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STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP2001 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL LEE MCADORY,

Defendant-Appellant.

Appeal from a Judgment of Conviction
Entered in the Circuit Court for Rock County,
the Honorable John M. Wood Presiding
Circuit Court Case No: 2016CF26

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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I. Was the evidence before the jury sufficient to support a conviction of operating a motor vehicle while under the influence of a controlled substance?

Trial Court Answered: The court accepted the jury's guilty verdict.

II. Was Mr. McAdory deprived of due process when the trial court removed language defining "under the influence" from the jury instructions, therefore failing to properly instruct the jury as to the only disputed element of the charge?

Trial Court Answered: Over Mr. McAdory's objection, the trial court removed the following language in JI-CRIM 2664 from its instruction to the jury:

> Not every person who has consumed (name controlled substance) is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of (name controlled substance) to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

III. Is Mr. McAdory entitled to a new trial in the interest of justice because the real controversy – whether he was under the influence of a controlled substance at the time of driving – was not fully tried?

Trial Court Answered: Not raised in the trial court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue in this case involves the application of well-settled law to the facts of this case, therefore neither oral argument nor publication is requested.

STATEMENT OF THE CASE

This is an appeal from the Judgment of Conviction entered on October 25, 2019, in the Circuit Court for Rock County, the Honorable John M. Wood presiding, wherein the Court entered judgment on a jury verdict finding Carl M. McAdory guilty of one count of operating while under the influence of a controlled substance (8th), contrary to Wis. Stat. § 346.63(1)(a). (93:3.)[1] The jury also found Mr. McAdory guilty of operating with a restricted controlled substance (8th), contrary to Wis. Stat. § 346.63(1)(am); the court dismissed this count on the state's motion at sentencing. (130:5.)[2]

On January 5, 2016, Mr. McAdory was arrested and charged with operating while intoxicated, obstructing an officer, and operating while revoked. (1.) He waived his right to a preliminary hearing on January 15, 2016. (100:2-3.) An amended information was filed on February 1, 2017, alleging

[1] Mr. McAdory was also convicted by the jury of obstructing an officer, contrary to Wis. Stat. § 946.41(1). (93:1.) He pled guilty to operating while revoked (due to alcohol/controlled substance/refusal), contrary to Wis. Stat. § 343.44(1)(b). (*Id.*) The court withheld sentence on these counts and ordered two years probation consecutive to the bifurcated sentence on Count 1. (*Id.*) These counts are not at issue in this appeal.

[2] This count was dismissed pursuant to Wis. Stat. § 343.63(1)(c), which provides "If the person is found guilty of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing…"

an additional count of operating with a detectable amount of restricted controlled substance. (28.).

A jury trial was held on August 19, 2019. (129.) During the jury instruction conference, the State requested that the court amend the standard jury instruction for operating under the influence of a controlled substance by removing language defining "under the influence." (129:158, 169-70.) The court granted the State's motion over Mr. McAdory's objection. (129:158, 172-73, 177-78; App.102, 108, 110-11.) During deliberations, the jury asked several questions, one related to the definition of under the influence of a controlled substance; the court directed the jury to rely upon the jury instructions provided (129:206; 87.) Ultimately, the jury convicted Mr. McAdory on all counts. (129:218; 79.)

At sentencing, the court granted the State's motion to dismiss Count 2, operating with a restricted controlled substance. (130:5.) The court sentenced Mr. McAdory on Count 1, operating while under the influence of a controlled substance, to four years initial confinement and five years extended supervision. (130:35; 93:3.)

Mr. McAdory filed a timely notice of appeal. (95.) This appeal addresses whether the jury had sufficient evidence to convict Mr. McAdory of operating under the influence of a controlled substance; whether he was deprived of due process when the trial court removed language defining "under the influence" from the jury instruction; and whether, due to the failure of the jury to consider the real controversy in this case – whether Mr. McAdory was actually under the influence at the time of driving, or merely had a detectable amount of controlled substance in his blood – his conviction should be reversed in the interest of justice.

STATEMENT OF FACTS

Preliminary Jury Instructions

Prior to trial, the State requested the standard jury instructions[3] 2664 (operating while under the influence of a controlled substance) and 2664B (operating with a detectable amount of a restricted controlled substance); Mr. McAdory agreed these were the proper instructions for Counts 1 and 2, respectively. (129:16.) The court questioned whether Instruction 2663 (operating under the influence of an intoxicant) should be included. (129:18.) Defense counsel noted the case was originally charged as operating while intoxicated, but that the facts at trial would be different. (129:19.) The State agreed, but also stated, "[a]s charged is correct however we have the – we do have Count 2 which is the 2664." (129:19.)[4]

The court did not instruct the jury on the substantive offenses during its preliminary instructions, because "there is some elective language in those instructions that we have not had an opportunity to go through with you today." (129:90.)

Opening Statements

During its opening statement, the State presented its case for only one of the charges and argued: "At this time I ask you to pay particularly close attention to the evidence surrounding *the operating while intoxicated charge*. But there

[3] For ease of reading, the Wisconsin Jury Instructions-Criminal will be referred to throughout as "Instruction ___."

[4] This was incorrect, as Instruction 2664 was the instruction for operating while under the influence of a controlled substance – Count 1. This would be the first of numerous times the two counts and their elements were confused throughout the trial.

are two things. First, the defendant had to be driving. And, second, that he had a detectable amount of controlled substances in his system." (129:98-99 (emphasis added).) The State discussed the evidence it would present related to Mr. McAdory's driving and the detection of controlled substances in his blood. (129:99.) The State then repeated these elements: "if you believe that the elements of the offense are met, defendant was driving, had a detectable amount of controlled substance was in his system, then you do what you must do. You find the defendant guilty…" (129:100.) The State did not discuss the separate count of operating with a detectable controlled substance, nor did it discuss the element of impairment for operating while intoxicated and what evidence it would show related to that offense. (*See* 129:98-100.)

