and unverified evidence to find probable cause for arrest regarding *intoxication* itself. No one trained to investigate intoxication offenses evaluated Young to test for actual impairment or to rule out alternative explanations for what the laypersons observed (e.g., low blood sugar from fasting for and undergoing a blood draw, residual alcohol on her jacket from her night shift as a bartender).

Thus, the City did not present clear and convincing evidence at trial that would satisfy a reasonable factfinder to a

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[1] *DWI Detection & Standardized Field Sobriety Testing Participant Manual*, NHTSA (Revised Oct. 2015), Session 2, pg. 24. Available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst_pm_full_manual.pdf. *See also* R.34:120.

[2] *Id.* at Session 3, pg. 4.

reasonable degree of certainty that Young was intoxicated *at all* on December 12, let alone *while driving*.

C. Even if this Court finds sufficient evidence that Young was intoxicated while at school, the City did not present clear and convincing evidence at trial that Young operated a vehicle at 11:31 a.m.

Circumstantial evidence can support a finding that a defendant operated a motor vehicle. In *Mertes*, for example, *officers* responded to a report that two individuals were passed out inside a vehicle at the gas pumps at a gas station, and they noted an odor of intoxicants and "red and glassy" eyes. 315 Wis. 2d 756, ¶¶ 2, 5. No one had witnessed Mertes drive into the lot or put the keys in the ignition, but this Court concluded "the jury was entitled to consider the circumstantial evidence in this case to determine how and when the car arrived where it did and whether it was Mertes who operated it." *Id.* ¶ 16. *See also Burg ex rel. Weichert v. Cincinnati Ins. Co.*, 2002 WI 76, ¶ 27 n.8, 254 Wis. 2d 36, 645 N.W.2d 880 ("'[O]peration' for purposes of the drunk driving laws can be proved circumstantially. A defendant found intoxicated behind the wheel of a parked car with its engine off but still warm might well be prosecuted on that circumstantial evidence of recent 'operation.'").

None of that occurred here. Young was not found drunk behind the wheel. No one observed her driving at 11:31 a.m., contrary to the circuit court's clearly erroneous finding (R.34:127), and no camera captured her exiting the vehicle that is alleged to be hers. Even construing the evidence in the light most favorable to conviction, the City did not present clear and convincing evidence at trial that Young was driving her car at 11:31 a.m. *at all.*

D. Even if this Court finds sufficient evidence to conclude Young was driving at 11:31 a.m., and that she was intoxicated *while at school,* the City did not present clear and convincing evidence at trial that Young had consumed alcohol *prior to* driving at 11:31 a.m.

Even assuming *arguendo* that Young consumed enough alcohol at some point on December 12 to give rise to reasonable suspicion that she had been drinking among the

laypersons who observed her *after 11:34 a.m.*, and that Young was behind the wheel when a red vehicle was recorded pulling into the parking lot at *11:31 a.m.*, no evidence exists to support a finding that Young had consumed any alcohol *before* allegedly driving at 11:31 a.m.

Between 11:31 and 11:34 a.m., Young easily could have consumed enough alcohol to produce an odor and exhibit some indicia of intoxication in the window of time that is missing from a verifiable timeline in this case. According to the National Institute on Alcohol Abuse & Alcoholism (NIAAA), "[a]lcohol's immediate effects can appear within about 10 minutes." [3] Women—especially young women drinking on an empty stomach—absorb alcohol more quickly.[4] As Young noted at trial, she "could have slammed a flask before" walking into the school. (R.34:115.) In that event, her breath would have instantly smelled of alcohol, and within minutes she could have been slurring her speech and walking with an altered gait.

That is why the circuit court's finding that Young "was under the influence of an intoxicant … *within a half hour of … driving*" (R.34:126) is patently insufficient to meet the standard of proof required to sustain a conviction here. The law requires a finding that Young was intoxicated *while driving*, not thirty—or even four—minutes *later*.

And even if Young was under the influence of alcohol at work *after 11:34 a.m.*, she indisputably *walked home*. (R.34:53.)

Thus, the City did not—and could not—present clear and convincing evidence at trial that Young had consumed any alcohol prior to allegedly driving at 11:31 a.m.

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[3] "Overview of Alcohol Consumption," *National Institute of Health: NIAAA*, https://www.niaaa.nih.gov/alcohols-effects-health/overview-alcohol-consumption.

[4] "What Happens When You Drink on an Empty Stomach?," *healthline*, www.healthline.com/health/drinking-on-an-empty-stomach#TOC_ TITLE_ HDR_1.

