STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

City of Cedarburg,
Plaintiff-Respondent,

vs. Appeal No. 20-AP-1848

Katherine D. Young,
Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER ENTERED BY THE OZAUKEE COUNTY CIRCUIT COURT THE HONORABLE SANDY A. WILLIAMS, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The City does not request oral argument. This will be a one-judge opinion that will not qualify for publication. Wis. Stats. §§ 809.23(1)(b)(4), 752.31(2)(c). A three-judge panel is not necessary as this appeal involves the application of well-settled legal principles.

STATEMENT OF THE FACTS

Katherine Young was a Spanish teacher at Cedarburg High School. R. 34 at 38. On Wednesday, December 12, 2018—a regular school day—surveillance video showed Young walking into the school building without incident at 7:12 a.m. R. 19, file titled "Door 48 Lobby Arrival 7.12.50-7.13.04". At 9:47 a.m., surveillance video showed Young walking out of the school building, again without incident, to a red SUV parked in the staff parking lot. R. 19, file titled "Door 48 Lobby Exiting 9.47.30-9.47.52". The video shows Young getting into the driver's door of the SUV, followed by the SUV driving out of the lot at 9:48 a.m. R. 19, file titled "NE Lot Driving Off Site 9.47.50-9.49.07".

At 11:31 a.m., surveillance video showed a red SUV driving on Evergreen Boulevard and turning into the staff parking lot. R. 19, file titled "NE Lot Evergreen Drive Return 11:30:52-11.35.32". The SUV pulled into in the same parking space it left from, which the assistant principal testified was Young's assigned space. R. 35 at 78. This particular video clip ends at 11:31:27 a.m., while the SUV is still in the process of parking. R. 19, file titled "NE Lot Evergreen Drive Return 11:30:52-11.35.32". Two and a half minutes later, at 11:34:10 a.m., video shows Young walking through the entrance doors. R. 19, file titled "Door 48 Lobby Return 11.34.09-11.34.28".

Five different Cedarburg High School staff members interacted with Young in the following minutes; all of them either concluded

Young was intoxicated, or, described observations consistent with intoxication.

The staffer posted at the door who had to "buzz" Young into the building noted that Young had a lack of coordination, incoherent speech, smelled of alcohol, and was not able to walk straight down the hallway. R. 34 at 6-9. This staffer concluded Young was "some level of drunk" and notified an assistant principal. *Id.* at 9-10.

An administrative assistant who interacted with Young one minute later noted that Young "was slurring her speech quite a bit and had to brace herself against the doorway as she was talking". R. 34 at 32. The assistant immediately went to the office to notify the principal. *Id.*

Cedarburg High School Principal Adam Kurth first saw Young at 11:36 a.m. "staggering" down the hall to another classroom, unable to walk in a straight line. R. 34 at 40, 43-44. The principal waited about two minutes for Young to return to her empty classroom. *Id.* The principal noted that Young had "a very distinct odor of alcohol," "delayed reaction time," and slurred speech, leading him to conclude Young was "under the influence at the time." *Id.* at 40-41. He ordered her to come to the office as the bell was about to ring for the change in class periods, but Young refused. *Id.* at 41. When the principal persisted in directing Young to come to the office, she opened a can of soda and began swishing it around in her mouth. *Id.* at 42.

The principal obtained a preliminary breath test device from the school resource officer. R. 34 at 46. Young refused to submit to a breath sample and tried to leave the office. *Id.* The principal asked Young a second time and she again refused. *Id.* Young then grabbed a "sucker" from a candy dish in the principal's office and began to

suck and chew on it. *Id.* at 47, 73. Young then agreed to provide a preliminary breath sample. *Id.* at 46.

An assistant principal came to the office just after the principal brought Young back to the office, and they remained with Young until Young was sent home. The as immediately noted the smell of alcohol in the room where Young was and that Young's speech was slurred. R. 34 at 66. They also noted that Young kept repeating the same conversation—Young would ask why she was in the office and expressed a desire to return to her class; the assistant principals would advise she was there due to their concern for her well-being. *Id.* at 66. That conversation repeated itself for "probably 10, 15 minutes." *Id.* at 67.

It is undisputed that police did not investigate this incident as an OWI until several days after the fact. R. 14 at 2, 5.

