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 REPLY BRIEF

Respectfully submitted by:

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STATEMENT OF THE ISSUES

Petitioner and Respondent disagree on the framing of the issues. In reply, Young incorporates by reference the essential framing of the issues as stated on page 1 of the Defendant-Appellant's Brief, clarified as necessary herein.

ARGUMENT

Katherine Young argues her conviction for OWI (1st) should be reversed with instructions to enter a judgment of acquittal because (1) the City of Cedarburg did not present clear and convincing evidence that Young operated a vehicle *while under the influence of an intoxicant*, as defined by Wisconsin law; and (2) additionally or in the alternative, the circuit court committed plain error by denying Young the right to meaningly cross-examine her *only actual* accuser, the complaining Officer. The City disagrees on all points. However, on some crucial factual and legal matters, the City does "not undertake to refute" Young's propositions, which means those propositions should be "taken as confessed" by this Court. *Charolais Breeding Ranches, Ltd. V. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (1979) (quoting *State ex rel. Blank v. Gramling*, 219 Wis. 196, 199, 262 N.W. 614 (1935)).

Young offers the following in reply.

I. THE CITY CONCEDES BY SILENCE THAT IT PRESENTED NO EVIDENCE—LET ALONE SUFFICIENT EVIDENCE—THAT YOUNG DROVE *WHILE UNDER THE INFLUENCE* OF AN INTOXICANT, AS DEFINED BY WISCONSIN LAW.

At trial, the City did not present clear, convincing, and satisfactory evidence that Young drove while under the influence of an intoxicant *to the requisite legal degree*. The City passes over Young's legal and factual argument in this regard in silence. Because no evidence has been—nor can be—presented to demonstrate Young's legal intoxication at the time she is alleged to have been driving, this Court should reverse.

The City argues at length that it presented sufficient evidence that Young was intoxicated *at school, sometime after 11:34 a.m.* The City argues—less convincingly—that it offered sufficient evidence that Young was driving her car on Evergreen Road *at 11:31 a.m.* The City does not—and cannot—offer *any evidence* that Young was legally "under the influence of an intoxicant" *while driving*. Indeed, the only available evidence shows the alleged driver of a red SUV legally and safely managing to navigate City roads and a High School parking lot in the Wisconsin winter.

While reviewing courts search the record for evidence to support the trial court's findings, this Court will search in vain for evidence supporting the circuit court's finding that Young "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*." (R.34:127) (emphasis). That is because *no one* observed Young driving at 11:31 a.m., and *no evidence* exists to support a finding that she was legally intoxicated at that time.

To be clear: There exists *no evidence* that Young drove after having "consumed a sufficient amount of alcohol to cause [her] 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). Even if there exists sufficient evidence that Young was intoxicated *at school*, or even that she had consumed some alcohol before driving (and the City can offer *no evidence* to that effect), *no evidence* exists to establish that Young drove *while* "under the influence of an intoxicant" as defined by Wisconsin's highest court in *City of Fond du Lac v. Hernandez*, 42 Wis. 2d 473, 475-76, 167 N.W.2d 408 (1969), and adapted into jury instructions in WIS JI-CRIMINAL 2633. *See also State v. Hubbard*, 2008 WI 92, ¶ 59, 313 Wis. 2d 1, 752 N.W.2d 839 (concluding "[t]he term 'materially impaired' does not have a technical or peculiar meaning in the law beyond the time-tested explanations in standard jury instructions").[1]

[1] The Wisconsin Department of Transportation offers this definition on its website:

> A driver is under the influence when his or her *ability to operate a motor vehicle is impaired*. A person's ability to

The City does not refute Young's argument that the City did not allege, argue, or support by *any*—let alone sufficient—actual evidence that Young was intoxicated to the legal degree of intoxication *while driving*. As such, this Court can and should "take[ ] as confessed," *see Charolais*, 90 Wis. 3d at 108-09, the following propositions:

- No evidence was presented at trial to support an allegation that Young had consumed alcohol prior to driving. Appellant's Br., pp. 13-14. That is: No one testified that Young consumed alcohol before driving.
- No evidence was presented at trial to support an allegation that Young drove while lacking the "clear judgment and steady hand necessary to handle and control a motor vehicle." Appellant's Br., pg. 15. That is: No one testified to a belief that Young had driven while intoxicated to *any* degree, let alone a *legal* degree. Until the citation, no one accused Young of driving while under the influence of an intoxicant.
- No evidence was presented at trial to support an allegation that Young drove erratically, caused an accident, broke any traffic laws, failed FSTs, possessed chemical evidence of a prohibited BAC, refused to provide chemical evidence of intoxication to law enforcement, or confessed to drinking or driving. Appellant's Br., pg. 17. That is: No testifying witness alleged that Young broke any laws whatsoever; and no one invited police involvement on the day of the alleged violation, despite there being a police officer *in the building*.