E. Even if this Court finds sufficient evidence that Young operated a vehicle after consuming alcohol, the City did not present clear and convincing evidence at trial that Young drove *while under the influence of an intoxicant to a degree which rendered her incapable of safely driving*. Wis. Stat. § 346.63(1)(a).

Even assuming Young drove to school at 11:31 a.m., and even assuming she had consumed enough alcohol to give off an odor thereof as she entered the building, no evidence exists to prove that *while driving*, she lacked the "clear judgment and steady hand necessary to handle and control a motor vehicle." WIS JI-CRIMINAL 2633 (incorporating instructions on "under the influence of an intoxicant" from *City of Fond du Lac v. Hernandez*, 42 Wis. 2d 473, 47576, 167 N.W.2d 408 (1969)).

Again, circumstantial evidence can support a finding of operating a vehicle:

Mertes was passed out behind the wheel. *Mertes*, 315 Wis. 2d 756, ¶ 2.

In *Milwaukee County v. Proegler*, 95 Wis. 2d 614, 618, 628, 291 N.W.2d 608 (Ct. App. 1980), the defendant was also passed out behind the wheel of his truck while "partially" parked on the I-43 emergency ramp, and this Court found sufficient circumstantial evidence of operating while intoxicated.

In *Shawano County v. Wendt*, 20 Wis. 2d 29, 3132, 34 121 N.W.2d 300 (1963), Wisconsin's supreme court found sufficient circumstantial evidence of operating while intoxicated when the driver was found sleeping behind the wheel and there was ample evidence that he had been drinking.

In *Monroe County v. Kruse*, 76 Wis. 2d 126, 250 N.W.2d 375 (1977), officers found the driver asleep behind the wheel with the engine running, exhibiting a strong smell of alcohol on his breath. Kruse admitted having drunk five beers that evening on an empty stomach, and also admitted to driving.

In *State v. Steinke*, 2010 WI App 135, 2010 WL 3389881 (unpublished, citable under § 809.23(3)), no one saw

Steinke drive to the location where he was arrested; however, he admitted driving earlier, and an *officer* noticed a strong smell of liquor. Testimony by an expert chemist substantiated that a later *admissible* blood draw found a high enough BAC to reasonably infer that Steinke had a BAC of well over 0.24 during the window of time *when he admitted driving*.

Not every prosecution on circumstantial evidence succeeds, however. In *Village of Cross Plains v. Haanstad*, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447, Haanstad was found drunk while sitting at the wheel of a parked car that was still running, and the Supreme Court still found "no evidence" that Haanstad had "operated" the vehicle. *Id.* ¶¶ 56, 24.

Other jurisdictions help elaborate on circumstantial evidence that can and cannot support a conviction for OWI equivalents. *See, e.g., State v. Gregoroff*, 951 P.2d 578 (Mont. 1997) (skid marks at accident scene and passed out driver sufficient to determine driver drove erratically and was intoxicated); *State v. Larson*, 243 P.3d 1130 (Mont. 2010) (screeching and squealing of tires in plain view of two officers, slow reactions, slurred speech, failed FSTs); *State v. Boylen*, 547 N.W.2d 202 (Iowa 1996) (driver asleep at the wheel and confessed to having consumed six to twelve beers before driving and could feel the effects of alcohol while driving).

In *Gatewood v. State*, 921 N.E.2d 45 (Ct. App. Ind. 2010), the court reversed a conviction because officers did not witness Gatewood driving, and even though layperson security guards saw him "stumble" into the building an hour before the police were called, "intoxication at the time the defendant drove cannot be reasonably inferred." *Id.* at 49. This, even though Gatewood was found passed out, too intoxicated to perform standard FSTs, and submitted to a blood draw that registered a BAC of 0.286. *Id.* at 4647. The court knew Gatewood had driven *at some point*, and knew he was quite drunk when the police arrived to investigate, but the court found the State had presented "no evidence" of Gatewood's intoxication *at the time he indisputably drove*. *Id.* at 50.

Young's conviction stands on even less evidence than *Gatewood*. Even if this Court finds sufficient evidence that Young drove herself to school at 11:31 a.m., and even if the Court finds sufficient evidence that Young had some alcohol in her system at that time, there exists no evidence whatsoever

that Young was "under the influence" at 11:31 a.m. as a matter of law. She was not passed out behind the wheel. She was not driving erratically. She did not cause an accident. She broke no traffic laws. She cannot be observed stumbling away from her vehicle. She did not fail FSTs. There is no chemical evidence of a prohibited BAC. She did not confess to drinking or driving the vehicle at all, and *absolutely no one* observed her driving. No officer corroborated layperson opinions regarding her state of alleged intoxication—because no officer was involved.