Summary of Evidence at Trial

At approximately 2:30 a.m. on January 5, 2016, Janesville Police Officer Jason Bier was on patrol duty when he noticed a car traveling past him in the opposite direction with a non-functioning headlight. (129:106-08.) Bier got behind the vehicle and activated his emergency lights. (129:108.) The vehicle continued driving another block and took a right turn, at which point Bier activated his siren. (129:108-09.) The vehicle pulled over about two blocks from the point Bier initially turned on his lights. (129:109.)

Bier approached the driver of the vehicle, Mr. McAdory, to explain he had pulled him over for a nonfunctioning headlight. (129:110.) Bier testified he could smell an odor of intoxicants from Mr. McAdory's person and his speech was slightly slurred. (129:110.) Bier also testified that Mr. McAdory was acting nervous and did not answer when asked for his address. (129:110.) When asked if he had been drinking, Mr. McAdory said he had one beer about 30 minutes

prior. (129:110-11.) Mr. McAdory denied having identification and gave the name Gary McAdory. (129:111.) When Bier returned to his squad car to run the information, Mr. McAdory exited his vehicle and walked in the direction of the squad car. (129:112.)

Bier was wearing a body camera, which was activated during the traffic stop. (129:112.) Footage from the body camera was admitted into evidence and played for the jury (129:112-14; 80.)[5] The footage shows Mr. McAdory returned to his vehicle when directed to do so by Bier and remained there for several minutes. (80, at 3:10.) Mr. McAdory then exited his vehicle a second time and ran. (*Id.* at 5:15.) Bier and a backup officer pursued Mr. McAdory and caught him after a minute. (*Id.* at 5:15-6:15.) When Mr. McAdory was placed in custody, he admitted his name was Carl, not Gary. (*Id.* at 7:20.) A search of the vehicle located an open can of beer and a photo identification in the name Carl McAdory. (129:115.)

Mr. McAdory's hand was injured during the chase, and he was taken to Mercy Hospital for medical care upon his arrest. (*Id.* at 10:00-10:39; 129:114.) After McAdory was treated by medical staff, Bier read him the Informing the Accused form at the hospital. (129:115-16.) Mr. McAdory consented to a blood draw for chemical testing. (129:116.) He declined to answer the questions on the alcohol drug influence report completed by Bier. (129:118-19; 83.)

Kathryn Nolte, a phlebotomist at Mercy Hospital, testified she performed the blood draw on Mr. McAdory on January 5, 2016. (129:129-30.) Nolte had no independent recollection of performing this blood draw, and her testimony

[5] The body camera footage, marked as Exhibit 2 at trial and included as Item 80 in the circuit court record, was mailed to the Court of Appeals separately from the electronic court record. (131.)

was limited to the general process and procedure she follows when performing a legal blood draw. (129:127-31.)

Michael Larson, a toxicologist at the State Crime Lab, testified he had performed the cocaine confirmation test on Mr. McAdory's blood sample. (129:140.) Larson testified the blood sample tested positive for cannabinoids and cocaine metabolites, both of which are restricted controlled substances. (129:141-43.) Larson's report was admitted into evidence and published to the jury. (84; 129:153.)[6]

Larson testified that the window of time for detecting cocaine in the blood after use depends on how the user administered the drug and the analytical capabilities of the laboratory in terms of how low of an amount it could detect. (129:143.) Larson relied on pharmacokinetic studies to estimate that cocaine generally stayed in the blood for two to eight hours after use. (129:143.)

Larson testified that the blood sample was first tested for alcohol, which was not detected in the blood. (129:144; 86.)

Jury Instructions

Regarding Instruction 2664 (operating while under the influence of a controlled substance), the court noted there was "bracketed language" within the portion of the instruction on the definition of "under the influence," stating it "certainly seems like we have some optional language that we will need to address." (129:157-58; App.101-02.) The State argued that none of the language listed within that paragraph was relevant and asked that it be stricken. (129:158; App.102.) Mr.

[6] Although there was no testimony to this fact, the toxicology report indicates that Mr. McAdory's blood was drawn at 3:05 a.m. on January 5, 2016 – approximately a half hour after the traffic stop and his arrest. (84.)

McAdory disagreed, arguing the language was relevant: "I think that it is relevant for this charge because, again, this charge does discuss the concept of operating under the influence which does bring about the impairment concept. So I think that language is fair under that first charge." (129:158; App.102.)

Initially, the court agreed with Mr. McAdory:

> Well, my thought is to leave it in there, just for the purpose of trying to perhaps answer some questions the jury may have with regard to what that means to be under the influence because the paragraph does talk about, you know, bad driving is not necessarily a prerequisite to a finding of that element.

(129:158; App.102.)

After discussing the other jury instructions, the State asked to revisit the issue; however, it was initially unclear whether the State was requesting a change to Instruction 2664 or 2664B. (129:168; App.104.)[7] The State initially asked the court to revisit Instruction 2664B, arguing:

> [M]y my understanding of this offense as we have charged it here with controlled substances is that as long as the defendant had a detectible amount of controlled substances in his system, then he's guilty of the offense. If doesn't actually get into whether the defendant was impaired. And I think -- and that's why we objected to that part of 2664B that seemed to confuse the issue. That's where my worry is in reading the definition of under the

[7] The State had earlier asked the court to remove "for clarification purposes" an optional paragraph regarding "How to Use the Test Result Evidence" from Instruction 2664B. (129:159.) Mr. McAdory objected, and the court kept the language in the instruction. (129:160.)