> operate a motor vehicle is impaired if he or she is *less able to safely control the vehicle* because of the consumption of alcohol or controlled substances. This means that if *a police officer pulls you over* and determined that you are impaired by alcohol and/or any other drug, you could be arrested and prosecuted, regardless of your BAC.

"Drunk driving law," *Wisconsin Dep't of Transportation*, https://wisconsindot.gov/Pages/safety/education/drunk-drv/ddlaw.aspx (last visited Feb. 12, 2021) (emphasis).

Indeed, the *only* person to accuse Young of being intoxicated *before or while driving* at 11:31 a.m. was the complaining Officer, who was notably absent at trial and admittedly uninvolved in this case until over a week later. The only written or spoken allegation that Young was "operating while intoxicated" is found in the citation, which was not—and could not—be offered as evidence at court (*see* Part II, *infra*).

The City spills volumes of ink explaining how several laypeople believed Young was intoxicated *at school*, and why the circuit court was justified in believing their allegations.[2] All that ink is entirely beside the point: No one saw Young intoxicated *before or while driving*, and no one saw Young operate a vehicle while legally under the influence of an intoxicant.

At no point in the trial did any witness allege that Young had been intoxicated before or while driving on City streets. Ms. Vandinter admitted she "never saw Ms. Young drive a vehicle that day." (R.34:37.) Mr. Kurth took Young's keys because he "did not want her to have the ability to drive home," (R.34:52), but he admitted he "never personally observed her driving a vehicle" that day, (R.34:54). Ms. McNerney reported that Young said "she wouldn't drive" but would rather "walk home." (R.34:73.) But Ms. McNerney admitted she did not see Young drive on the day in question. (R.34:82.) Mr. Berg also admitted he "never saw her drive that day." (R.34:104.)

The only parties—other than the complaining Officer—who actually alleged that Young was intoxicated *while driving* are the City, (*e.g.*, R.34:10809), and the circuit court, which had "no problem saying she was driving the vehicle even at 11:31 or 11:30" and that "she was under the influence of an

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[2] Young does not dispute that Wisconsin courts can recognize layperson opinions regarding intoxication. Respondent's Br., pp. 7-8. However, every case in this regard pertains either to a matter of negligence in a civil claim, *see, e.g., Kuroske v. Aetna Life Ins. Co.*, 234 Wis. 394, 291 N.W. 384 (1940) (quoted in Respondent's Br., pg. 8), or a criminal and/or traffic matter in which lay opinions *supplemented* or *precipitated* investigation by law enforcement, *see, e.g., City of Milwaukee v. Johnston*, 21 Wis. 2d 411, 124 N.W.2d 690 (1963) (cited in Respondent's Br., pg. 8).

Again, whether laypeople believed Young was intoxicated *at school* is immaterial to the central legal question in this case: Was she legally under the influence *while driving*? On that issue, the City has offered no evidence.

intoxicant … within a half hour of that driving," (R.34:126). Of course, neither the City nor the court observed Young driving while intoxicated that day either. *No one did.*

Still, the court found—without evidence—that Young "was operating her motor vehicle under the influence of an intoxicant." (R.34:128.)

Even so, *no one*—not even the complaining Officer—has made any allegation or offered any evidence that Young was legally under the influence of an intoxicant as defined by Wisconsin law. *See Hernandez*, 42 Wis. 2d at 475-76; WIS JI-CRIMINAL 2633. She was not cited for lane deviation, disregarding intersection controls, speeding—*nothing*. No one has alleged anything that would justify even a pretextual stop had an Officer observed her on the road. She was not asked, nor did she refuse, to give admissible chemical evidence of intoxication.

No one asked Young if she had driven to school while intoxicated. No one accused her of driving to school while intoxicated. No one called the on-site Officer (SRO) to investigate allegations of driving to school while intoxicated. (R.34:59-60.) The SRO supplied Mr. Kurth with a PBT device, but no one thought to involve that SRO in a criminal/traffic investigation. Because *no one* had alleged that Young had broken any law. She was accused of being drunk at school, which—if true—is bad behavior, but it is not illegal.

Notably, the City does not cite to *Hernandez* or WIS JI-CRIMINAL 2633 in its Brief, nor does it make any attempt to respond to Young's argument regarding Wisconsin's legal standard for intoxication. As such, this Court should take the City's silence as a concession.

The City's only response to the question of *when* Young allegedly lost her ability to "handle and control a motor vehicle"—and chose to drive anyway—is a one paragraph appeal to "common sense" and the trial court's prerogative to decide which inference to draw from "evidence support[ing] two conflicting but reasonable inferences." Respondent's Br., pp. 12-13 (quoting *Plesko v. Figgie Int'l*, 190 Wis. 2d 764, 775-76, 528 N.W.2d 446 (Ct. App. 1994)). A trial court acting as factfinder "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to their testimony." *Id.*

However, that assumes there are "witnesses" testifying to consequential "facts" for the court to find. Here there are none.