As such, this Court should find that no reasonable factfinder could have been convinced of Young's guilt by clear, convincing, and satisfactory proof based on the evidence presented by the City.

Crucially, the circuit court's decision was based on its clearly erroneous finding that Young "was under the influence of an intoxicant as recent as 11:31 *when the first witness made an observation of her*." (R.34:127.) The evidence clearly does not support such a finding, as no one observed, or could have observed, Young driving at 11:31 a.m.—the critical time alleged by Officer Meyer on the citation. (R.4.) What little evidence appears on camera does not support a finding of driving while intoxicated "to a degree which rendered her incapable of safely driving."

Therefore, this Court should reverse.

II. THE CIRCUIT COURT COMMITTED PLAIN ERROR BY DENYING YOUNG'S MOTION TO DISMISS WHEN IT WAS CLEAR THAT YOUNG'S CONFRONTATION RIGHT WAS DENIED.

A. Legal standards governing plain error review.

The plain error doctrine allows this Court to review errors that were otherwise waived by a party's failure to object. Wis. Stat. § 901.03(4); *State v. Mayo*, 2007 WI 78, ¶ 29, 301 Wis. 2d 642, 734 N.W.2d 115. A plain error is one that is "so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *State v. Sonnenberg*, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984) (citation omitted). This Court is encouraged to use the plain error doctrine when "a basic constitutional right has not been extended to the accused." *Id.*

Where a defendant demonstrates an unobjected to error is "fundamental, obvious, and substantial, the burden shifts to the State to show the error was harmless." *State v. Jorgensen*, 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77. Demonstrating harmless error requires the State to prove "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Mayo*, 301 Wis. 2d 642, ¶ 47 (citation omitted).

Unobjected to confrontation clause violations may invoke the plain error doctrine on appeal. *Jorgensen*, 310 Wis. 2d 138, ¶ 33.

Young did not formally raise a confrontation clause objection at trial. As noted above, her counsel repeatedly drew the court's attention to the fact that no law enforcement was involved in the original "investigation," nor was any officer present for trial—during both the argument over her motion to dismiss and during closing argument. (R.34:105, 11719.)

Whether specifically preserved or not, the circuit court's failure to dismiss when it was clear that Young was denied her right to confront her accuser was a plain and fatal constitutional error.

The City cannot prove beyond a reasonable doubt that a rational fact finder would have found Young guilty absent this plain error. When Young *was* afforded her confrontation right at trial before the municipal court, the rational fact finder found her not guilty and dismissed the citation. Officer Meyer's absence at circuit court was a plain and irreparable error.

B. The circuit court committed plain error by denying Young's motion to dismiss when the City failed to produce the complaining officer at trial.

1. Legal standards governing the right to confront one's accuser

The Sixth Amendment to the United States Constitution protects the accused's right to confront the witnesses against her "in *all* criminal prosecutions." U.S. Const., Am. VI (emphasis). Wisconsin's Constitution requires that "[i]n all criminal prosecutions the accused shall enjoy the right … to demand the nature and cause of the accusation against him" and "to meet the witnesses face to face." Wis. Const., Art. I,

§ 7. "The Confrontation Clause of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them." *State v. Jensen*, 2007 WI 26, ¶ 13, 299 Wis. 2d 267, 727 N.W.2d 518 (citation omitted).

It is by sheer coincidence—not the nature of the offense nor the facts of the allegations—that the case at bar involves a trial for a "quasi-criminal traffic matter,"[5] rather than a full-blown criminal (even felony) charge. As noted below, OWI cases are fundamentally different from other traffic matters, and therefore this Court ought to review proceedings in OWI matters in a manner consistent with its review of criminal prosecutions.

Prior testimony may be admitted against a defendant only when she has had a prior opportunity to cross-examine the witness giving the testimony. *State v. Hale*, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 593. If a hearsay declarant does not appear at trial, the state must make a good-faith effort to produce the declarant and, if there is a remote possibility that affirmative measures might produce him, good faith requires taking steps to do so. *State v. King*, 2005 WI App 224, 287 Wis. 2d 756, 706 N.W.2d 181.