> influence, as well. Because by reading that it seems to imply that they need to find that the defendant's behavior suggested he was under the influence when the law as I understand it, is that he was driving. And that there was a detectable amount of controlled substances.

(129:168-69; App.104-05.) The court responded that, while it found the language at issue in Instruction 2664B to be redundant, nothing in the instruction "even raises a legitimate argument about impairment. It's simply saying the jury has to decide based upon all the evidence whether or not there was a detectible amount of restricted controlled substance in the blood at the time of the alleged operating." (129:169.)

The State then argued:

> [W]hat I am referencing right now is the definition of under the influence on page 2. And that part that says under the influence means that the defendant's ability to operate a vehicle was impaired because of consumption. And you stated before that the part about the -- the part that seemed relevant was that -- or informative was that the defendant need not have been driving erratically.

(129:169-70; App.105-06.) At this point, the court verified the State was actually arguing about Instruction 2664. (129:170; App. 106.)[8]

[8] It is not clear whether the State had intended to revisit only the court's decision not remove language from Instruction 2664 from the beginning, or whether it was arguing about both Instruction 2664 and Instruction 2664B, because it discussed the two charges and instructions interchangeably throughout its argument. (129:168-70; App.104-06.)

In response, Mr. McAdory highlighted that the two OWI counts had different elements, with Count 1 focused on being under the influence and Count 2 being a strict liability offense based on the finding of a detectable amount of controlled substance. (129:170; App.106.)

The court decided to remove the bracketed sentence from the paragraph in question, stating:

> The real question is whether or not the language under the definition of under the influence is going to create confusion or clarify things for the jury. And I appreciate the fact that some of this language in my estimation would, in fact, be more confusing to the jury than helpful to them. Which is why originally my thought was to not include bracketed language there. Because it is a strict liability provision, as you say.
>
> But then the question is, do we leave the other language that what must be established is the person has consumed a sufficient amount of cocaine and what will now be Delta 9 tetrahydrocannabinol to cause a person to be less able to exercise the clear judgment and steady hand necessary to handle the control of a motor vehicle. Well, part of reason why that language, I think, adds to confusion is because of point you just made. It's a strict liability provision. Okay? It's in your blood, you're done. Right.
>
> …
>
> So it opens up the door to the jury thinking about things that they really shouldn't be considering. So because that last sentence that I just read, is somewhat inconsistent or could be interpreted in a fashion that's inconsistent with the very next sentence in the next

> paragraph. It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. That's pretty specific. So I think what I will do I will leave off the bracketed language at the beginning of that paragraph, even though I think, counsel, your request was to eliminate that entire paragraph.

(129:171-72; App.107-08.)

Mr. McAdory reiterated his argument that the language regarding impairment should be kept in the instruction. (129:172; App.108.)

However, the court went on to hold that the full paragraph should be eliminated as requested by the State:

> I guess my point, and I think to the State's point if you read the very first sentence of the definition of under the influence, and then read the very last paragraph, if you just eliminate that whole center paragraph, to me that's much more consistent and clear about what the law really is. And, I mean, you can still argument impaired. The term impair is in the first -- it's in both sentences.
>
> …
>
> I am going to just eliminate the entire middle paragraph. So it will be the first paragraph there that begins with, quote, under the influence, closed quote, and then it will jump right into it's not required that impaired ability to operate. We will leave that in, as well. Okay? I think that's much more consistent with the state of law. You can certainly still argue your impairment issue. I think I understand where you are coming from there. But I think it's much clearer to the jury to not confuse the law for them.

(129:173; App.109.)[9]

The court instructed the jury regarding Count 1 as follows:

> Operating a motor vehicle while under the influence of a controlled substance. Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway while under the influence of a controlled substance.
>
> State's burden of proof. Before you may find the defendant guilty of this offense the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present. Number one, the defendant operated a motor vehicle on a highway. Definition of operate. Operate means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion. Number 2. The defendant was under the influence of cocaine and Delta 9 tetrahydrocannabinol at the time the defendant operated a motor vehicle. Cocaine and Delta 9 tetrahydrocannabinol are controlled substances.
>
> The definition of, quote, under the influence, closed quote. Under the influence means that the

---

[9] Specifically, the language the circuit court omitted from the instruction was:

> Not every person who has consumed (name controlled substance) is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of (name controlled substance) to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

See JI-CRIM 2664.

> defendant's ability to operate a vehicle is impaired because of consumption of a controlled substance. It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.
>
> If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty.

(129:177-178; App.110-11.) The court followed this instruction with the instruction for operating with a restricted controlled substance, Instruction 2664B. (129:178-80.)

Jury Deliberation and Verdict

During its deliberations, the jury asked several questions, including: "Can we please have a definition of operating while intoxicated or is it the same as operating under the influence of a controlled substance." (129:206; 87.)[10] The court's response to the jury was, "Please rely upon the jury instructions provided; namely 2664 and 2664B." (129:207; 87.)

The jury ultimately returned guilty verdicts on all counts. (129:218; 79.)

[10] The jury also requested to have all exhibits. (129:206; 87.) Later the jury asked, "What is the metabolization slash oxidation rate for alcohol." (129:208; 87.) The court responded that it was a fact not in evidence. (129:209; 87.) Finally, the jury requested to review the testimony of the toxicologist, "specifically his explanation of cocaethylene." (129:210; 87.) That portion of the transcript was read back to the jury. (129:214-216.)

