STATE OF WISCONSIN

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

DISTRICT IV

Case No. 20AP2001-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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State reframes the issues as follows:

1. Whether the State presented sufficient evidence to sustain Defendant-Appellant Carl Lee McAdory's conviction for Operating a Motor Vehicle while Under the Influence of a Controlled Substance?

The trial court answered yes.

This Court should answer, "Yes."

2. Whether McAdory's due process rights were violated when the trial court chose to amend the pattern Criminal Jury Instruction 2664?

This Court should answer, "No."

3. Whether this Court should grant McAdory a new trial in the interests of justice?

This Court should answer, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties' briefs, and the issue presented involves the application of well-established principles to the facts presented.

INTRODUCTION

McAdory was convicted of Operating a Motor Vehicle while Intoxicated as a 7th, 8th, or 9th Offense; Operating a Motor Vehicle with a Detectable Amount of a Restricted Controlled Substance in the Blood as a 7th, 8th, or 9th Offense; Obstructing an Officer; and Operate a Motor Vehicle while Revoked. On appeal, he challenges the sufficiency of the evidence at trial as to the Operating a Motor Vehicle while

Intoxicated charge. He also claims that the jury was not properly instructed because the trial court amended the jury instruction as to that charge, and that therefore the charge was not fully tried. This Court should affirm McAdory's conviction because, under controlling precedent, the jury heard ample evidence showing that McAdory was impaired, and although the jury heard a shortened version of the jury instruction, that did not prevent the jury from making a complete and reasoned decision regarding the Operating a Motor Vehicle while Intoxicated charge.

STATEMENT OF THE CASE AND FACTS

On January 5, 2016, at approximately 2:26 am, Officer Jason Bier of the Janesville Police Department observed a vehicle being operated with a non-functioning driver's side headlight. (R. 129:107.) Officer Bier turned on his emergency lights and attempted to stop the vehicle. (R. 129:108.) The vehicle continued to drive without stopping, and took a right turn. (R. 1:2; 129:108.) Officer Bier activated his siren, and the vehicle eventually pulled over. (R. 1:2; 129:109.)

Upon making contact with the driver and sole occupant of the vehicle, Officer Bier noticed that the driver was "acting nervous," that his speech was slightly slurred, and that he was emitting an odor of intoxicants. (R. 129:110.) Officer Bier asked the driver where he lived, but he would not give an address; instead, he "kept pointing and acted nervous." (R. 129:110.) Officer Bier asked the driver if he had been drinking, and the driver admitted he had consumed "one beer" approximately 30 minutes earlier. (R. 129:110–11.)

Officer Bier asked the driver for his identification; the driver said he had none, but verbally identified himself as "Gary McAdory," with a date of birth of November 24, 1966. (R. 1:2; 80; 129:111.) Officer Bier returned to his squad car to confirm the identification, and during that time the driver, without being instructed to do so, got out of his vehicle and

began walking back toward the squad car. (R. 1:2; 80; 129:112.) Officer Bier instructed the driver to return to his vehicle, and the driver complied. Shortly thereafter, despite being told to remain in his vehicle, the driver got out of his vehicle again and fled the traffic stop on foot. (R. 1:2; 80; 107:6–7; 129:112.)

Officer Bier and a backup officer, Officer Welte, pursued the fleeing driver on foot. (R. 1:2; 80.) Ultimately, they caught the driver and took him into custody. (R. 1:2; 80.) After he was apprehended, the driver admitted his name was not actually Gary, but Carl McAdory. (R. 80.) The officers transported the driver to the hospital because he had injured his hand in a fall while fleeing. (R. 1:2; 80; 129:115.) Officer Welte located an identification card on the defendant, which positively identified him as the defendant, Carl Lee McAdory. (R. 1:3; 129:115.)

While at the hospital, Officer Bier placed McAdory under arrest for OWI. (R. 129:117.) He read the Informing the Accused Form to McAdory, who consented to a blood draw. (R. 129:116, 118.) Hospital staff drew McAdory's blood. (R. 129:118.) The blood was sent to the Wisconsin State Crime Laboratory for testing. (R. 129:120.) The blood test showed results that were negative for ethanol (R. 86), but positive for the following: 130 ug/L of Cocaine, 19 ug/L of Cocaethylene, 280 ug/L of Ecgonine Methyl Ester, 2,300 ug/L of Benzoylecgonine, 3.0 ug/L of Delta-9-tetrahydrocannabinol, 2.0 ug/L of 11-Hydroxy-THC, and 16 ug/L of Carboxy-THC. (R. 84.)