STATEMENT OF THE CASE

A trial was held before the Mid-Moraine Municipal Court on September 12, 2019. R. 5 at 2. On October 1, 2019, the Municipal Court found Young not guilty. R. 5 at 1. The City appealed and requested a de novo trial to the circuit court. R. 1. Young filed a motion to dismiss prior to trial, which the circuit court denied. R. 17, R. 33. A de novo bench trial was held before the circuit court. R. 34. The circuit court found Young guilty of OWI and imposed a sentence. R. 34 at 122-133, Resp't. App. at 1-8. The only post-trial motion Young filed was a motion for relief from the penalties pending appeal. R. 23. Young appeals. R. 27.

STATEMENT OF THE ISSUE

The City disagrees with Young's framing of the issues. The City contends there is one issue, appropriately framed as:

Was the evidence offered by the City at trial sufficient to meet the City's burden of proof on the charge of operating while under the influence, and thus sufficient to support the circuit court's finding of guilt?

The Circuit Court answered: Yes.

ARGUMENT

To prevail in any OWI citation, the City must offer evidence to prove the two elements of the offense: first, that the defendant drove or operated a motor vehicle on a highway, and second, that the defendant was under the influence of an intoxicant at the time of driving. Wis. Stat. § 346.63(1)(a). The City's evidence must be strong enough to meet its burden of proof, which is evidence that is clear, satisfactory, and convinces the factfinder to a reasonable certainty. Wis. Stats. §§ 345.45, 800.08(3).

Here, the City met its burden in what the circuit court called an "incredibly strong case." R. 34 at 128, Resp't. App. at 7. It did so through the testimony of five laypersons, including the principal and two assistant principals of Cedarburg High School, and surveillance video from various vantage points inside and outside of the school. While it may be unusual for the City to have been able prove its case without the testimony of a police officer, it was not improper.

I. Standard of review

In a challenge to the sufficiency of the evidence in a civil bench trial, an appellate court should affirm the circuit court's decision

unless the circuit court's findings of fact are clearly erroneous. Wis. Stat. § 805.17(2), *see also Ozaukee County v. Flessas*, 140 Wis. 2d 122, 130-31, 409 N.W.2d 408 (Ct. App. 1987). In order to reverse, the great weight and clear preponderance of the evidence must support a contrary finding. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). The appellate court is to search the record for evidence to support the findings the circuit court made, and to accept the reasonable inferences the trial court drew from the evidence. *Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶ 10, 253 Wis. 2d 588, 644 N.W.2d 269.

II. The evidence was sufficient to meet the City's burden of showing Young drove a motor vehicle on a highway

The circuit court found that Young drove a motor vehicle on a highway. This finding was not clearly erroneous and should be affirmed.

The City offered direct evidence of Young's driving in the form of surveillance video evidence. The video shows Young walking out of the school building and through the parking lot to a parked, red SUV at 9:47-9:48 a.m. R. 19, file titled "Door 48 Lobby Exiting 9.47.30-9.47.52"; R. 19, file titled "NE Lot Driving Off Site 9.47.50-9.49.07". The video shows Young opening the driver's door and getting into the SUV, and the SUV driving away. R. 19, file titled "NE Lot Driving Off Site 9.47.50-9.49.07". At 11:31 a.m., a red SUV turns off of Evergreen Boulevard and pulls into the same parking space. R. 19, file titled "NE Lot Evergreen Drive Return 11.30.52-11.35.52". Assistant Principal Carolyn McNerney testified this particular parking space was assigned to Young. R. 35 at 78. The video clip ends at 11:31:27 a.m., as the SUV is still in the process of

finishing its parking maneuver[1]. R. 19, file titled "NE Lot Evergreen Drive Return 11.30.52-11.35.52". At 11:34:10 a.m., the video shows Young walking into the school entryway. R. 19, file titled "Door 48 Lobby Return 11.34.09-11.34.28." At 1:17 p.m., when Young leaves after the principal sent Young home for the day, the red SUV is still parked in the same spot. R. 19, file titled "NLot NW Trees to Off Site (z) 1.19-1.21". The video shows Young accessing the SUV before leaving the parking lot on foot. R. 19, file titled "CPAC N Lot Drive Trees to Vehicle to Off Site 1.17.23-1.21.14". Further, Young provided a handwritten timeline of her version of the day's events while she was in the principal's office. R. 34 at 48-49, R. 20. In Young's statement, she states that at 9:45 she "left for hospital" had a blood test at 10:15, went "[h]ome to heat up enchiladas" at 10:45, and was "[b]ack @ school" at 11:05. R. 20.