ARGUMENT

Mr. McAdory was charged with both operating under the influence of a controlled substance and operating with a detectable amount of restricted controlled substance in his blood. At issue on this appeal is his conviction for operating under the influence of a controlled substance, contrary to Wis. Stat. § 346.63(1)(a). To be found guilty of this charge, the State must prove two elements beyond a reasonable doubt: *first*, that the defendant drove or operated a motor vehicle, and *second*, that the defendant was under the influence of a controlled substance at the time that he drove or operated the motor vehicle. *Id.*; JI-CRIM 2664.

The sole issue at trial on this count was whether Mr. McAdory was impaired by a controlled substance at the time of driving. Unlike the strict liability offense of operating with a detectable amount of restricted controlled substance, operating while under the influence requires the State to prove impairment, which cannot be proven simply by showing the presence of a controlled substance in the blood. Wis. Stat. § 346.63(1)(a); JI-CRIM 2664. The State failed to meet its burden of proving that Mr. McAdory was impaired by a controlled substance at the time of driving. Because the evidence was insufficient as a matter of law, the conviction should be vacated and dismissed.

Alternatively, because the trial court removed language defining "under the influence," the jury instructions were inaccurate and/or misleading, making it reasonably likely that the jury convicted Mr. McAdory without sufficient evidence. Finally, because the real controversy – whether Mr. McAdory was under the influence of a controlled substance at the time of driving – was not fully tried, this court should exercise its discretion to vacate the conviction and remand for a new trial.

I. THE EVIDENCE AT MR. MCADORY'S TRIAL WAS INSUFFICIENT TO SUSTAIN HIS CONVICTION OF OPERATING WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE

A. Legal principles and standard of review

The Due Process Clause of the United States Constitution guarantees that a person accused of a crime is presumed innocent and that the burden of proof is upon the state to establish guilt of every essential fact beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-64 (1970); U.S. CONST. Amend. V; *see also State v. Smith*, 117 Wis. 2d 399, 415, 344 N.W.2d 711 (Ct. App. 1983). The sufficiency of the evidence is reviewed not simply to determine whether the jury was properly instructed and reached a guilty verdict, but instead whether the evidence of record could reasonably support a finding of guilt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979).

A criminal defendant may challenge the sufficiency of the evidence on appeal regardless of whether the issue was raised at trial. *State v. Hayes*, 2004 WI 80, ¶ 4, 273 Wis. 2d 1, 681 N.W.2d 203. In order to overturn a conviction on the basis of insufficient evidence, appellate courts must determine whether the evidence, "viewed most favorably to the State and to 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 guilty beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

Jury verdicts must be based on evidence, not "conjecture and speculation." *Herbst v. Wuennenberg*, 83 Wis. 2d 768, 774, 266 N.W.2d 391 (1978). A jury may draw

reasonable inferences from facts established by circumstantial evidence, but it may not indulge in inferences wholly unsupported by any evidence. *State ex rel. Kanieski v. Gagnon*, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972).

When a reviewing court has found that the evidence was legally insufficient, the only remedy is to direct a judgment of acquittal. *United States v. Burks*, 437 U.S. 1, 18 (1978); *State v. Wulff*, 207 Wis. 2d 143, 145, 557 N.W.2d 813 (1997).

B. The evidence did not establish that Mr. McAdory was under the influence of a controlled substance at the time of driving

The State did not provide sufficient evidence at trial to support the jury's conviction of Mr. McAdory for operating under the influence of a controlled substance, because it failed to prove he was under the influence at the time of driving. A showing of under the influence requires proof that a defendant's ability to operate and safely control the vehicle was impaired. JI-CRIM 2664; *State v. Waalen*, 130 Wis. 2d 18, 22, 27-28, 386 N.W.2d 47 (1986); *City of Fond du Lac v. Hernandez*, 42 Wis. 2d 473, 475-76, 167 N.W.2d 408 (1969). For further discussion of the definition of impairment, *see infra* II.B.1.

"Under the influence" is defined by the same standard for intoxicants and controlled substances. *See* JI-CRIM 2600, at 22-23. However, a key distinction between impairment by alcohol and impairment by a controlled substance, is that the latter cannot be proven simply by submitting results of a blood test. The jury instructions for impairment due to alcohol provide that a jury "may find from [an admitted blood test showing an alcohol concentration of .08 or more] alone that the defendant was under the influence . . . at the time of the alleged driving." JI-CRIM 2663. The instructions for impairment due

to a controlled substance contain no such provision. *See* JI-CRIM 2664. Thus, the state must prove both the presence of a controlled substance in the driver's system and impairment by that controlled substance.

Here, the State's entire case on this count consisted of testimony from Officer Bier regarding his interactions with Mr. McAdory, and evidence that detectable amounts of controlled substances were found in Mr. McAdory's blood. None of this evidence proves that Mr. McAdory was under the influence of a controlled substance at time of driving. In fact, the evidence relating to Mr. McAdory's alleged impairment by a controlled substance at the time he was driving was so lacking in this case, that the evidence is insufficient as a matter of law. *Poellinger*, 153 Wis. 2d at 501.

During his testimony, Officer Bier opined several times that, based on his training and experience, Mr. McAdory was impaired while driving. (129:114, 121.) Officer Bier testified that Mr. McAdory appeared nervous, would not provide his address, and had slurred speech. (129:110.) However, Bier offered no factual support that the jury could use to find that Mr. McAdory was under the influence of a controlled substance. Bier's testimony was that he smelled an odor of an *intoxicant* on Mr. McAdory's breath and that Mr. McAdory admitted to drinking one beer thirty minutes prior to the traffic stop. (129:110-11.) In fact, a test of Mr. McAdory's blood taken only thirty minutes after he was pulled over detected *no* alcohol. (86; 129:144.)

