STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP001858-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS D. HUSS,

Defendant-Appellant.

On Appeal from an Order Denying
Suppression and a Judgment of Conviction
Entered in the Winnebago County Circuit Court,
the Honorable John A. Jorgensen, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> In an OWI trial, did the circuit court err in excluding evidence of law enforcement's refusal to perform a breathalyzer when Mr. Huss repeatedly requested one in the course of the OWI investigation?

The circuit court ruled this evidence was inadmissible.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested but would be welcomed if the Court would find it helpful in resolving this case. Publication may be warranted, as there are no published cases addressing the admissibility of a defendant's request for a preliminary breath test.

STATEMENT OF THE CASE

This appeal involves a challenge to a critical evidentiary ruling during Mr. Huss's OWI/PAC trial. Mr. Huss was charged with operating while intoxicated and operating with a prohibited alcohol content, third offense. (4). The intended defense at trial was a challenge to the thoroughness of law enforcement's investigation into whether Mr. Huss was impaired at the time of driving in combination with the "curve defense" (*i.e.* due to alcohol absorption

rates, Mr. Huss's blood alcohol level was not above the legal limit at the time of driving even though it was at the time of the blood draw). (109:58-61). Mr. Huss was not able to present the intended defense, however, because the circuit court ruled that evidence of Mr. Huss's repeated request for a breath test and law enforcement refusal to give him one was inadmissible. (109:104). This ruling severely limited the defense's ability to challenge the thoroughness of the investigation into his impairment as well as the conclusion that Mr. Huss was actually impaired at the time of driving.

This evidentiary ruling was wrong under Wis. Stat. § 343.303 and as well under statutory and case law rules governing the admissibility of relevant evidence. Further, with a viable curve defense and virtually no observations of intoxication at the time of driving, a conviction was far from a certainty. As such, evidence challenging the conclusion that Mr. Huss was impaired at the time of driving was essential to Mr. Huss's defense. Because Mr. Huss was not able to present this essential evidence, he was denied his constitutional due process right to present a defense.

STATEMENT OF FACTS

On September 20, 2019, at approximately 1 a.m., Officer Paige Collins observed Mr. Huss's vehicle make a right hand turn at an intersection with flashing red lights without coming to a complete stop. (109:64, 69). Apart from the rolling stop, Officer Collins did not observe any concerning driving. (109:84).

Officer Collins initiated a stop for the traffic violation. (109:70). When Officer Collins approached Mr. Huss, she noticed the odor of intoxicants, rapid, slurred, and nonsensical speech. (109:73). Mr. Huss was talking about "corruption on you guys" "the MEG[1] unit" "mini surveillance cameras" and his "privacy consultant business." (Ex. 1 00:36-2:40).[2] Based on her observations, Officer Collins believed Mr. Huss was "tweaking out on something" and asked Mr. Huss to perform field sobriety tests. (109:73; Ex. 1 6:19).

Officer Collins began with the horizontal gaze nystagmus test but Mr. Huss continued talking while she tried to explain the directions and then would not do as she asked. (109:73-74; Ex. 1 6:47-11:11). After

[1] MEG is an acronym that references law enforcement's drug unit. (109:71).

[2] Trial Exhibit 1 is found in Record 123, which is a thumb drive that contains Officer Collins's body camera footage. Portions of this footage were played for the jury. Exhibit 1 in this brief will refer to the folder titled "Huss media" → subfolder "other media" → subfolder "146" and will be followed by a minute and second marker.

Mr. Huss repeatedly failed to comply with her instructions, Officer Collins lost her temper and without attempting other field sobriety tests placed Mr. Huss under arrest for operating while intoxicated. (109:7; Ex.1 11:08). As soon as Officer Collins put the handcuffs on Mr. Huss, he repeatedly – at least 8 times – requested a breathalyzer test. (Ex 1. 11:18, 11:27, 11:47, 13:40, 13:48, 13:57, 47:24, 47:30). Officer Collins refused to perform a breath test on Mr. Huss. (Ex 1. 11:50). The jury never heard about Mr. Huss's requests for a breath test or Officer Collins's refusal to give him one.

After arresting Mr. Huss, Officer Collins took him to the hospital for a legal blood draw. (109:76). The blood tests results showed that Mr. Huss had a blood alcohol content of 0.109 grams per 100 milliliters at 2:14 a.m. (109:124; 86).