Circumstantial evidence of driving may support an OWI conviction. *State v. Mertes*, 2008 WI App 179, ¶¶ 12, 17, 315 Wis. 2d 756, 762 N.W.2d 813. Circumstantial evidence is evidence from which the fact finder "may logically find other facts according to common knowledge and experience." *Id.*, ¶ 14. The combination of (a) video evidence showing Young walking to the red SUV and getting into the driver's seat, (b) video evidence showing the same red SUV coming back into the parking lot and parking in the same spot, (c) the testimony that this particular parking spot was Young's assigned space, (d) Young walking into the school building 2 ½ minutes after the SUV was pulling into the parking space, and (e) that SUV still being there when Young left the school building at

[1] Assistant Principal McNerney clarified at trial that the motion-activated nature of the surveillance system results in the video clip's abrupt ending and skipping ahead in time. R. 34 at 78-79.

1:17 p.m. leads to a logical conclusion Young was driving that red SUV at 11:31 a.m.

Regardless of whether one labels the evidence of driving as direct or circumstantial, the evidence was sufficient for the circuit court to find that Young drove or operated her vehicle on a highway. As the trial court stated in its findings,

> [t]he Court is convinced not just by clear and convincing, but for the part of her driving, the Court is convinced beyond that because you see the same vehicle leave earlier in the morning that arrives back on Evergreen into the driveway going to the very same spot. And you can see within minutes she's entering the building and no one else was around.

R. 34 at 126, Resp't. App. at 5.

The circuit court's finding that Young was driving the red SUV seen in the video was amply supported by the video evidence, and is not clearly erroneous. This Court should affirm the circuit court's decision and order.

III. The evidence was sufficient to meet the City's burden of showing Young drove while under the influence of an intoxicant

The circuit court found that Young was under the influence of an intoxicant at the time of driving. The circuit court's finding was not clearly erroneous and should be affirmed.

Wisconsin law has been settled for decades: lay persons may provide an opinion as to whether a person is intoxicated.

> Numerous cases may be found which hold, in substance, that no particular scientific knowledge is required to recognize whether a person is in a drunken or intoxicated condition, and that a lay witness, who has the opportunity to observe the facts upon which he bases his opinion, may give his opinion whether a person at a particular time was or was not intoxicated.

Kuroske v. Aetna Life Ins. Co., 234 Wis. 394, 404, 291 N.W. 384 (1940); *City of Milwaukee v. Johnston*, 21 Wis. 2d 411, 414-15, 124 N.W. 690 (1963) (citing *Kuroske*); *City of Milwaukee v. Bichel*, 35 Wis. 2d 66, 69, 150 N.W.2d 419 (1967) (citing *Johnston*); *State v. Burkman*, 96 Wis. 2d 630, 645, 292 N.W.2d 641 (1980) (citing *Johnston* and *Bichel*).

The evidence offered at trial was overwhelming that Young was intoxicated by the consumption of alcohol.

Jennifer Batiansila was the staffer who "buzzed" the door open when Young returned at 11:34 a.m. R. 34 at 5-7. Batiansila first noticed an issue with Young's coordination: Young reached for the door handle but "missed," and had to make a second attempt at grabbing the handle. *Id.* at 7. Batiansila greeted Young, but Young only replied with a "mumble" that "wasn't coherent." *Id.* at 8. As Young walked past Batiansila, Batiansila smelled the odor of alcohol. *Id.*

Batiansila then began watching Young on security camera monitors in front of her as Young proceeded down a hallway to her classroom. R. 34 at 8. Batiansila noted that Young, who was normally a "pretty direct walker," was instead "swaying a little bit left and right" as Young walked down the hall to her classroom. *Id.* at 8-9. This was corroborated by surveillance video. R. 19, file titled "Main Hall 70 Stairs Return 11.34-11.38" at 11:34:28-11:34:45.