Bier did not testify, nor was there any other evidence, that any of these things are signs of impairment by cocaine or THC. There was no testimony regarding field sobriety tests or any other standardized tests to measure Mr. McAdory's impairment by a controlled substance. There is no evidence

that Biers was trained as a drug recognition evaluator or that he or any other officer implemented the Drug Recognition Evaluation (DRE) protocol to evaluate whether Mr. McAdory was impaired by a controlled substance.[11] Biers' opinion, based on his training and experience, that Mr. McAdory was impaired, given without providing any factual evidence to support that Mr. McAdory was impaired by a controlled substance, is insufficient as a matter of law to allow the jury to convict. *Herbst*, 83 Wis. 2d at 774 (jury verdict must be based on evidence, not conjecture and speculation); *see also* Wis. Stat. § 907.02(1) (requiring expert opinions to be based "upon sufficient facts or data").

The State's evidence that the State Crime Lab was able to detect amounts of cocaine and THC in Mr. McAdory's blood is also insufficient to show that he was under the influence of a controlled substance at the time of driving. The State's expert testified only that Mr. McAdory's blood tested positive for cocaine and THC. (129:141-43.) There was no evidence as to what amount or concentration of either substance was detected in the blood. Although the toxicology report admitted into evidence and published to the jury contained this information,[12] (84), there was no testimony that the amounts

[11] "The DRE protocol is a nationally standardized protocol for identifying drug intoxication… based on the well-established concept that drugs cause observable signs and symptoms, affecting vital signs and changing the physiology of the body." *State v. Chitwood*, 2016 WI App 36, ¶ 31, 369 Wis. 2d 132, 879 N.W.2d 786 (internal quotes and citations omitted). The DRE protocol contains 12 steps, which are used to determine "whether or not the suspect is behaviorally impaired; if so, whether the impairment relates to drugs or a medical condition; and, if drugs, then what category or combination of categories of drugs are the likely cause of impairment." *Id.*

[12] The values listed in the toxicology report were cocaine: 130 ug/L and Delta-9-tetrahydrocannabinol (THC): 3.0 ug/L. (84.)

detected would be consistent with impairment. Further, unlike a blood test positive for alcohol, there is no basis in law for the jury to find *solely* from the presence of a controlled substance in Mr. McAdory's blood that he was impaired.

The State failed to provide evidence of the impairing effects of cocaine or THC. There was no testimony regarding the typical signs of impairment by cocaine or THC or how either substance would impact a user's ability to operate a vehicle. There was no testimony regarding how long a user of either substance would be under the influence by either substance, or regarding how much of either substance a user would need to ingest in order to impair their ability to drive.

While the State's expert testified that cocaine could typically be detected in the blood for two to eight hours after ingestion, depending on the user's method of ingestion and the lab's detection capabilities, (129:143), there was no evidence regarding how long THC could be detected in blood after ingestion. Finally, there was no evidence as to how or when Mr. McAdory consumed either substance.

The evidence, "viewed most favorably to the State and to 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 guilty beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 501. Therefore, the trial evidence was insufficient as a matter of law to establish beyond a reasonable doubt that Mr. McAdory was guilty of operating while intoxicated by a controlled substance. This conviction should be vacated and, upon remittitur, a judgment of acquittal should be entered. *Burks*, 437 U.S. at 18; *Wulff*, 207 Wis. 2d at 145.

II. MR. MCADORY'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT IMPROPERLY MODIFIED THE STANDARD JURY INSTRUCTION FOR OPERATING WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE

At the state's request, and over Mr. McAdory's objection, the court modified the standard jury instruction for operation while impaired by a controlled substance, Instruction 2664, by eliminating language defining the element of "under the influence." In doing so, the court removed language necessary for an accurate statement of the law regarding impairment, and necessary to help the jury understand the difference between the two OWI counts. The improper jury instruction resulted in a conviction for operating under the influence of a controlled substance where the State's only evidence was the presence of a controlled substance in his system and there was no evidence to suggest he satisfied the impairment standard.

A. Legal principles and standard of review

Instruction of the jury "is a crucial component of the fact-finding process." *State v. Schulz*, 102 Wis.2d 423, 426, 307 N.W.2d 151 (1981). "The purpose of the instructions is to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *State v. Dix*, 86 Wis. 2d 474, 486, 273 N.W.2d 250 (1979). A trial court has broad discretion in instructing the jury, but must exercise its discretion in order to fully and fairly inform the jury of the applicable rules of law. *State v. Austin*, 2013 WI App 96, ¶ 5, 349 Wis. 2d 744, 836 N.W.2d 833.

"There are two types of jury instruction challenges: those challenging the legal accuracy of the instructions, and those alleging that a legally accurate instruction unconstitutionally misled the jury." *State v. Burris*, 2011 WI 32, ¶ 44, 333 Wis.2d 87, 797 N.W.2d 430. A challenge to jury instructions warrants relief where the reviewing court is persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury. *State v. Ziebart*, 2003 WI App 258, ¶ 16, 268 Wis. 2d 468, 673 N.W.2d 369.

A reviewing court "examine[s] the instructions as a whole to determine whether it was reasonably likely that the jury understood the instructions to allow a conviction based on insufficient proof." *Austin*, 2013 WI App 96, ¶ 6. Whether a jury instruction is appropriate, under the given facts of a case, is a legal issue subject to independent review. *Id.*

B. The jury did not receive an accurate instruction regarding the definition of "under the influence"

1. Defining "under the influence"

Wisconsin law prohibits the operation of a motor vehicle while under the influence of a controlled substance. Wis. Stat. § 346.63(1)(a). In order to be found guilty of this charge, the State must prove two elements beyond a reasonable doubt: first, that the defendant drove or operated a motor vehicle, and second, that the defendant was under the influence of a controlled substance at the time that he drove or operated the motor vehicle. *Id.*; JI-2664.