McAdory was charged with one count of Operating a Motor Vehicle while Intoxicated as a 7th, 8th, or 9th Offense, contrary to Wis. Stat. § 346.63(1)(a); one count of Operating a Motor Vehicle with a Detectable Amount of a Restricted Controlled Substance in the Blood as a 7th, 8th, or 9th Offense, contrary to Wis. Stat. § 346.63(1)(am); one count of Obstructing an Officer, contrary to Wis. Stat. § 946.41(1); and

one count of Operating a Motor Vehicle while Revoked, contrary to Wis. Stat. § 343.44(1)(b). (R. 28:1–2.)

A jury trial was held on August 19, 2019. (R. 129:1.) During the jury instructions conference, the trial court – on the State's motion – removed a paragraph from the pattern Criminal Jury Instruction 2664, for the charge of Operating a Motor Vehicle while Intoxicated (Controlled Substance). (R. 129:173.) The language that was removed pertained to the definition of "under the influence," and the trial court explained its decision by saying, "I think that's much more consistent with the state of the law." (R. 129:173.) That instruction, with the modification, was read to the jury at the end of the trial. (R. 129:178.) Criminal Jury Instruction 2664B, Operating a Motor Vehicle with a Detectable Amount of a Restricted Controlled Substance in the Blood, was read to the jury without modification. (R. 129:178–80.)

During deliberation, the jury submitted the following question: "Can we please have a definition of operating while intoxicated or is it the same as operating under the influence of a controlled substance"? (R. 129:206.) The trial court responded, "Please rely upon the jury instructions provided, namely 2664 and 2664B." (R. 129:207.)

The trial court entered judgment on the count of Operate a Motor Vehicle while Revoked. (R. 129:161.) The jury found McAdory guilty of the other three charges. (R. 79:1–3.)

At the sentencing hearing, on October 25, 2019, the State moved to dismiss the charge of Operating a Motor Vehicle with a Detectable Amount of a Restricted Controlled Substance in the Blood, saying that it was "duplicative." (R. 130:4; *see also* Wis. Stat. § 346.63(1)(c) ("If the person is found guilty of any combination of [§§ 346.63](1)(a), [(1)](am), and [(1)](b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of

sentencing and for purposes of counting convictions. . . .").) McAdory was then sentenced on the remaining charges. (R. 130:35–39.)

McAdory now appeals to this Court, claiming that there was insufficient evidence at trial to convict him of a violation of Wis. Stat. § 346.63(1)(a), and that the jury was improperly instructed on that charge.

ARGUMENT

I. The State presented sufficient evidence to sustain McAdory's conviction for Operating a Motor Vehicle while Under the Influence of a Controlled Substance.

McAdory maintains that the State presented insufficient evidence to support his conviction. As explained below, the jury's verdicts were supported by ample evidence to show that McAdory operated a motor vehicle while under the influence of a controlled substance.

Accordingly, this Court should affirm.

A. Standard of review and legal principles concerning challenges to the sufficiency of the evidence.

The sufficiency of trial evidence to support guilt presents a question of law, reviewed by this Court de novo. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410.

However, this Court may not reverse McAdory's convictions "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

"If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Poellinger*, 153 Wis. 2d at 507; *see also State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244 (reversal is warranted only if the trier of fact "could not possibly have drawn the appropriate inferences" to find guilt).

This is a difficult showing to make because, in its role as factfinder, the jury determines witness credibility, resolves conflicts in testimony, weighs the evidence, and draws reasonable inferences from it. *State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989); *State v. Johannes*, 229 Wis. 2d 215, 222, 598 N.W.2d 299 (Ct. App. 1999).

If the evidence supports more than one inference, this Court must follow the inference which supports the jury's finding of guilt. *Allbaugh*, 148 Wis. 2d at 809. "For purposes of appellate review 'the trier of fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, reject that inference which is consistent with the innocence of the accused.'" *Smith*, 342 Wis. 2d 710, ¶ 31, citing *Poellinger*, 153 Wis. 2d at 506. The jury may properly draw logical inferences from direct and circumstantial trial evidence, "connecting [the] dots into a coherent pattern" establishing guilt. *State v. Sarnowski*, 2005 WI App 48, ¶ 12, 280 Wis. 2d 243, 694 N.W.2d 498.

B. The trial evidence was sufficient to support McAdory's conviction for Operating While Under the Influence of a Controlled Substance.

The evidence, viewed in the light most favorable to the State and the convictions, was sufficient to sustain the jury's guilty verdict.

The crime of Operating a Motor Vehicle While Under the Influence of a Controlled Substance requires proof of the following two elements: "(1) The defendant drove/operated a motor vehicle on a highway, and (2) The defendant was under the influence of (name of controlled substance) at the time the defendant drove/operated a motor vehicle." Wis. JI–Criminal 2664 (2020); Wis. Stat. § 346.63(1)(a).

