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**COURT OF APPEALS**

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

Appeal Case No. 2021AP001696

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JEFFREY S. WEIN,

Defendant-Appellant.

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ON APPEAL FROM JUDGMENT ENTERED IN THE  
WAUKESHA COUNTY CIRCUIT COURT, THE  
HONORABLE JENNIFER DOROW, CIRCUIT JUDGE,  
PRESIDING

Case No. 2020-FO-000335

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BRIEF OF PLAINTIFF-RESPONDENT

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### **ISSUES PRESENTED**

Did the circuit court err in its finding of fact that the Defendant-Appellant operated a motorboat while under the influence of intoxicants after hearing testimony from two state witnesses and six defense witnesses?

No. The circuit court, in its role as the finder of fact for this bench trial, properly assessed and weighed the credibility of the witnesses between the two parties and determined that the defendant had in fact operated the motorboat under the influence of an intoxicant on the evening of July 17<sup>th</sup>, 2020.

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

### **STATEMENT OF THE CASE**

The State has chosen to omit this section in accordance with Wis. Stat. 809.19(3)(a)(2) as the description of the factual and procedural background of the case is undisputed.

### **STANDARD OF REVIEW**

Following a trial to the court, an appellate court will not set aside the factual findings of the circuit court unless they are clearly erroneous. Wis. Stat. § 805.17(2). In making this determination, the appellate court should give due regard to the trial court's ability to assess and judge the credibility of the witnesses. *Id.* A trial court's finding of fact will not be disturbed as long as "it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable court could reach." *State v. Bailey*, 2009 WI App 140, ¶ 15, 321 Wis.2d 350, 773 N.W.2d 488.

## ARGUMENT

**I. THIS COURT SHOULD NOT DISRUPT THE  
FACTUAL FINDINGS OF THE CIRCUIT COURT  
BECAUSE THE CIRCUIT COURT  
DEMONSTRATED ITS REASONING ON THE  
RECORD FOR FINDING MR. WEIN GUILTY OF  
OPERATING A BOAT WHILE INTOXICATED**

If the circuit court applies the relevant facts and standard of law while demonstrating a rational process in coming to a conclusion, the appellate court will uphold the circuit court's decision. *Mohns Inc. v. BMO Harris Bank National Association*, 2021 WI 8, ¶ 33, 395 Wis.2d 421, 954 N.W.2d 339. The appellate court will affirm a circuit court's finding as long as that factual finding was not clearly erroneous. Wis. Stat. § 805.17(2).

On September 7<sup>th</sup>, 2021, the Defendant-Appellant challenged his citations for operating a motorboat while under the influence of an intoxicant, a boating refusal, and failure to comply with federal boat lighting regulations. Prior to testimony the defendant stipulated to being under the influence of an intoxicant, the second element required of the OWI citation. (R.31:4). During the trial to the court, the State called to the stand two wardens with the Wisconsin Department of Natural Resources who initiated the interaction with Mr. Wein and ultimately cited him for operating the motorboat while under the influence of an intoxicant.

In their testimony, the wardens both testified to seeing the Defendant-Appellant in the captain's chair of the boat when they first originated the investigatory stop for a light violation. (R.31:16, 39). One of the wardens further stated that as he approached the Defendant-Appellant's boat, he observed Defendant-Appellant in the captain's chair of the boat while it was still in motion and operating. (R.31:17). One of the wardens also testified to the fact that after Defendant-Appellant was placed under arrest he told the officers "he wasn't a threat to anyone or the public because

**he was driving** his boat at such a slow speed in the channel.” (R.31:22) (emphasis added).

The defense called six witnesses to the stand who all alternatively testified that Defendant-Appellant was not the operator of the boat at the time the wardens initiated the investigatory stop. Following their testimony, Defendant-Appellant took the stand to offer his recollection of the events.

Prior to hearing final arguments from the parties, the court asked to again listen to an audio recording the state had introduced that involved the wardens’ interaction with Defendant-Appellant following his detention. (R.31:99).