Batiansila then saw Young speaking to someone at the end of the hallway, and Young was "leaned up on the wall because it seemed to me like she had a hard time standing on her own." R. 34 at 9. This too was corroborated by video. R. 19, file titled "Main Hall N Classroom to Rm 5 11.36.30-11.38.43" at 11:37:00-11:37:50. Batiansila saw Assistant Principal Trent Berg, and reported her concerns. R. 34 at 10. Batiansila felt that Young was "some level of drunk." *Id.*

Separately, at the other end of the hallway, administrative assistant Robin Van Dinter was approaching Young's classroom from the other direction. R. 19, file titled "Main Hall South Classroom to Office 11.34-11.42" at 11:35:03-11:35:30. Just after Young had entered her classroom, Van Dinter stopped to briefly speak with Young. *Id.*, R. 34 at 31-32. Van Dinter noted that Young "was slurring her speech quite a bit and had to brace herself against the doorway as she was talking to" Van Dinter. R. 34 at 32. Van Dinter suspected there was something "physically wrong" with Young and that she "needed some attention." *Id.* Van Dinter immediately went to the main office to notify Principal Adam Kurth. *Id.* at 32-33, R. 19, file titled "Main Hall South Classroom to Office 11.34-11.42" at 11:35:25-11:35:42.

To put a finer point on it: Young walked back into the school building at 11:34:10, and in less than 90 seconds, two staff members separately and independently became concerned of Young's apparent intoxication.

Principal Kurth went to Young's classroom after Van Dinter reported what she had seen. R. 34 at 39. Kurth first saw Young at 11:36 a.m. "staggering down the hallway" and "not able to keep a straight line." R. 34 at 40, R. 19, file titled "Main Hall N Classroom to Rm 5 11.36.30-11.38.43" at 11:36:33-11:36:44. Kurth waited for Young to return to her classroom, which she did about two minutes

later. R. 34 at 40. The precise times, and Young's staggering walk, are corroborated by video. R. 19, file titled "Main Hall N Classroom to Rm 5 11.36.30-11.38.43" at 11:38:17-11:38:33.

Kurth immediately smelled a "very distinct odor of alcohol" and saw that Young "continued to stagger." R. 34 at 40. Young couldn't maintain eye contact and was very slouched in her chair. *Id.* Kurth asked if there was anything he should know; Young replied "no." *Id.* Kurth asked again, and Young's response was "elevated, almost a little angry." *Id.* Kurth directly asked if Young was under the influence, which she denied. *Id.* However, Young's speech remained "slurred" and "delayed" and her overall "processing was delayed, slow." *Id.* at 40-41. Kurth believed these were all "clear signs she was under the influence at that point." *Id.* at 40-41.

Kurth directed Young to go to Kurth's office, because students would soon be arriving. R. 34 at 41. Young refused. *Id.* Kurth directed her a second time, at which point Young opened a can of soda and began swishing it around in her mouth. *Id.*

Young continued to protest going to the office, stating she did nothing wrong, but ultimately relented and went to the office with the principal. R. 34 at 42. In the office, Young continued to deny drinking or being intoxicated, with her tone becoming more sharp and defensive. *Id.* at 45. However, Kurth continued to notice slurred speech. *Id.*

Ultimately, school staff asked Young to submit to a preliminary breath test, or PBT[2]. R. 34 at 45-46. After the first request, Young

[2] The City has always acknowledged that the result of the PBT is statutorily inadmissible. Wis. Stat. § 343.301. The City has never agreed or stipulated that discussion of the events leading up to the PBT, including Young's reaction to being asked to submit to a PBT, was inadmissible, and it is disappointing that

refused and tried to leave the principal's office. *Id.* at 46. Young then refused a second request. *Id.* Then, Young took a "sucker" from a candy dish and began to eat it. *Id.* at 47. She also drank some of the soda she had with her. *Id.* at 73. Ultimately, Young did provide a PBT sample to the school staff. *Id.*

Principal Kurth left to speak with district office administrators, leaving Young with Assistant Principal Carolyn McNerney and Assistant Principal Trent Berg. R. 34 at 47. When he returned, he continued to smell the odor of alcohol in the room where Young was located. *Id.* at 48. Kurth then asked Young to write out a timeline of the day's events. *Id.* at 48-49, R. 20. Kurth noted that the handwriting was sloppy as compared to Young's normal handwriting. R. 34 at 50.