McAdory argues the evidence at trial was insufficient because the State failed to present specific evidence related to the THC and cocaine found in his blood. (McAdory's Br. 22–25.) McAdory contends that he deserves a new trial because there was no evidence presented as to when he consumed the THC and cocaine found in his blood, and no testimony linking a certain amount of those substances to certain facts demonstrating impairment by McAdory, and because the State is not allowed to rely solely on a blood test to show impairment. (McAdory's Br. 22–25.) McAdory's claims fail.

The State did not rely solely on the blood test to prove that McAdory was impaired; it presented other evidence demonstrating that he was impaired. Further, the State was not required to present the specific evidence that McAdory contends it was.

McAdory claims that the only evidence the State presented to prove the Operating Under the Influence charge was the testimony of Officer Bier and "evidence that detectable amounts of controlled substances were found in McAdory's blood." (McAdory's Br. 23.) That is incorrect: the jury heard the testimony of Officer Bier (R. 129:107–20), the phlebotomist (R. 129:126–35), and the Lab analyst, Michael Larson (R. 129:135–52). The jury viewed the video of Officer Bier's contact with McAdory (R. 80), and also reviewed all the other exhibits that were introduced at trial (R. 80–86).

Despite what McAdory now claims, all the following facts were put before the jury; these facts, viewed together, support a finding of guilty on the charge of Operating a Motor Vehicle Under the Influence of a Controlled Substance:

- McAdory's vehicle was stopped at 2:26 am. (R. 129:107.)
- McAdory did not immediately pull over, despite the fact that Officer Bier was directly behind him with his emergency lights activated. It wasn't until Officer Bier activated his siren that McAdory finally pulled over. (R. 1:2; 80; 129:107–109.)
- McAdory was alone and seated in the driver's seat of the vehicle. (R. 129:110.)
- McAdory was "acting nervous," in the officer's words. (R. 129:110.) This was confirmed by his actions on the video played for the jury. (R. 80.)
- McAdory either couldn't or wouldn't give a direct answer when Officer Bier asked for his address. (R. 80; 129:110.)
- McAdory's speech was slightly slurred. (R. 80; 129:110.)
- Officer Bier noticed the odor of intoxicants coming from McAdory's person. (R. 129:110.)
- Lab analyst Michael Larson testified that Cocaethylene was found in McAdory's blood, and that both alcohol and cocaine must be present in the blood in order for cocaethylene to be created, so clearly McAdory had been drinking. (R. 129:140–41.)
- McAdory admitted to drinking. (R. 129:110–11.) His statement that he had consumed "one beer" approximately 30 minutes prior was, however, discredited by the fact that McAdory had an open beer can in the vehicle with him at the time of the stop. (R. 129:115.)

- McAdory gave Officer Bier a false name and date of birth. (R. 1:2–3; 80; 129:111, 115.)
- McAdory got out of the car without being told to do so. (R. 1:2; 80; 129:112.)
- McAdory, after being instructed to return to his vehicle, did so, then got back out again a short time later and fled on foot. (R. 1:2; 80; 129:112; 107:6–7.)
- A sample of McAdory's blood test showed 130 ug/L of Cocaine, 19 ug/L of Cocaethylene, 280 ug/L of Ecgonine Methyl Ester, 2,300 ug/L of Benzoylecgonine, 3.0 ug/L of Delta-9-tetrahydrocannabinol, 2.0 ug/L of 11-Hydroxy-THC, and 16 ug/L of Carboxy-THC. (R. 84.)

McAdory apparently ignores the vast majority of the above facts and claims that the State relied solely on the test result to show impairment. (McAdory's Br. 22.) That is simply not the case. Perhaps during its closing argument the State relied upon the test result in large part to show impairment, but the statements of counsel are not evidence, and the jury was informed of that. (R. 129:189); Wis. JI–Criminal 157 (2000) (Remarks of Counsel). All the factors listed above were presented as evidence – in the form of testimony or video – to the jury. Viewed in the light most favorable to the State and conviction, the above factors combine to provide an ample basis upon which a reasonable jury could find beyond a reasonable doubt that McAdory was impaired by the substances he had consumed.

McAdory asserts that "There was no evidence as to what amount or concentration of either substance was detected in the blood." (McAdory's Br. 24.) However, this is incorrect, as the Lab report, which reflected the actual blood test result, was admitted into evidence at trial. (R. 84.) McAdory himself admits as much, although he appears to claim that in order for the jury to find him guilty, testimony linking the particular *amounts* of controlled substances to his

specific exhibited impairment was required. (McAdory's Br. 24–25.)