The current version of the standard jury instruction defines "under the influence" as follows:

> "Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a controlled substance.
>
> [Not every person who has consumed (name controlled substance) is "under the influence" as that term is used here.] What must be established is that the person has consumed a sufficient amount of (name controlled substance) to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

JI-CRIM 2664. Regarding the bracketed sentence, the committee comments state:

> The sentence in brackets is appropriate for cases involving the consumption of substances which are roughly similar in their effect on a person as alcohol. That is, a person could use some substances in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here. Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used.

JI-CRIM 2664, n.9.

The definition of "under the influence" contained in the jury instruction was adopted from the one used for offenses involving alcoholic beverages. JI-CRIM 2664, n.8. Indeed, the two definitions are nearly identical aside from the terms "intoxicant" versus "controlled substance." *See* JI-CRIM 2663.

However, as discussed *supra* at I.B., Instruction 2664 contains no provision allowing a jury to find impairment based on a positive test result alone; whereas Instruction 2663 does allow a jury to find impairment based on a test result with a certain blood alcohol concentration alone. *Compare* JI-CRIM 2663 *with* JI-CRIM 2664.

Wisconsin's Traffic Code does not define under the influence of an intoxicant or controlled substance. See Wis. Stat. §§ 346.63(1)(a) (OWI offense), 340.01 ("Words and phrases defined," within the general motor vehicle code provisions), 346.01 ("Words and phrases defined," within the Rules of the Road). However, this phrase is defined in the Criminal Code: "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle…is materially impaired because of his or her consumption of … a controlled substance…." Wis. Stat § 939.22(42).

Our supreme court has explained that the definition of "under the influence of an intoxicant" is "equivalent" when that phrase is used in the criminal code and in the motor vehicle code. *State v. Waalen*, 130 Wis. 2d 18, 27-28, 386 N.W.2d 47 (1986). The level of impairment required to satisfy this standard can be met "when a person is incapable of driving safely, or is without proper control of all those faculties necessary to avoid danger to others." *Id.* at 27 (internal quotes and citation omitted). The *Waalen* court affirmed an instruction defining under the influence as follows:

> The phrase "under the influence of an intoxicant" covers not only the well-known and easily recognized conditions and degrees of intoxication but also any abnormal mental or physical conditions which [are] the result of indulging in any degree in intoxicating liquors, including beer, which tends to deprive one of the

> clearness of intellect and self control which one would otherwise possess.
>
> Not every person who has consumed alcoholic beverages falls within the ban of the statute. If that consumption of alcoholic beverages does not cause the person to be influenced in the ordinary and well-understood meaning of the term, the person is not under the influence of an intoxicant within the meaning of the statute.

Id. at 22. The court approved this instruction, holding that even though the instruction did not use the criminal code definition of "under the influence of an intoxicant," it "accurately describes the circumstances in which a jury can infer whether an operator's ability to operate a vehicle is 'materially impaired.'" *Id*. at 28.

The *Waalen* court also noted with approval that this instruction was "almost identical" to an instruction affirmed by an earlier decision of the court in *City of Fond du Lac v. Hernandez*, 42 Wis. 2d 473, 167 N.W.2d 408 (1969). *Waalen*, 130 Wis. 2d at 26. In *Hernandez*, the jury instruction contained additional language defined impairment as "to some degree at least[,] less able either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern motor vehicle with safety to himself and the public." 42 Wis. 2d at 475-76.

In *State v. Hubbard*, the supreme court noted this result with approval, stating that the instruction given in *Waalen* was an "acceptable means for a circuit court to instruct a jury regarding the definition of 'under the influence.'" 2008 WI 92, ¶ 54, 313 Wis.2d 1, 752 N.W.2d 839. However, the *Hubbard* court differed from *Waalen* in its interpretation that the

language "to a degree which renders him or her incapable of safely driving" modified all provisions in Wis. Stat. § 346.63(1)(a). *Id.* at ¶ 46. *Hubbard* held that this language only applied where a defendant was alleged to be under the influence of "any other drug" or a combination of an intoxicant and "any other drug."

2. Removing language defining "under the influence" rendered Instruction 2664 inaccurate

At the state's request, and over Mr. McAdory's objection, the trial court removed, and therefore the jury was not instructed on, the following standard language defining under the influence:

> Not every person who has consumed (name controlled substance) is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of (name controlled substance) to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

JI-CRIM 2664.[13] By removing this language, the court eliminated the state's requirement to establish that Mr. McAdory had consumed a sufficient amount of cocaine or

[13] Instead, the court instructed the jury:

> The definition of, quote, under the influence, closed quote. Under the influence means that the defendant's ability to operate a vehicle is impaired because of consumption of a controlled substance. It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

(129:179; App.111.)

THC to cause impairment, as well as the that the definition of impairment required that Mr. McAdory be "less able to exercise the clear judgment and steady hand necessary to handle or control" his vehicle. *Id.; see also Waalen*, 130 Wis. 2d at 22, 27; *Hernandez*, 42 Wis. 2d at 475-76.