Here, the hearsay declarant is the complaining officer, Bradley Meyer, without whose issuance of a citation upon presumably corroborating citizen-witness allegations Young would never have appeared before the circuit court in the first place. Without the citation, there is no case. The citation *is* Officer Meyer's statement that the alleged infraction indeed occurred. Allowing the case to proceed without the author of the citation present is equivalent to allowing testimonial hearsay without any opportunity to confront the declarant-accuser.

2. Young was denied the constitutional right to confront her accuser when the City refused to produce the author of the citation at trial.

Officer Meyer *is* the accuser here. The citation alleges Young operated while intoxicated at precisely 11:31 a.m. on

[5] The City itself used the language of "quasi-criminal traffic matter" in the briefing below. (R.16:1.)

December 12, 2018. (R.4.) As established above, *no one* witnessed Young operating a vehicle—intoxicated or not—at 11:31 a.m., despite the circuit court's clearly erroneous finding to the contrary. (*See* R.34:127.) Therefore, the allegation in the citation *must be* the result of a police investigation. Officer Meyer, the author of the citation (R.4), must have investigated and come to the legal and factual conclusion that Young had committed the charged offense.

Officer Meyer did appear for the municipal court trial, and the court found Young not guilty and dismissed her citation (R.5:12). No transcript of that trial exists, so it is a question unanswerable by the record whether and how Officer Meyer's testimony on direct or cross-examination factored into the municipal court's finding of not guilty.

The City refused to produce Meyer for the new trial before the circuit court. (R.34:2.) Despite Young's repeated objections, the circuit court did not allow Young to face her accuser, and it denied her motion to dismiss based in part on the absence of the complaining officer. This error was fundamental, obvious, and substantial, and unless the City can prove beyond a reasonable doubt that the error was harmless, this Court should reverse. *Jorgensen*, 310 Wis. 2d 138, ¶ 23.

3. Officer Meyer *is* the accuser, as citizen witnesses cannot singlehandedly effect a quasi-criminal investigation and subsequent citation.

Young would never have been haled into municipal and then circuit court for this quasi-criminal prosecution had it not been for Officer Meyer's issuance of a citation. Coworkers at a public high school cannot issue a citation, no matter how reliable their layperson opinions may be regarded by a court. The only person empowered to issue the citation under which Young now faces significant deprivations of liberty and property—and potential criminal collateral consequences—was Officer Meyer. And Officer Meyer was absent at trial, over Young's repeated objections.

Citizen witnesses are an important *piece* of the puzzle of law enforcement, but they cannot themselves enforce the law. In *State v. Kolk*, 2006 WI App 261, 298 Wis. 2d 99, 726 N.W.2d 337, this Court noted that Wisconsin courts "recognize the importance of citizen informants and accordingly apply a

relaxed test of reliability"; however, "there must be some type of evaluation of the reliability of victim and witness informants." *Id.* ¶ 13 (quotations and citations omitted). The more reliable the informant, the less evaluation is required—but police must still *corroborate* the information in order to develop reasonable suspicion that a crime has occurred. *See State v. Miller*, 2012 WI 61, ¶ 32, 341 Wis. 2d 307, 815 N.W.2d 349.

Police corroboration of citizen tips also occurs in OWI investigations. In *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516, the Wisconsin supreme court approved of an investigatory stop *by police* on the basis of an anonymous tipster who had followed an allegedly intoxicated driver for a while before calling it in. *Id.* ¶¶ 46, 38. In *Powers*, the investigation began when a drug store clerk reported *to police* that "an intoxicated man had come in to make purchases at the store buying beer, a little outfit, and something else." *Powers*, 275 Wis. 2d 456, ¶ 2.

Other states agree.

- In *State v. Riefenstahl*, 779 A.2d 675 (Vt. 2001), Vermont's highest court found a named informant's tip—that a driver whose vehicle and license plate the tipster could identify "was possibly intoxicated and driving"—"contained sufficient indicia of reliability to justify the stop" by *police*. *Id.* at 67677.
- In Colorado, an appellate court upheld a *police* stop based on a tip from a gas station clerk who reported witnessing an intoxicated man getting into a car. *Peterson v. Tipton*, 833 P.2d 830, 83132 (Colo. Ct. App. 1992).
- A Connecticut court upheld a *police* stop initiated by a tip from a nightclub employee who reported an intoxicated patron leaving the club. *State v. Bolanos*, 753 A.2d 943, 94445 (Conn. App. Ct. 2000).
- Kansas' highest court found reasonable suspicion when the *police* corroborated a tip reporting a possible drunk driver—giving a description of the vehicle and its license plate number. *State v. Slater*, 986 P.2d 1038, 1044 (Kan. 1999).