This is, of course, not the law. Wisconsin Stat. § 346.63(1)(a) – the statute under which McAdory was charged – says that "No person may drive or operate a motor vehicle while under the influence of . . . a controlled substance." Nothing in the statute requires particular acts of impairment to be linked, by testimony or other evidence, to certain levels of substances found in the blood. Even the jury instruction for the crime tells jurors that "'[U]nder the influence' means that the defendant's ability to operate a motor vehicle was impaired because of consumption of a controlled substance." Wis. JI–Criminal 2664 (2020).

This is all the State is required to show at trial: that the defendant operated a motor vehicle while under the influence of a controlled substance. Wis. JI–Criminal 2664 (2020). Nowhere in the law or jury instructions is the State required to prove that there is a direct link between a specific amount of a controlled substance in the blood to the impairment a person exhibits. In fact, there is no set prohibited concentration for drugs because individuals react differently to them and exhibit signs of impairment at varying levels. This is precisely why our law does not have a "PAC-like" provision for OWI cases involving drugs.[1]

The jury is encouraged to assess the credibility of witnesses and to draw its own inferences from evidence heard during trial. Wis. JI–Criminal 300 (2000) (Credibility of Witnesses). In addition to direct evidence, "A jury may draw reasonable inferences from facts established by

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[1] *See* generally the legislative history of 2003 WI Act 97, available at https://docs.legis.wisconsin.gov/2003/related/public_hearing_records/sc_judiciary_corrections_and_privacy/bills_resolutions/03hr_sc_jcp_ab0458_pt01.pdf.

circumstantial evidence." (McAdory's Br. 21–22, citing *State ex rel. Kanieski v. Gagnon*, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972).) What the jury saw during the trial was a person who, despite having a squad car with its emergency lights on behind him, didn't realize that the police were trying to pull him over until the officer activated his siren; who, while talking to the officer, was slurring his speech and acting nervous; who wouldn't or couldn't give a straight answer about his address; who tried to conceal his identity by giving a false name and date of birth; and who fled the scene of a traffic stop in order to evade further contact with police.

The act of fleeing can be interpreted as evidence of consciousness of guilt. *State v. Quiroz*, 2009 WI App 120, ¶ 18, 320 Wis. 2d 706, 772 N.W.2d 710 ("It is well established that evidence of flight has probative value as to guilt.") So can McAdory's not wanting to give the officer his address, or not being able to, and giving a false name. *State v. Bettinger*, 100 Wis. 2d 691, 698, 303 N.W.2d 585, *amended,* 100 Wis. 2d 691, 305 N.W.2d 57 (1981) ("It is generally acknowledged that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge.")

The jury could reasonably infer that McAdory's "nervous" demeanor and actions reflected in the video were due to his impairment. And the fact that McAdory had slurred speech and did not see the officer's lights and pull over right away are direct evidence of impairment.

The jury is not required to link specific facts indicating impairment to the specific substance or substances that cause impairment, as McAdory appears to claim. (McAdory's Br. 23–25.) As stated above, the jury only need find the two elements of the crime beyond a reasonable doubt. Wis. JI–Criminal 2664 (2020). A jury need not find a direct or causal connection between a particular fact in evidence (such as slurred speech) and a specific substance found in a

defendant's blood (such as cocaine). In fact, it would be improper for a trial attorney to suggest that this is what the jury must decide.

Despite McAdory's contentions, there is no requirement that certain evidence – such as field sobriety tests, or an evaluation by a Drug Recognition Expert (McAdory's Br. 23–24) – be presented at trial in order for a jury to return a verdict of guilty in an OWI case. Naturally, every OWI arrest presents its own unique set of facts and circumstances. Evidence presented in OWI trials varies from case to case. While the evidence that McAdory references might have provided the jury with more information, the State was not required to present it. Furthermore, the law does not require that the jury hear testimony as to the impairing effects of the particular substances that were found in a defendant's blood, or how long they might stay in a person's system. (McAdory's Br. 25.) To reiterate, all that is necessary for a finding of guilty is evidence showing (1) that McAdory drove or operated a motor vehicle, and (2) that McAdory was under the influence of a controlled substance at the time he drove or operated a motor vehicle.

This Court may not overturn the jury's verdict and McAdory's claim fails, because the evidence as a whole shows more than a "possibility" that the jury could have heard the evidence adduced at trial and drawn inferences allowing it to find him guilty. *Poellinger*, 153 Wis. 2d at 507; *see also Watkins*, 255 Wis. 2d 265, ¶ 68 (reversal is warranted only if the trier of fact "could not possibly have drawn the appropriate inferences" to find guilt).

II. McAdory's due process rights were not violated when the trial court amended the pattern Criminal Jury Instruction 2664.

A. Standard of review and legal principles.

Jury instruction error is subject to the harmless error rule, meaning that the erroneous instruction is harmless if it is clear beyond a reasonable doubt that the jury's verdict would have been the same had the proper instruction been given. *State v. Williams*, 2015 WI 75, ¶¶ 6, 51, 59, 364 Wis. 2d 126, 867 N.W.2d 736.