The trial court's reasoning for removing the language indicates that it was doing so to allow for the incorrect legal standard for this count:

> [S]ome of this language in my estimation would, in fact, be more confusing to jury than helpful to them. Which is why originally my thought was to not include bracketed language there. ***Because it is a strict liability provision, as you say.***
>
> But then the question is, do we leave the other language that what must be established is the person has consumed a sufficient amount of cocaine and what will now be Delta 9 tetrahydrocannabinol to cause a person to be less able to exercise the clear judgment and steady hand necessary to handle the control of a motor vehicle. Well, part of reason why that language, I think, adds to confusion is because of point you just made. ***It's a strict liability provision. Okay? It's in your blood, you're done. Right.***

(129:171-72; App.107-08 (emphasis added).) These statements clearly indicate that the court was incorrectly applying the strict liability standard of operating with a detectable amount of controlled substance to its decision on how to instruct the jury regarding "under the influence" – an offense which is ***not*** a *per se* or strict liability offense. *See Hernandez*, 42 Wis. 2d at 475-76 ("Not every man who has consumed alcoholic beverages falls within the ban of the statute.") Removing the sentence "Not every person who has

consumed [the controlled substance] is 'under the influence'" from the definition of "under the influence" resulted in an instruction that failed to warn that mere consumption of a controlled substance was not sufficient to find that Mr. McAdory was "under the influence."

The trial court also found that the removed language was "inconsistent or could be interpreted in a fashion that's inconsistent" with the statement that "it is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving." (129:172; App.108.) While it is true that one's ability to operate can be impaired even without particular acts of unsafe driving, the court removed important language defining what impairment *is,* if it is *not* unsafe driving: "that the person has consumed a sufficient amount of [the controlled substance] to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." JI-CRIM 2664; *Hernandez*, 42 Wis. 2d at 475-76; *see also Waalen*, 130 Wis. 2d at 22 (impairment includes "any abnormal mental or physical conditions" as a result of consumption, "which tends to deprive one of the clearness of intellect and self control which one would otherwise possess.")

Here, the trial court's error deprived Mr. McAdory of a jury deliberation based on the correct standard of law by altering and removing key sentences from the definition of "under the influence." The jury should have been instructed that "not everyone who consumes cocaine and/or THC is under the influence" and that in order to find Mr. McAdory "under the influence of a controlled substance," it must find that he had "consumed a sufficient amount of cocaine and/or THC to cause him to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle," in accordance with the standard language in Instruction 2664.

Ziebart, 2003 WI App 258, ¶ 16 (trial court must exercise its discretion in order to fully and fairly inform jury of applicable rules of law); *see also Hubbard*, 2008 WI 92, ¶ 26 ("The objective of an instruction is not only to state the law accurately but also to explain what the law means to persons who usually do not possess law degrees") (internal quotes and citation omitted); *State v. Langlois*, 2018 WI 73, ¶ 42 n.23, 382 Wis. 2d 414, 913 N.W.2d 812 (noting "it is best practice to read the pattern instructions for each charge," rather than to abbreviate the instruction).

Where the trial court incorrectly instructs the jury, the verdict must be set aside unless the error was harmless; that is, unless there is no reasonable possibility that the error contributed to the conviction. *Ziebart*, 2003 WI App 258, ¶ 26. The State has the burden of establishing, beyond a reasonable doubt, an error was harmless. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985). A conviction must be reversed, unless the court is certain that the error did not influence the jury. ***Id.*** at 541-42.

The incorrect jury instruction was not harmless here, because there was no evidence that Mr. McAdory was impaired by cocaine or THC, other than the fact that those substances were detected in his blood. As addressed more thoroughly *supra* at I.B., there was no evidence at trial as to the impairing effects of cocaine or THC and that those effects were present in Mr. McAdory. Not only was there no evidence of unsafe driving, but there was no evidence that Mr. McAdory was physically or mentally impaired to a degree to impact his ability to drive in any way. The *only* testimony regarding impairment from the arresting officer suggested that Mr. McAdory was impaired by alcohol; however, the blood test results were negative for alcohol.

Based on the totality of the evidence at trial, and incorporating by reference the arguments made *supra* at I.B., the trial court's erroneous instruction must be considered a contributing factor in the conviction. Therefore, the error was not harmless.

C. Even if legally accurate, the revised instruction unconstitutionally misled the jury as to the standard for under the influence of a controlled substance

Mr. McAdory asserts that the jury instruction given was not a legally accurate definition of the "under the influence" standard. Yet even if this court disagrees, the revised instruction was still erroneous because, based the proceedings as a whole, the instruction was reasonably likely to cause the jury to be misled as to the standard for finding Mr. McAdory under the influence at the time of driving.

A defendant is entitled to reversal if there is a reasonable likelihood that the jury applied the challenged instruction in a manner that violates the constitution. *Burris*, 2011 WI 32, ¶ 45; *State v. Lohmeier*, 205 Wis. 2d 183, 193-94, 556 N.W.2d 90 (1996) A jury instruction that allows conviction based on insufficient proof violates the defendant's constitutional rights. *Austin*, 2013 WI App 96, ¶ 16. The burden is on the defendant to establish a reasonable likelihood that the jury unconstitutionally applied the instruction. *Burris*, 2011 WI 32, ¶ 46. In determining whether this burden is met, the reviewing court "examine the challenged jury instructions in light of the proceedings as a whole." *Lohmeier*, 205 Wis. 2d at 194.

Viewing Mr. McAdory's trial as a whole, it is reasonably likely the jury was misled by the removal of key language defining "under the influence" from Instruction 2664. Importantly, the jury indicated its confusion over what "under

the influence" meant in this case when it asked the court to clarify the definition of under the influence of an intoxicant versus a controlled substance. (87; 129:206.) The jury's question makes sense when viewed in full context of the evidence at trial, and the fact that where there was any evidence of impairment, it was related to impairment by an intoxicant and *not* a controlled substance. (*See* arguments at *supra* at I.B., hereby incorporated by reference.) The jury's question demonstrated that the modified instruction was insufficient to explain the standard for "under the influence." As such, the court's instruction to the jury to review the standard instructions – which had been modified to *remove* a full paragraph defining under the influence – did not help the issue.