At trial, a chemist specializing in toxicology from the Wisconsin State Laboratory testified that alcohol is not immediately absorbed into the bloodstream and that an individual's physiology will affect the rate of absorption. (109:126-127). The chemist testified that alcohol levels can be higher at the time of the blood draw than they would have been earlier in time. (109:128). Specifically, the chemist testified that if someone consumes a couple of "harder alcohol" drinks an hour and a half or so before the blood draw it is possible that the blood alcohol concentration would still be rising at the time the blood is drawn. (109:130).

Based on his knowledge of typical absorption and elimination rates, the chemist was asked to calculate the blood alcohol level at the time of driving if Mr. Huss had had a shot and a "Jack Daniels double" between 12:15 and 12:45. (109:169-170). Under this circumstance, the chemist estimated "the blood alcohol concentration could be anywhere between a .077 and .087." (109:170). The chemist also testified that if the shot and Jack Daniels double was not consumed at the last minute, the blood alcohol concentration could have been between .091 and .101. (109:171).

Mr. Huss offered testimony about how much alcohol he had had to drink on the night in question, but his testimony was often rambling narrative, non-responsive, non-linear, and contradictory. (109:137-167). Mr. Huss made many references to surveillance cameras, tapes and flash drives, sting operations, speaking in code and to people putting things in his drinks. (*See e.g.* 109:149, 150, 154, 155). He stated that Officer Collins had arrested him pursuant to a mental commitment in 2016, but that it was because of "another fake story on officers." (109:150).

The prosecutor distilled some of Mr. Huss's rambling testimony, calculating that Mr. Huss had admitted to consuming somewhere between 8-12 drinks over the course of 6 hours that night. (109:148, 164). The defense elicited testimony that the night finished with a Jack and Coke and a shot just before Mr. Huss left the bar, and that he "slammed it fast." (109:166).

In closing, the defense argued that the 0.077 testimony created a reasonable doubt as to the PAC charge. (109:197). The defense further argued that none of the typical indicators of intoxication which would corroborate a blood alcohol concentration of 0.08 or above were present in this case. (109:198). The defense also argued that impairment was not fully investigated because Officer Collins inappropriately lost her cool with Mr. Huss before completing the investigation. (109:199-200).

The state conceded that there was very little evidence of impairment apart from the chemical blood test but, the state argued, it was Mr. Huss's fault for not being cooperative. (109:193, 194). The state asked the jury to rely on the chemist's estimates that put the blood alcohol level at 0.08 or above at the time of driving and find impairment based on that. (109:191, 196).

The jury returned a guilty verdict on both counts, as well as a letter that stated "We the Jury, recommend that though guilty, the defendant would benefit from better/and or extra mental health supervision and support." (83, 90).

This appeal follows.

ARGUMENT

The circuit court erred when it ruled Mr. Huss could not present evidence about his request for a breath test.

The circuit court ruled that evidence that Mr. Huss repeatedly requested a breathalyzer while being investigated for the OWI and that Officer Collins refused to give him one was confusing and prejudicial. (109:104-105; App. 9-10). Specifically, the court held that Mr. Huss was "pick[ing] and choos[ing] which evidence he provides to law enforcement" and because an officer is not obligated to conduct any field sobriety tests, much less give a breathalyzer test, this evidence would confuse the jury "about the officer's legal obligation." (109:104-105; App. 9-10). The court held therefore disallowed it.

But the circuit was wrong in excluding this essential, relevant evidence. With the chemist's testimony that it was possible that Mr. Huss's blood alcohol concentration level was as low as 0.077 at the time of driving, Mr. Huss had a viable curve defense. Thus, any evidence related to the determination of impairment at the time of driving was critical to a determination of guilt or innocence. In a case where there was almost no evidence of actual impairment, this repeated request and its denial – evidence that bears on a consciousness of innocence as well as Mr. Huss's willingness to cooperate despite his mental illness – was essential to the defense.

A. Governing law on OWI/PAC, relevance and standard of review.

In an OWI trial, the state must prove, beyond a reasonable doubt, that the defendant: (1) operated a motor vehicle on a highway and (2) was under the influence of an intoxicant at the time the defendant operated the motor vehicle. WIS JI – CRIMINAL 2669. "Under the influence" means "the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage." *Id.* A jury is typically instructed, as it was here, that

> [n]ot every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

Id. (91:3).

With respect to the PAC charge, the first element is the same but instead of needing to prove the defendant was "under the influence," the state must prove that at the time of driving, the defendant had a blood alcohol concentration of 0.08 grams or more of alcohol per 100 milliliters of blood. *Id.*

Any evidence relevant to these elements is admissible. Wis. Stat. § 904.02. Relevant evidence is

"evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 901.01. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury…." Wis. Stat. § 904.03.