The trial court has broad discretion in how it instructs the jury based on the facts of the case. *State v. Steffes*, 2013 WI 53, ¶ 22 n.7, 347 Wis. 2d 683, 832 N.W.2d 101. A trial court's decision on jury instructions will not be reversed absent an erroneous exercise of discretion. *State v. Hubbard*, 2008 WI 92, ¶ 23, 313 Wis. 2d 1, 12–13, 752 N.W.2d 839, 845; *State v. Miller,* 231 Wis. 2d 447, ¶ 28, 605 N.W.2d 567 (Ct. App. 1999); *State v. Morgan,* 195 Wis. 2d 388, 448, 536 N.W.2d 425 (Ct. App. 1995). The issue of whether a jury instruction violates due process is, however, a question of law to be decided by this Court independently. *State v. Tomlinson*, 2002 WI 91, ¶ 53, 254 Wis. 2d 502, 648 N.W.2d 367.

To prevail on an argument that the jury was unconstitutionally misled in violation of a defendant's due process rights, a defendant must show: (1) "that the instruction was ambiguous" and (2) "that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *State v. Badzinski*, 2014 WI 6, ¶ 37, 352 Wis. 2d 329, 344–45, 843 N.W.2d 29, 36, quoting *State v. Burris,* 2011 WI 32, ¶ 48, 333 Wis. 2d 87, 797 N.W.2d 430.

As to the first prong, this Court is to look at the instructions as a whole to determine whether a particular

instruction was unconstitutionally ambiguous. The purpose of a jury instruction is "to fully and fairly inform the jury of a rule or principle of law applicable to a particular case." *Nommensen v. American Cont'l Ins. Co.*, 2001 WI 112, ¶ 36, 246 Wis. 2d 132, 629 N.W.2d 301. In determining whether a jury instruction correctly informed the jury, an appellate court reviews "the jury instructions as a whole to determine whether the overall meaning communicated by the instructions was a correct statement of the law." *State v. Langlois*, 2018 WI 73, ¶ 38, 382 Wis. 2d 414, 913 N.W.2d 812 (citation omitted).

As to the second prong, the burden is on the defendant to establish a reasonable likelihood that the jury misapplied an instruction. *Burris*, 333 Wis. 2d 87, ¶ 48. A defendant meets this burden "only [when] he or she establishes that a constitutional violation was reasonably likely." *Id.* ¶ 49. "Even some 'ambiguity, inconsistency, or deficiency' in an instruction does not violate due process unless there is a reasonable likelihood that, considering the whole trial, the jury unconstitutionally applied the instruction." *Id*. (citation omitted).

B. Wis. JI-Criminal 2664, as read to the jury, was not ambiguous and accurately instructed the jury regarding the definition of "under the influence."

During the jury instruction conference at the close of evidence, there was extensive discussion between the court and the parties regarding Instruction 2664, the substantive instruction for the Operating a Motor Vehicle While Under the Influence of a Controlled Substance charge. (R. 129:158–60; 168–73.)

Specifically, the discussion focused on the portion of the instruction setting forth the definition of "under the influence." (R. 129:158–60; 168–73.) The State requested that

the entire definition section be deleted from the instruction. (R. 129:158.) After receiving input from both the State and defense counsel, the court decided "to just eliminate the entire middle paragraph" under the section defining "under the influence." (R. 129:173.)

The portion of the instruction at issue, in its entirety, reads:

> "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.

Wis. JI–Criminal 2664 (2020).[2]

The "middle paragraph" that the trial court referred to and subsequently eliminated reads as follows:

> [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.

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[2] Although the citations here are to the 2020 version of Wis. JI-Criminal 2664, this portion contained the exact same wording in the previous version used at trial in this case. (*See, e.g.*, R. 129:172–73; McAdory's Br. 12.)

Wis. JI–Criminal 2664 (2020).

The first sentence of the paragraph – "Not every person who has consumed (name controlled substance) is 'under the influence' as that term is used here" – is bracketed and appears with a corresponding footnote:

> 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.

McAdory's Br., at 28, citing Wis. JI–Criminal 2664 (2020), n.9.

However, in citing the Committee's comments in his brief, McAdory conveniently omits the last sentence of the footnote: "Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used." Wis. JI–Criminal 2664 (2020), n.9. The Committee's comments, especially the last sentence of Footnote 9, clearly demonstrate that it expected that there would be cases in which the bracketed sentence would not be appropriate, and that it expected trial courts to exercise discretion in determining whether to include that language.