Assistant Principal Carolyn McNerney went into Principal Kurth's office a few minutes after Young came into the office. R. 34 at 66. When McNerney entered, she could "immediately smell alcohol in the room." *Id.* She also could tell that Young's speech was slurred, and had a flushed face and legs. *Id.* After Principal Kurth left, Young repeatedly asked what was going on and why she couldn't be in her class. *Id.* at 67. McNerney repeatedly responded that they were concerned for Young and that a different Spanish teacher was covering her class. *Id.* at 66-68. Young claimed the last time she had consumed alcohol was the previous night. *Id.* at 69. But McNerney opined that "there was no reason she should still have what appeared to be an intoxicated reaction to the alcohol she had the night before." *Id.* McNerney testified she was "very certain" Young was under the influence of an intoxicant based on the odor of

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Young mischaracterized this both at trial and in her brief. R. 34 at 46, Appellant's Br. at 7.

alcohol, slurred speech, repeatedly asking the same questions, and agitated demeanor. *Id.* at 80.

Assistant Principal Trent Berg first learned of the situation when Jennifer Batiansila reported her concerns to him around 11:45 a.m. R. 34 at 96-97. After Principal Kurth stepped away, Berg was asked to step into Kurth's office to sit with Young and McNerney. *Id.* at 98. Upon entering the office, he immediately smelled alcohol, which was strong enough he could smell it from a few feet away. *Id.* at 98. He also noted Young's speech was slurred and she repeatedly asked the same questions. *Id.*

Staff then called Young's husband to pick her up; he refused. R. 34 at 51. They next called Young's mother, who was listed as an emergency contact. *Id.* Young responded angrily by stating "you called my f—king mother, you just made it worse." *Id.* At some point while Young was in the office, the principals took Young's car keys away from her, as "it was very evident that she was intoxicated and we did not want her to have the ability to drive home." *Id.* at 52.

All of this is evidence of intoxication at the time Young was driving because of the incredibly short period of time that elapsed between Young's vehicle in the process of parking at 11:31:27 a.m. to when Young opens the exterior door of the high school at 11:34:10 a.m., and is observed in very short order by Batiansila at 11:34, Van Dinter at 11:35 a.m., and Kurth at 11:36 a.m. Young argued at trial, and argues again here, that the City didn't disprove that Young consumed alcohol after driving, i.e., between 11:31:27 a.m. and 11:34:10 a.m. Appellant's Br. at 13-14, R. 34 at 115 (arguing Young "could have slammed a flask in the car" between parking and walking into the school.) But Young offered nothing more than argument to support this claim. Fact finders are called upon to use their common sense and life experience, not abandon it. Common

sense does not support a finding that Young was not intoxicated at 11:31:27 a.m. but was suddenly intoxicated in three to five minutes' time. In any event, "[w]hen evidence supports the drawing of either of two conflicting but reasonable inferences, the trial court, and not [the appellate] court, must decide which inference to draw." *Plesko v. Figgie Int'l*, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994).

The same is true for Young's contention that the City did not disprove alternate theories, such as Young's night job as a bartender as an alternate explanation for the odor of alcohol, or "fasting for and undergoing a blood draw, or other medical issues" as an explanation for the various indicia of intoxication observed by the witnesses. Appellant's Br. at 12. These arguments invite this Court to substitute its judgment for that of the circuit court in deciding between competing factual inferences, which this Court may not do.

The circuit court found that the observations of the principal, assistant principals, and other school staff, in conjunction with the surveillance video evidence, were sufficient to demonstrate Young was driving while under the influence of an intoxicant. This finding was supported by ample evidence the circuit court described as "incredibly strong." R. 34 at 128, Resp't. App. at 7. Therefore, this Court should affirm the circuit court's decision and order.

IV. There is no requirement that an OWI prosecution must be supported by law enforcement testimony

To prove a municipal ordinance or traffic violation, a prosecuting entity must offer evidence that proves the elements of an offense to a reasonable certainty by evidence that is clear, satisfactory, and convincing. Wis. Stats. §§ 800.08(3), 345.45. The circuit court found that the City met its burden. Because that finding was not clearly erroneous, this Court should affirm.

While it is common in OWI cases for a law enforcement officer to testify, there is no statute or case that mandates it. There is simply no bright-line requirement that the intoxication prong of an OWI citation or charge be satisfied by any particular type of testimony or evidence, other than the evidence must be admissible, and Young cites no authority to the contrary.