Whether to admit evidence is a discretionary decision. *State v. Raczka*, 2018 WI App 3, ¶7, 379 Wis. 2d 720, 906 N.W.2d 722. Importantly, however, exercising "discretion is not the equivalent of unfettered decision making." *State v. Daniels,* 160 Wis. 2d 85, 100, 465 N.W.2d 633 (1991). To survive appellate scrutiny, a discretionary decision by the circuit court must result from "reasoned application of the appropriate legal standard to the relevant facts in the case." *Id.; see also Raczka,* 379 Wis. 2d 720, ¶7 ("if the exercise of discretion is based on an incorrect legal standard, it is an erroneous exercise of discretion").

There are circumstances under which "the application of an evidentiary rule impermissibly abridges an accused's right to present a defense." *State v. St. George*, 2002 WI 50, ¶51, 252 Wis. 2d 499, 643 N.W.2d 777; *see also State v. Pulizzano,* 155 Wis.2d 633, 647–48, 456 N.W.2d 325 (1990). Whether the application of the evidentiary rule deprives a defendant of constitutional rights is a question of constitutional fact subject to independent appellate review. *St. George*, 252 Wis. 2d 499, ¶16.

B. Evidence of Mr. Huss's repeated request for a breathalyzer was relevant and admissible.

Wisconsin Stat. § 343.303 prohibits the admission of preliminary breath tests results in OWI trials. *See* Wis. Stat. § 343.303 ("[t]he result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest"); *see also State v. Fischer*, 2010 WI 6, ¶4, 322 Wis. 2d 265, 778 N.W.2d 629. But the fact that a test was given – or not – and the reasons it was given or not are regularly presented and admitted in OWI trials. The circuit court's exclusion of evidence regarding Officer Collins's decision not to give the breath test even though Mr. Huss repeatedly requested one in this case was in error.

Evidence of a refusal to perform field sobriety tests or take a preliminary breath test will be admitted on the theory that "the most plausible reason for refusing the test is consciousness of guilt." *State v. Albright*, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980) (regarding the admissibility of breath test refusals); *State v. Mallick*, 210 Wis. 2d 427, 565 N.W.2d 245 (Ct. App. 1997) (regarding the admissibility of field sobriety tests refusals); *see also State v. Lemberger*, 2017 WI 39, 369 Wis. 2d 224, 880 N.W.2d 183. If evidence of a refusal is admissible on the theory that it demonstrates a consciousness of guilt, the corollary must also be true that a request for a breathalyzer is admissible on the theory that it demonstrates a consciousness of innocence. *See*

State v. Hoffman, 106 Wis. 2d 185, 217, 316 N.W.2d 143 (Wis. App. 1982) (evidence bearing directly on consciousness of innocence is relevant).

Along this vein, our supreme court has held that a defendant's explanation for refusing to take a chemical breath or blood test is admissible in an OWI prosecution. *State v. Bolstad,* 124 Wis. 2d 576, 586, 370 N.W.2d 576 (1985). *Bolstad* explained "evidence that would tend to show that the refusal was for reasons unrelated to a consciousness of guilt or the fear that the test would reveal the intoxication, tends to abrogate, or at least diminish, the reasonableness of the inference to be drawn from an unexplained refusal to take the alcohol test." *Id.* Mr. Huss's requests for a breathalyzer show that he was willing and wanted to demonstrate to officers that he did not believe he was impaired at the time of driving. Like Mr. Bolstad's explanation for refusal, Mr. Huss's requests for a PBT "tend to show" that Mr. Huss's refusal to participate in the field sobriety tests was unrelated to a consciousness of guilt or fear that the test would reveal intoxication.

The admissibility of a request for a breathalyzer is also analogous to the way in which a polygraph test may be used at trial. Like the results of a preliminary breath test, the results of a polygraph are inadmissible in Wisconsin. *State v. Pfaff,* 2004 WI App 31, ¶¶ 26-27, 269 Wis. 2d 786, 676 N.W.2d 562. An offer to take a polygraph test, however, is admissible because it "is relevant to the state of mind of the person making the offer." *Id.* Here, Mr. Huss's comments captured on the

audio of the body camera demonstrate that he understood he was being arrested for operating while intoxicated, that he understood the breathalyzer was a test that measured alcohol in his body and that at the time of his arrest, he did not believe that he had consumed enough alcohol such that he would blow over the limit. (*See* Ex. 1).