McAdory has never argued that either cocaine or THC, or a combination of cocaine and THC, would be "roughly similar in its effects to alcohol." Nor has he argued that a person could use cocaine and THC in limited amounts and not be "under the influence." And he does not argue that cocaine and THC are not controlled substances that "have such extreme effects that the sentence in brackets should not be used." Wis. JI–Criminal 2664 (2020), n.9. He does not argue these things because he cannot; there is no evidence to support such claims. Without such evidence, McAdory had no basis to ask the court to include the bracketed sentence in the

instruction, and the trial court was well within its discretion when it excluded that language.

In addition to deleting the bracketed first sentence, the trial court also chose to eliminate the second and final sentence of the middle paragraph: "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." Wis. JI–Criminal 2664 (2020); (McAdory's Br. 27–33.) This sentence did not appear in brackets, nor did it appear with a footnote indicating further comment from the Committee. Nevertheless, it was within the trial court's discretion to remove it. *Steffes*, 347 Wis. 2d 683, ¶ 22 n.7 ("[A] circuit court has wide latitude to give [jury] instructions based on the facts of a case."). And even without that sentence, the instruction fully and fairly informed the jury and provided a correct statement of the law.

McAdory argues that the trial court erred by not reading the two sentences discussed above to the jury, and that this "error deprived [him] of a jury deliberation based on the correct standard of law. . . ." (McAdory's Br. 33.) In making this argument, he relies principally on *State v. Waalen*, 130 Wis. 2d 18, 386 N.W.2d 47 (1986) and *State v. Hubbard*, 2008 WI 92, 313 Wis. 2d 1, 752 N.W.2d 839. Both of those cases were decided before there was a pattern jury instruction for the crime of Operating a Motor Vehicle While Under the Influence of a Controlled Substance, so both courts had to essentially create their own jury instructions. *Hubbard*, 313 Wis. 2d 1, ¶ 8.

In *Hubbard*, the jury was confused by the term "materially impaired," which was included in the jury instruction written by the court. *Id.* ¶¶ 9–13. The jury appeared to be specifically concerned about the word "materially." *Id.* ¶ 15. After much discussion, the court decided to tell the jury to "give all words not otherwise defined

in the jury instructions their ordinary meaning." *Id.* ¶ 16. The jury convicted Hubbard, and he appealed, claiming that *Waalen*, supra, had defined "materially impaired" and the judge should have instructed the jury accordingly. *Hubbard*, 313 Wis. 2d 1, ¶ 20. *Hubbard* did not address the question of whether the instruction that was given to the jury was appropriate, which is the question here, and the term "materially impaired" does not appear in the instruction that was read to the jury in this case.

Although the definition of "under the influence" that was read to the jury in this case slightly differed from the pattern instruction, it still accurately and unambiguously conveyed the law. The trial 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 specific acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

(R. 129:179.) This is a correct statement and adequately conveyed to the jury what it means to be "under the influence" of a controlled substance under Wisconsin law.

For the reasons already set forth above, the first sentence removed by the trial court was not applicable in McAdory's case and it was not error for the court to omit it.

Although the second sentence the trial court removed may have elaborated on what the meaning of "under the influence" is in relation to the defendant's ability to safely control a vehicle, its removal did not render the instruction ambiguous. The jury was instructed that "under the influence" means that the defendant's ability to operate a motor vehicle was impaired due to the consumption of THC and cocaine; that impaired ability does not have to be

demonstrated by specific acts of unsafe driving; and that in order to meet its burden the State must establish that the defendant's ability to safely control the vehicle was impaired. The jury was accurately instructed and was adequately advised as to what "under the influence" means in relation to the defendant's ability to operate a motor vehicle.

McAdory claims that the trial court "removed important language defining what impairment *is*, if *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.'" (McAdory's Br. 33.) However, McAdory has failed to establish that the modified version of Wis. JI–Criminal 2664 that was read to the jury was either ambiguous or inaccurate.

Although there is a legal definition for the term "under the influence," it is not such an obscure term that a lay person would never know what it meant if he or she was not provided the legal definition. Clearly any person would know that it means a substance was consumed, and that substance caused the person who consumed it to feel – and exhibit signs of feeling – influenced in some way.

To say that "Under the influence means that the defendant's ability to operate a vehicle is impaired because of consumption of a controlled substance," is not an inaccurate reflection of the law as described above. (R. 129:178.) Therefore, the jury instruction is neither confusing nor inaccurate, and McAdory's motion should be denied.

C. There is no reasonable likelihood that the jury applied Wis. JI-Criminal 2664 in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt.