Further, the state and the court repeatedly confused the two OWI counts and their elements throughout the trial, referring to the operating under the influence charge as a strict liability offense that could be proven simply by the presence of a controlled substance in Mr. McAdory's blood. The state told the jury as much during its opening arguments, telling it to "pay particularly close attention to the evidence surrounding the operating while intoxicated charge. But there are two things. First, the defendant had to be driving. And, second, that he had a detectable amount of controlled substances in his system." (129:98-99.)

The state made the same arguments during the jury instruction conference. (129:158, 168-70; App.102, 104-06.) And the court applied this erroneous standard in deciding to remove some of the defining language from Instruction 2664: "[O]riginally my thought was to not include bracketed language there. *Because it is a strict liability provision*… Well, part of reason why that language, I think, adds to confusion is because of point you just made. *It's a strict liability provision. Okay? It's in your blood, you're done.*" (129:171-72; App.107-

08 (emphasis added).) It's true that these comments were not made in the presence of the jury, but they informed the court's decision in revising the language used to instruct the jury as to the "under the influence" element.

Thus, the proceeding as a whole demonstrates the reasonable likelihood that removing key defining language from Instruction 2664 misled the jury as to what the state had to prove to show Mr. McAdory was under the influence of a controlled substance at the time of driving. "[T]here is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner." *See Lohmeier,* 205 Wis.2d at 194, 556 N.W.2d 90. Given that the other charge of operating with a restricted controlled substance did have a strict liability standard, and the focus on the elements and supporting evidence of *that* offense over the offense of operating under influence, there is a reasonable likelihood that the jury confused the two standards and convicted solely on the presence of a controlled substance in McAdory's blood instead of finding that he was actually impaired at the time of driving. The resulting impact was a lowering of the standard by which the state was required to prove impairment, making it "reasonably likely that the jury understood the instructions to allow a conviction based on insufficient proof." *Austin*, 2013 WI App 96, ¶ 16.

It is reasonably likely that the jury was misled by the court's removal of defining language from Instruction 2664, in violation of Mr. McAdory's constitutional rights.

III. MR. MCADORY'S CONVICTION OF OPERATING UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE SHOULD BE REVERSED IN THE INTEREST OF JUSTICE BECAUSE THE REAL CASE OR CONTROVERSY WAS NOT FULLY TRIED

A. Legal principles and standard of review

This court may exercise its discretion to grant reversal of a conviction "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried... regardless of whether the proper motion or objection appears in the record…" Wis. Stat. § 752.35.

An appellate court "may reverse a conviction based on a jury instruction regardless of whether an objection was made, when the instruction ... arguably caused the real controversy not to be fully tried." *State v. Perkins*, 2001 WI 46, ¶ 12, 243 Wis. 2d 141, 626 N.W.2d 762. A court's failure to provide the jury a proper framework for analyzing the key issue at trial prevented that issue from being fully tried. *Austin*, 2013 WI App 96, ¶ 23.

B. The Real Controversy – Whether Mr. McAdory was Under the Influence of a Controlled Substance at the Time of Driving – was Not Fully Tried

Throughout the trial, both the prosecutors and the court conflated the two OWI charges Mr. McAdory faced, treating both as strict liability offenses. The state told the jury in its opening arguments, "[P]ay particularly close attention to the evidence surrounding *the operating while intoxicated charge*. But there are two things. First, the defendant had to be driving. And, second, that he had a detectable amount of controlled

substances in his system." (129:98-99 (emphasis added).). The court based its decision to remove language defining "under the influence" from the jury instructions on a belief that it was a strict liability offense – this after the state argued the same during the jury instruction conference. (129:158, 168-72; App.102, 104-08.)

The state presented no evidence linking any alleged impairment on Mr. McAdory's part to controlled substances. *See* arguments *supra* at I.B., hereby incorporated. The state's case was made up of an officer who believed that Mr. McAdory was under the influence of an intoxicant, (129:110-11, 114, 121), and evidence that a detectible level of cocaine and THC was found in Mr. McAdory's blood, whereas his blood was negative for alcohol. (84; 86; 129:141-44.)

Confusion between the two counts and their elements infected the entire proceeding from opening arguments to the jury instructions and resulted in a failure to fully try the real controversy in this case – whether the evidence showed that Mr. McAdory was under the influence of a controlled substance at the time of driving. That this failure occurred is demonstrated by the lack of any evidence to support a finding that Mr. McAdory was under the influence of a controlled substance at the time of driving. For these reasons, his conviction should be reversed pursuant to this court's discretion under Wis. Stat. § 752.35.

CONCLUSION

For the foregoing reasons, Mr. McAdory respectfully requests the Court to enter an order vacating the Judgment of Conviction and directing the trial court to enter a judgment of acquittal notwithstanding the verdict on Count 1. Alternatively, Mr. McAdory asks this Court to vacate the Judgment of

Conviction and remand this case to the circuit court for a new trial on Count 1.

Dated this 1st day of March, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 8,900 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served by mail on all opposing parties.

Dated this 1st day of March, 2021.

Signed:

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CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on March 1, 2021, I deposited in the United States mail for delivery to the clerk by first-class mail, ten copies of the defendant-appellant's brief and appendix.

Dated this 1st day of March, 2021.

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CERTIFICATION AS TO APPENDIX

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 § 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 1st day of March, 2021.

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