It is common for police to receive a 911 call or other citizen tip of impaired driving and, on the basis of the tip, conduct a traffic stop. Because that's a common way OWI cases start, there are many reported cases discussing when police must corroborate a citizen tip as a predicate to a traffic stop, as Young discusses at length in her brief. Appellant's Br. at 21-22. Those cases analyze under the Fourth Amendment the constitutional justification and reasonableness of the stop in various factual contexts. None of those cases have applicability here, as it is undisputed that police did not conduct a stop, seizure, or other Fourth Amendment event in this case. R. 14 at 5. While it is common for an OWI investigation to start with a traffic stop, it is not required. None of the cases cited by Young stand for the proposition that law enforcement observation or testimony is a per se requirement in an OWI case.

The essence of Young's argument is that the City's evidence was weak or unreliable because it came from lay persons and not from law enforcement that is trained in detecting and testing impaired drivers. Appellant's Br. at 12. That argument goes to the weight of the evidence, not its admissibility. It is the job of the fact finder, not an appellate court, to consider the weight of the testimony. *Lessor v. Wangelin*, 221 Wis. 2d 659, 667, 586 N.W.2d 1 (Ct. App. 1998).

Young also offers no case or statute in support of her argument that OWI cases should be evaluated differently than other traffic forfeiture actions. Young correctly describes the progressive

penalty scheme for OWI cases. Appellant's Br. at 23. But the existence of progressively more severe penalties for OWI offenses does not mean that a first offense OWI citation is legally distinguishable from other forfeiture level traffic violations with respect to the burden of proof or the evidence required to secure a conviction.

The statutory provisions relating to issuance of noncriminal traffic citations do not specify that the officer must personally witness the violation. *See generally* Wis. Stats. chs. 345, 800. An officer may issue a criminal traffic citation so long as the officer "has reasonable grounds to believe" the person committed a misdemeanor; there is likewise no requirement of first-person observation. Wis. Stat. § 968.085(2). There is likewise no requirement that police must testify at trial, for traffic matters or even for crimes. *E.g.*, *Taylor v. State*, 580 N.E.2d 223 (Ind. 1991) (affirming murder conviction where State offered only eyewitness testimony); *Appraicio v. State*, 431 Md. 42, 63 A.3d 599 (2012) (affirming second-degree assault conviction where State offered only victim's testimony, recordings of victim's 911 calls, and video of victim's injuries.)

There is no statutory or common law requirement that a police officer must testify to prove that a person drove while under the influence of an intoxicant, or any other traffic violation. This Court should affirm the circuit court.

V. Young forfeited any argument regarding the confrontation clause; regardless, there was no error

Young admits she did not raise an objection to a confrontation clause violation in the circuit court. App. Br. at 18. Therefore, this Court should find Young has forfeited appellate review of this issue.

The general rule is only those issues raised in the trial court can be raised on appeal. *E.g.*, *Vollmer v. Luety*, 156 Wis. 2d 1, 10, 456 N.W.2d 797 (1990). When a trial is held to the court, a party has 20 days after judgment to seek reconsideration of the court's findings or conclusions. Wis. Stat. § 805.17(3). A failure to seek reconsideration constitutes forfeiture of any manifest error. *Schinner v. Schinner*, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1998). This Court uses the plain error doctrine sparingly, reserving it for "exceptional" cases where there is error that is "obvious and substantial" or where "the real controversy has not been fully tried." Wis. Stat. § 752.35, *State v. Miller*, 2012 WI App 68, ¶ 18, 341 Wis. 2d 737, 816 N.W.2d 331, *State v. Schutte*, 2006 WI App 135, ¶ 62, 295 Wis. 2d 256, 720 N.W.2d 469.

In her motion to dismiss at the end of the City's case in chief, Young did not mention the confrontation clause or make any constitutional argument. R. 34 at 105-107. Rather, Young's argument was essentially the same as the argument Young makes here: that the evidence was insufficient because Young contends an OWI prosecution can't survive without police testimony. *Id.*

Regardless, Young had no confrontation rights, and because there was no violation of Young's cross-examination rights, the circuit court did not commit plain error.

The confrontation clause, by its plain text in both the United States and Wisconsin Constitutions, applies only to "criminal prosecutions." U.S. Const. amend. VI, Wis. Const. art. I, § 7. No confrontation clause rights attach in a civil case, including a civil forfeiture action for first-offense OWI. *Town of Geneva v. Tills*, 129 Wis. 2d 167, 176, 384 N.W.2d 701 (1986).