McAdory has failed to meet his burden to show that the version of the instruction read to the jury was ambiguous, but should this Court find that he has, his claim must still fail because he cannot establish "that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *State v. Badzinski*, 2014 WI 6, ¶ 37, 352 Wis. 2d 329, 843 N.W.2d 29, quoting *Burris,* 333 Wis. 2d 87, ¶ 48. "Even some ambiguity, inconsistency, or deficiency in an instruction does not violate due process unless there is a reasonable likelihood that, considering the whole trial, the jury unconstitutionally applied the instruction." *Burris*, 333 Wis. 2d 87, ¶ 49.

McAdory claims that there is a "reasonable likelihood" that the jury was misled by the trial court's amendment to the jury instruction, pointing to one of the questions posed by the jury during deliberations in support of his claim. (McAdory's Br. 35–45.) Specifically, the jury asked "[c]an we please have a definition of operating while intoxicated or is it the same as operating under the influence of a controlled substance." (R. 129:205–206.) After consulting with both parties, the trial court advised the jury to "'Please rely upon the jury instructions provided, namely 2664 and 2664B.'" (R. 129:207.)

The jury's question did not ask for clarification of the definition of "under the influence of a controlled substance." Instead, it asked for a definition of "operating while intoxicated," which, incidentally, was how Count One - the Operating While Under the Influence of a Controlled Substance charge - was labeled on the verdict form. (R. 129: 200–201.) Therefore, the jury's question did *not* demonstrate

that the modified instruction was insufficient to explain the standard for "under the influence," as McAdory contends. (McAdory's Br. 36.) Instead, the question represented the jury's attempt to confirm that Count One as listed on the verdict form was, in fact, the same as the Operating While Under the Influence of a Controlled Substance charge as contained in the jury instructions.

The charges reflected on the verdict form were taken from the third amended Information. (R. 129:200–201; 28.) Despite the title of the offense – "Operating While Intoxicated" – on the amended Information and verdict form, the substantive jury instruction read to the jury is titled "Operating While Under the Influence of a Controlled Substance." Wis. JI–Criminal 2664 (2020). Other than the reference to "Operating While Intoxicated" on the verdict form, the jury was instructed that Count One charged McAdory with Operating While Under the Influence of a Controlled Substance, which is most likely the reason why it asked for clarification during deliberations. Contrary to McAdory's claim, the question actually demonstrates that the jury understood the meaning of "under the influence" in that it specifically asked if the definition of operating while intoxicated was the same as operating under the influence of a controlled substance. (R. 129:206.)

In looking at the jury instructions as a whole and the trial in its entirety, as this Court is required to do, it is clear that the State was held to its burden of proving two separate and distinct crimes. *Langlois*, 382 Wis. 2d 414, ¶ 38. The jury was told that McAdory was charged with two different offenses under Wis. Stat. § 346.63(1) and was read the corresponding substantive instructions for each offense: WI-JI Criminal 2664 and 2663B. (R. 129:177–180.) The jury was told that one of the crimes – Count One - Operating Under the Influence of a Controlled Substance – required that the State prove the defendant was under the influence of a controlled

substance, while the other – Count Two - Operating with a Detectible Amount of a Restricted Controlled Substance – required that the State prove that the defendant had a detectible amount of a restricted controlled substance in his blood. After being instructed on each offense, the jury was also reminded again when the judge read the verdict forms that it was to consider each charge separately and render a verdict on *each* offense. (R:129:201.)

McAdory argues that "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 [his] blood." (McAdory's Br. 36.) While it does appear from a review of the record that the court (and the parties) at times conflated the Operating a Motor Vehicle While Under the Influence of a Controlled Substance charge and the Operating a Motor Vehicle While Having a Detectable Amount of a Restricted Controlled Substance in the Blood charge, the trial court still accurately conveyed the law to the jury. And the legal standard in this case has to do with the jury's understanding, not the parties', or even the judge's, understanding.

Furthermore, although the trial court's confusion about the two offenses may have led it to amend WI-JI Criminal 2664, as long as the instruction accurately conveyed the law to the jury, the trial court's internal motivation for making the amendment is irrelevant. It doesn't even matter if the amendment was made based on a misunderstanding of the law. What matters is whether the jury was accurately instructed on the applicable law; it was, so McAdory's claim fails.

The jury was fully and fairly informed of the definition of "under the influence" and did not apply WI JI-Criminal 2664 in a way that relieved the State of the burden of proving

every element of the Operating Under the Influence of a Controlled Substance charge beyond a reasonable doubt. The State was held to its burden to show that the defendant was under the influence of a controlled substance.

D. Even if the trial court erroneously instructed the jury, the error was harmless.

It is harmless error to give an instruction that creates an unconstitutional mandatory presumption in a case where a properly instructed jury would still find the defendant guilty beyond a reasonable doubt based on the undisputed facts presented at trial. *State v. Harvey*, 2002 WI 93, ¶¶ 47–49, 254 Wis. 2d 442, 647 N.W.2d 189.