- In *Playle*, a Minnesota appellate court upheld a *police* stop based on a call from a Burger King employee reporting a drunk driver. *Playle*, 439 N.W.2d at 748.

All these cases have one crucial element in common: Corroboration *by police* of a layperson accusation of intoxicated driving.

Even if the circuit court found the testimony of Young's coworkers sufficient to *support* the allegations in the citation, the officer responsible for the citation itself was not available for cross-examination. Officer Meyer is a crucial witness against Young. He is the only person qualified to "investigate" the citizen complaint and issue a citation. He is the only person who could have made the determination, upon investigation, that Young was driving at 11:31 a.m., because *none* of the lay witnesses observed that crucial and dispositive fact.

Officer Meyer's absence at trial is inexcusably violative of Young's fundamental right to confront her accuser, and the City cannot prove beyond a reasonable doubt that a different outcome would not have occurred absent this plain error.

If Officer Meyer corroborated the accusations of Young's coworkers, those efforts were completely unknown to the circuit court at trial. Without such efforts, the accusations could not be verified by an officer of the law—and *neither ordinary citizens nor circuit court judges are law enforcement officers*. *See* Wis. Stat. § 968.085 (stating citations are to be "issued by a law enforcement officer"); § 165.85(2)(c) (defining "law enforcement officer" as persons employed by the state "for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed to enforce").

The fact that a citation was issued means that Officer Meyer must have *somehow* corroborated these accusations. His methods and conclusions *must* be open to cross-examination in order to effectuate Young's confrontation right. That did not happen, and that is a fatal flaw that cannot be overcome.

4. OWI citations are fundamentally different from other traffic violations.

This is not an ordinary traffic citation. There are times when citizen witnesses can sustain a conviction for a traffic violation. This is not one of those times.

In *County of Winnebago v. Kettleson*, 2013 WL 2319548 (Ct. App. 2013) (unpublished, citable under § 809.23(3)), this Court upheld a conviction for reckless driving against a sufficiency of the evidence challenge, where a citizen-witness testified to seeing a vehicle driving too fast, tailgating, and making several un-signaled lane changes. *Id.* ¶¶ 1, 3. "The reckless driving citation … was issued based upon [the] citizen complaint to law enforcement." *Id.* ¶ 2. Because this Court construed the *pro se* challenge as a sufficiency of the evidence challenge, it simply had to decide which witness it believed—the citizen-witness or the accused. *Id.* ¶ 10.

Kettleson, in addition to being merely persuasive for this Court, is easily distinguishable from the OWI case at bar.

This is not a citation for speeding, lane deviation, or even reckless driving. Wisconsin has a statutory scheme, Wis. Stat. § 346.65(2)(am), of "progressive OWI penalties" that "are mandatory directives from the legislature 'to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence,'" *City of Cedarburg v. Hansen*, 2020 WI 11, ¶ 17, 390 Wis. 2d 109, 938 N.W.2d 463 (quoting Wis. Stat. § 967.055(1)(a)).

On conviction for a fourth OWI offense, the defendant becomes a convicted felon with all the collateral consequences therefor. Wis. Stat. § 346.65(2)(am)4.

If an individual has a known prior OWI offense (within the previous ten years), a subsequent OWI is a criminal proceeding that cannot be heard in municipal court. *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 23, 370 Wis. 2d 595, 882 N.W.2d 738 ("The legislature's use of 'shall' in Wisconsin's OWI escalating penalty scheme … is mandatory and, as a result, criminal penalties are required of all OWI convictions following an OWI first-offense conviction.").

The same is not true of reckless driving, no matter how many prior citations the driver may have. No other municipal

traffic infraction has the kind of escalating criminal penalty scheme imposed for OWI offenses.

Furthermore, OWI offenses are already treated differently in terms of municipal court procedure—by statute. *See, e.g.*, Wis. Stat. § 800.04(1)(d) (allowing *only* OWI defendants the ability to immediately bypass municipal court and demand a jury trial in circuit court).

Thus, the circuit court's analogous finding regarding being ticketed through the mail for speeding without law enforcement involvement is unpersuasive. (R.34:12829.) Wisconsin does not allow speed or red-light enforcement via automated photographic systems,[6] and the State Patrol Aircraft Program involves highly trained pilots using sophisticated technology to clock speeders from the skies—and even then, they "call down to waiting ground cars to *initiate* a traffic stop."[7] Disembodied, police-free speed enforcement is atypical in Wisconsin, to say the least.