Tills, and other cases, confirm that defendants have a common law right to cross-examine witnesses who testify against them. *Id.* at 179-80. But the officer who issued the citation did not testify against Young in circuit court, nor did the City attempt to introduce any statement made by the issuing officer.

Instead, Young argues that the officer is Young's "accuser" and, breathtakingly, that the officer's issuance of the citation makes the officer a "hearsay declarant." Appellant's Br. at 19. This argument widely misses the mark.

At its core, the confrontation clause prohibits a trial court receiving into evidence "out-of-court statements by someone who does not testify at the trial" if the statement is "testimonial." *State v. Mattox*, 2017 WI 9, ¶ 24, 373 Wis. 2d 122, 890 N.W.2d 256, citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (emphasis added). Young fails to realize a citation is a pleading, not a "statement." *City of Cedarburg v. Hansen*, 2020 WI 11 ¶¶ 27, 41, 390 Wis. 2d 109, 938 N.W.2d 463. Young also doesn't mention that the citation was never received (and could not be received) into evidence. Just like a criminal complaint, a citation is not testimony and it is not evidence. *Cf. State v. Oppermann*, 156 Wis. 2d 241, 246 n.2, 456 N.W.2d 625 (Ct. App. 1990) (citing WIS. JI-CRIMINAL 145). Because the citation was not (and could not be) offered as evidence of the truth of the matter asserted, by definition it is not "hearsay." Wis. Stat. § 908.01(3). Finally, the City is the plaintiff party, not the individual officer who issued the citation.

There is no categorical requirement that the officer who issues a citation be called to testify, just as the State, in a criminal prosecution, is not required to call as a witness the person (usually a law enforcement officer) who swears to a criminal complaint. Young cites to no case or statute holding to the contrary.

Even if this Court concludes there was error, it was harmless, as Young conceded in the circuit court that the officer's role was limited to a follow-up investigation one week after the incident, comprising interviews of the witnesses at the high school and review of the surveillance video. R. 14 at 2. The City simply chose to not call[3] as a witness someone who—as Young agrees—made no first-hand observations on the date of the offense. The witnesses who made those first-hand observations were called by the City to testify at trial, and Young cross-examined them.

Young forfeited this argument; regardless, there was no error. This Court should affirm the circuit court.

VI. Young forfeited any argument that the court lacked jurisdiction; regardless, the court had jurisdiction

Young mentions that "[a]t no point did the City demonstrate how Young came to be under the jurisdiction of the court." Appellant's Br. at 4. Young does not go further in developing this argument, so this Court may decline to address it as inadequately briefed. *Roehl v. American Family Mut. Ins. Co.*, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998). For the same reasons set forth in section V, *supra*, Young forfeited this argument because Young never raised any jurisdictional objection in the circuit court, either before, during, or after trial.

[3] Young mischaracterizes the proceedings by stating the City "refused" to make the officer "available for confrontation." Appellant's Br. at 25. This word choice improperly suggests the City actively prevented the officer from testifying, or that Young made a request or demand that the City refused. This is not true; the City simply did not call the officer as a witness. Nothing prevented Young from issuing a subpoena to the officer or any other witness Young believed had relevant testimony.

There are several ways the municipal court can obtain jurisdiction over a defendant; two of them apply here. First, Young voluntarily appeared before the municipal court when her counsel entered an appearance on her behalf. R. 6, Wis. Stat. § 800.01(2)(c). Second, Young admits in her brief, and her attorney admitted in closing argument at trial, that Young received the citation in the mail. Appellant's Br. at 2, R. 34 at 118, Wis. Stat. § 800.01(2)(e). The circuit court had jurisdiction under the statute providing for appeals from a municipal court judgment. Wis. Stat. § 800.14(5), R. 1.

CONCLUSION

The circuit court's finding that Young drove a motor vehicle while under the influence of an intoxicant was not clearly erroneous. Therefore, this Court should affirm the circuit court's decision and order.

Respectfully submitted February 9, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b) and (c), as modified by Order 19-02, for a brief produced with a proportional serif font. The length of this brief is 5,495 words.

Dated February 9, 2021.

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ELECTRONIC BRIEF/PILOT PROJECT CERTIFICATION

I hereby certify I am submitting only an electronic brief in compliance with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify this certificate has been served with this brief filed with the court and on all parties by electronic filing.

Dated February 9, 2021.

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