The court ultimately declared Defendant-Appellant guilty of all three citations. Despite the conflicting testimony, the court offered clear and articulable reasons for its decision. In doing so, the court referenced the jury instructions on the definition of “operating” and applied those instructions to the facts presented to the court through the testimony and evidence. (R.31:110). The court also declared that not a single witness, from defense or the State, “disputed that Mr. Wein was in the chair when police showed up.” (R.31:114). The court then added that it had “no reason to disbelieve the wardens who very clearly testified they believed Mr. Wein was the one in the operating chair.” *Id.*

Additionally, the court in its reasoning addressed the audio recording it asked to review for a second time before moving to closing arguments. (R.31:116). “[W]hat Mr. Wein says during that recording is what leads me to believe that he in fact was operating that pontoon,” the court declared. *Id.* “Those are statements in my mind, of a guilty conscious.” *Id.*

The court then determined the State met its burden by clear, convincing, and satisfactory evidence that Mr. Wein was the operator of the motorboat while under the influence of an intoxicant. (R.31:117-18).

“The trial judge is the ultimate arbiter of the credibility of witnesses,” and “when more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647, 650 (1979). It is not this Court’s function or role “to review questions as to weight of testimony and credibility of witnesses.” *Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813, 818 (1980).

The Defendant-Appellant’s brief essentially amounts to a factual recitation of their argument in front of the trial court. The brief reiterates the facts indicated within the record while offering little legal basis for why this Court should now overturn the decision of the circuit court.

Both statutory and case law direct this Court that it must defer to the trial court’s finding of fact. Wis. Stat. § 805.17(2); *Lessor v. Wangelin*, 221 Wis. 2d 659, 667, 586 N.W.2d 1, 4 (Ct. App. 1998).

An appellate court will affirm a circuit court’s findings “so long as there is evidence in the record that would permit a reasonable person to make the same findings, even if contrary findings could also reasonably be made based on the same evidence.” *Dickman v. Vollmer*, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202.

The appeal here is nothing more than rehash of the arguments put forth before the trial court and asks this Court to reassess the credibility of the witnesses offered by the State and Defendant-Appellant. *See* App. Br. at 10 (“It is clear from the decision that the circuit court gave the testimony of law enforcement more weight than that of the passengers on the Wein boat”).

There is no evidence offered by Defendant-Appellant’s brief or in the record that the court entirely ignored or dismissed the testimony proffered by the defense’s witnesses. Rather the court explicitly acknowledged on the record that it had considered the testimony of all of the witnesses before coming to its decision. Factual findings of the trial court will not be overturned unless they are clearly

erroneous and it is within the duty of the factfinder to determine the weight and credibility of witness testimony. *Metropolitan Associates v. City of Milwaukee*, 2018 WI 4, ¶ 25, 379 Wis.2d 141, 905 N.W.2d 784.

Additionally, there is no suggestion by the Defendant-Appellant that the court erred as a matter of law in making its decision. The court applied the proper evidentiary standard of proof and referenced the appropriate jury instructions prior to making its decision.

The Defendant-Appellant appealed all three citations issued by the circuit court which included failure to comply with federal boat lighting requirements and refusal to provide required sample/submit to chemical test along with the operating a motorboat while under the influence of an intoxicant. While the Defendant-Appellant did not address the other two other citations in the brief, the State would respectfully ask this Court to affirm the findings of guilt by the circuit court for those two citations based above the same legal reasoning offered for the court's factual finding on the operating while under the influence citation.

### **CONCLUSION**

This Court should affirm the findings of the circuit court because the court applied the correct evidentiary standard, assessed the credibility of the witness testimonies on the record, and provided a reasonable and articulable basis for making its determination that the Defendant-Appellant operated a motorboat while under the influence of intoxicants.

Dated this 20<sup>th</sup> day of June, 2022.

Respectfully submitted,

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### CERTIFICATION

I 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 word count of this brief is 1,926.

June 20, 2022  
Date

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