Even so, receiving a mere traffic citation in the mail is substantively different from being cited for an OWI without any law enforcement engagement whatsoever. Speeding infractions do not entail a progressive, compounding penalty scheme that has potential criminal, even felonious, implications.

Because under identical factual circumstances, Young's quasi-criminal OWI trial before the circuit court unequivocally would have been a full-blown "criminal prosecution"—perhaps even a *felony* prosecution—this Court should find that the Confrontation Clause required the presence of the only person authorized to issue OWI citations: the complaining officer.

The caption here is the *City of Cedarburg v. Katherine D. Young*. This is not a civil dispute between Young and her former employer, as Young assumed for forty-three days. It is

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6 *See* Preliminary Draft, LRB-2569/P3 (available at wpr.org/sites/default/files/draft_bill.pdf) (proposing automated photographic speed and red light enforcement in a bill that has yet to become law).

7 *See* "Aircraft program," *State of Wis. Department of Transportation*, (wisconsindot.gov/pages/safety/enforcement/air-program/default.aspx).

a quasi-criminal prosecution by a municipality. And yet that municipality refused to make the enforcer of municipal ordinances who determined a violation had occurred—the complaining officer—available for confrontation at trial.

Because the circuit court rejected Young's repeated objections on this fundamental question of constitutional law and failed to dismiss when the City refused to make Officer Meyer available for confrontation, this Court should find the circuit court committed plain error in denying Young her right to confront her accuser.

5. Allowing OWI convictions based entirely on layperson "investigation" without any law enforcement involvement sets a dangerous precedent.

Affirming the process by which the circuit court erroneously and unconstitutionally found Young guilty would set a chilling and dangerous precedent, an argument Young made multiple times below. (*See, e.g.*, R.14:36; R.34:106, 121.) This case invites this Court to ponder the innumerable scenarios in which Wisconsinites could be deprived of liberty and property under analogous circumstances:

A vehicle allegedly belonging to Joe is recorded from a distance pulling into the parking lot at American Family Field. It appears from the video that Joe was the driver. Regardless, whoever is driving appears to be managing the vehicle without any obvious trouble, breaking no laws, and causing no damage. Minutes later, when Joe gets to his seat, some fans accuse him of being intoxicated. An usher approaches him, and the usher also believes Joe is intoxicated. Joe disagrees, but the usher asks him to leave. Joe argues, but finally gives up and leaves. He is captured on video leaving the stadium and is recorded entering what is believed to be his vehicle and driving off.

Forty-three days later, based entirely on the lay opinions of fellow fans and the usher that he was *probably* intoxicated inside the stadium, and the video evidence of him subsequently driving away, Joe receives a citation for OWI. And because Joe received a first OWI 9 years ago, he now faces up to 6 months of confinement, a fine of up to $1,100, up to 2 years revocation, and up to 2 years of monthly charges for an IID on every vehicle in his name. His insurance rates

skyrocket. The lawyer takes her share. He loses his job and struggles to find another one.

All this, without *ever* coming into contact with a *single* law enforcement officer. No FSTs. No breath or blood test. No investigation—at least not that Joe is aware of. No encounter by which a trained officer corroborated the fans' and usher's accusations. Just an envelope in the mail that ends up costing Joe tens of thousands of dollars, jail time and other losses of liberty, and a permanent criminal record that will forever plague his personal and professional life.

Until receiving that envelope, Joe fully believed the full consequences of being accused of being drunk at a Brewers game were missing a Yelich walk-off homer.

That is where Young found herself on January 24, 2019. (R.4.) Except, of course, Young *indisputably walked home* and was *never* observed driving *after* being accused of being intoxicated.

This cannot be how Wisconsin does the important work of keeping its streets safe while also protecting the liberties and livelihoods of its citizens. This Court should not affirm such a dangerous precedent for investigating, prosecuting, and adjudicating offenses with potentially devastating consequences.

CONCLUSION

For the forgoing reasons, Young respectfully requests that this Court reverse the decision of the circuit court and remand with instructions to enter a judgment of acquittal.

Dated this 11th day of January, 2021.

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Electronically signed by Michael G. Levine
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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a 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, maximum of 60 characters per full line of body text. The length of the brief is 8,566 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, including the appendix, which complies with the requirements of the Interim Rule for Wisconsin Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 11th day of January, 2021.

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CERTIFICATION OF APPENDIX CONTENT

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 Section 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 11th day of January, 2021.

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