This one paragraph is an insufficient response to the substance of Young's argument. Therefore, this Court should reverse.

II. THE CITY CANNOT PROVE BEYOND A REASONABLE DOUBT THAT IT WAS HARMLESS ERROR TO DISALLOW YOUNG THE OPPORTUNITY TO CROSS-EXAMINE THE COMPLAINING OFFICER.

Young disputes that she forfeited her right to confront Officer Meyer. Nevertheless, even if she did, this Court can find plain error when confrontation clause violations go unobjected-to by counsel and unconsidered by the court, resulting in "fundamental, obvious, and substantial" error. *State v. Jorgensen*, 2008 WI 60, ¶¶ 23, 33, 310 Wis. 2d 138, 754 N.W.2d 77. If this Court agrees an error occurred, it falls to the City to prove "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Mayo*, 2007 WI 78, ¶ 29, 301 Wis. 2d 642, 734 N.W.2d 115. Even if the failure to produce Officer Meyer does not technically invoke the confrontation clause, the court still violated Young's common law right to meaningfully cross-examine her accuser. *Town of Geneva v. Tills*, 129 Wis. 2d 167, 178, 384 N.W.2d 701 (1986). Because the City cannot prove this error was harmless, this Court should reverse.

Wisconsin's supreme court did state in *Tills* that confrontation rights do not necessarily attach in civil trials for OWI (1st). *Tills*, 129 Wis. 2d at 176. The progressive penalty scheme for OWI has changed dramatically since 1986, but the court has not substantively revisited the question. Nevertheless, the *Tills* court still reversed because OWI (1st) defendants have a "common law right to have a meaningful cross-examination," which it was reversible error for the lower court to deny. *Id.* at 178.[3]

[3] The City argues "[n]othing prevented Young from issuing a subpoena to the officer." Respondent's Br., pg. 18 n.3. This misses the point entirely. Without Officer Meyer, there is no complaint—no allegation—that satisfies the elements of the alleged violation. Requiring Young to subpoena Officer Meyer in order to satisfy the right to "meaningful cross-examination" is tantamount to compelling Young's counsel to commit

While a criminal complaint is not "evidence" *per se*, *see State v. Oppermann*, 156 Wis. 2d 241, 246 n.2, 456 N.W.2d 625 (Ct. App. 1990), a complaint is "a written, formal accusation against a defendant charging the commission of one or more criminal acts," Wis. JI-CRIMINAL 145; *see also City of Cedarburg v. Hansen*, 2020 WI 11, ¶ 41, 290 Wis. 2d 109, 938 N.W.2d 463 (finding jurisdiction conferred "by the pleadings (

civil traffic citations) that *alleged violations*[;] *allegations* that Hansen operated a vehicle while intoxicated").

Oppermann is instructive here. There, this Court found the state "offered no evidence" of a crucial element of the charge, and "[w]ithout proof of the elements of the crime, there is no crime proved." *Oppermann*, 156 Wis. 2d at 246. It is in *this context* that this Court notes that a complaint is not evidence. *Id.* at 246 n.2.

Here, the citation is the only statement alleging the actual violation.

The City cannot have it both ways. Either the citation is *not* evidence—meaning there is actually *zero* evidence alleging that Young was intoxicated *while driving*—or it *is* evidence, which must be subject to meaningful cross-examination. Outside the citation, no witness alleges that Young drove while intoxicated. Without a meaningful opportunity to meet the allegations in the citation through cross-examination, the trial was fatally flawed.

The failure of the circuit court to provide for meaningful cross-examination on the most crucial allegation—and to confront the only person making that accusation—was plain error. The City cannot prove beyond a reasonable doubt that a rational jury would have found Young guilty of operating while intoxicated if *no one* ever actually *accused* her of doing so, or—in the alternative—if the only person who *did* accuse her was never subject to any, let alone meaningful, cross-examination. Therefore, this Court should reverse.

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legal malpractice—subpoenaing a witness whose testimony is fundamentally contrary to her interests.

Also, Officer Meyer *did* testify at the municipal trial, leaving Young surprised at circuit court when the City did not produce him for trial.

CONCLUSION

For those reasons and the ones set forth more fully in her initial brief, Young asks this Court to reverse the decision of the circuit court and remand with instructions to enter a judgment of acquittal.

Dated this 16th day of February, 2021.

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Electronically signed by Michael G. Levine
Michael G. Levine, SBN 1050078

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 2,868 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 16th day of February, 2021.

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