While the State does not believe that the amended version of WI-JI Criminal 2664 created an unconstitutional mandatory presumption, if this Court finds that it did, the error was harmless. Any lay person knows generally what "under the influence" means. The amended definition of "under the influence," combined with the jurors' common sense, would have led any reasonable jury to find McAdory guilty beyond a reasonable doubt after hearing and seeing the evidence presented at trial.

The facts listed in Section I are not in dispute. Despite this, McAdory claims that the jury instruction "was not harmless here, because there was no evidence that [he] was impaired by cocaine or THC, other than the fact that those substances were detected in his blood." (McAdory's Br. 34.) Again, McAdory ignores the multiple facts presented at trial that could, and did, lead a reasonable jury to determine that he was under the influence of the controlled substances he had consumed. Because even a properly instructed jury would still have found him guilty beyond a reasonable doubt based on the undisputed facts presented at trial, McAdory's argument that any error in this case was not harmless fails.

III. McAdory's conviction for Operating Under the Influence of a Controlled Substance should not be reversed in the interests of justice.

A. Standard of review and legal principles

This Court has the discretionary authority to grant a new trial in the interests of justice, Wis. Stat. § 752.35, but this Court exercises that power only in exceptional cases. "The power to grant a new trial . . . 'is formidable, and should be exercised sparingly and with great caution.'" *State v. Sugden*, 2010 WI App 166, ¶ 37, 330 Wis. 2d 628, 795 N.W.2d 456 (citation omitted). Thus, "the discretionary reversal statute should be used only in *exceptional* cases." *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258 (citations omitted).

The court of appeals is authorized to reverse a judgment and order a new trial "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." Wis. Stat. § 752.35. The purpose of Wis. Stat. § 752.35 is to allow the court of appeals to review an otherwise waived error in the interest of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17–19, 456 N.W.2d 797 (1990).

B. The real controversy was fully tried and McAdory is not entitled to a new trial.

This is not one of the unique cases mandating the dramatic remedy of discretionary reversal. McAdory has failed to demonstrate that the circuit court erred in its evidentiary rulings. There is no articulated argument that justice has been miscarried, and the controversy was fully tried, leading to unanimous guilty verdicts for all charges. For these reasons, this Court should not exercise its power under Wis. Stat. § 752.35, and it should affirm McAdory's conviction.

McAdory insists that the real controversy – whether he was under the influence of the cocaine and THC he had consumed – was not fully tried because "both the prosecutors and the court conflated the two OWI charges . . ., treating both as strict liability offenses." (McAdory's Br. 38.) While there was clearly some confusion, this, on its own, is not enough to make this one of the "exceptional" cases in which the defendant deserves a new trial.

Confusion on the part of the judge and the parties does not automatically equate to confusion on the part of the jury. This Court must look at all the information the jury had before it, including all the evidence and all the jury instructions, and decide whether the jury had an opportunity to fully decide whether McAdory was under the influence of the cocaine and THC he consumed.

As described in Section I above, the jury heard and saw ample evidence of impairment. And as described in Section II above, the jury instructions clearly delineated two separate charges, each with its own elements. The instructions required the jury to consider each offense individually and determine if the State had met its burden of proof on both charges. The jury had to separately consider Count One and its elements and Count Two with its corresponding elements. The omission of certain language from the definition of "under the influence" in Count One did not detract from the jury's ability to understand and fully consider that charge, because jurors may use their common knowledge of the term "under the influence," which is not different from the legal definition. Moreover, the jury's question actually suggests that it did in fact understand the meaning of "under the influence," but that it was confused by the form of the verdict that was presented to it for Count One, in comparison to the substantive jury instruction.

What went on outside the hearing of the jury is of no importance to this Court's determination. What matters here

is whether this jury was given sufficient facts and a reasonable opportunity to decide whether McAdory was under the influence. As described in the sections above, the jury in this case heard sufficient evidence to return a guilty verdict, and the instructions were accurate and complete enough to allow the jury to fully consider the second element of Count One: "The defendant was under the influence of (name of controlled substance) at the time the defendant drove/operated a motor vehicle." Wis. JI–Criminal 2664 (2020).

This Court may only reverse a judgment and order a new trial "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." Wis. Stat. § 752.35. This is not one of the "exceptional cases" in which such a request should be granted. The controversy in this case was fully tried.

CONCLUSION

For the above reasons, the State respectfully requests that this Court deny McAdory's appeal and affirm his conviction for Operating a Motor Vehicle While Under the Influence of a Controlled Substance.

Dated this 17th day of May 2021.

Respectfully submitted,

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CERTIFICATION

We hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7570 words.

Dated this 17th day of May 2021.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE

We hereby certify that we have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

We 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 17th day of May 2021.

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