The fact that Mr. Huss did not cooperate with the HGN test was a significant factor that caused Officer Collins to conclude that Mr. Huss was impaired that night. (109:75). It is a probable and permissible inference from his refusal to cooperate that Mr. Huss did not want to take the test because it would reveal that he was intoxicated. *Lemberger*, 369 Wis. 2d 224, ¶¶19-20. The fact that Mr. Huss was willing and desirous to take a breath test rebuts this inference. As such, Mr. Huss's requests for the breathalyzer "tend to make less probable the fact of intoxication - a fact of consequence in this action" and therefore this evidence should have been admitted. *Bolstad,* 124 Wis. 2d 576, 585-586.

C. Mr. Huss was denied his constitutional right to present a defense.

A defendant has a constitutional due process right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973). The test for whether the exclusion of evidence violates the right to present a defense is an inquiry into whether the proffered evidence was "essential to" the defense, and whether without the proffered evidence, the defendant had "no

reasonable means of defending his case." *State v. Williams*, 2002 WI 58, ¶70, 253 Wis. 2d 99, 644 N.W.2d 919.

The only way Mr. Huss could be acquitted in this case was if he established reasonable doubt as to his impairment and blood alcohol level being at 0.08 or above at the time of driving. Because the chemist testified that Mr. Huss's blood alcohol concentration could have been as low as 0.077 at the time of driving, any evidence that tended to support non-impairment at the time of driving was essential to his defense. In addition to being a complete defense to the OWI charge, if Mr. Huss could establish reasonable doubt as to impairment, it would be far more likely that the low end of the chemist's range was correct, thus increasing reasonable doubt on the PAC charge. As such, in a case where guilt turned on presence of hundredths or thousandths of a gram of alcohol, any fact tending to undermine the impairment conclusion was essential to Mr. Huss's defense.

In a typical OWI trial, a jury will hear about bad driving, fumbling or stumbling, glossy, blood shot eyes, poor performance on field sobriety tests – all things that lead to the conclusion the driver was impaired at the time of driving. Here, apart from the blood alcohol concentration, the only evidence that could suggest intoxication at the time of driving was a rolling stop, a Mr. Huss's drinking before driving and the "little" odor of alcohol, the irrational manner of speaking and the non-compliance with the request to perform one field sobriety test. (109:86). Under the totality of the

circumstances in this case, this is very weak evidence of impairment.

Officer Collins testified that she commonly observes drivers who do not come to a complete stop at that particular intersection and that many drivers she stops are not intoxicated. (109:88-89). The fact that Mr. Huss came to a rolling stop when he made a right hand turn that night does little to support the conclusion that he was impaired at the time of driving.

The fact that the odor of alcohol was present and that Mr. Huss had been drinking prior to driving also adds little to the question of whether Mr. Huss was impaired at the time of driving that night. It is not illegal to drive after drinking in Wisconsin; the law only prohibits a person from driving under the influence of an intoxicant "to a degree which renders him or her incapable of safely driving" or "with a prohibited alcohol content." Wis. Stat. § 346.63(1)(a) and (1)(b). The defense conceded that Mr. Huss had consumed alcohol before driving. The only issue in dispute was whether he had consumed enough of it to render him incapable of safely driving or to put him over the legal limit at the time of driving.

Mr. Huss's irrational speech, or as the prosecution termed it "crazy talk," may have provided probable cause for Officer Collins to believe Mr. Huss was "tweaking out on something" but probable cause to arrest is not proof beyond a reasonable doubt. (109:190). The jury had more information than

Officer Collins had at the time she stopped Mr. Huss.[3] Namely, after hearing all the evidence and observing Mr. Huss, the jury properly deduced that Mr. Huss suffers from a severe mental illness. (83). As such, the jury was aware that Mr. Huss's irrational speech during the OWI investigation, which mirrored his trial testimony, was likely a product of his mental illness rather than impairment due to consuming alcohol.

Thus, the jury was left with Mr. Huss's refusal to take one field sobriety test and the blood alcohol concentration an hour and fifteen minutes after he was driving. As prosecutor stated, "once he is stopped and uncooperative, all we have is the blood test." (109:196). But Mr. Huss wasn't entirely uncooperative.

To be sure, Mr. Huss's condition made the OWI investigation more difficult than it would have been if he wasn't suffering from a severe mental illness. Under the probable cause to arrest standard, Officer Collins did not need to believe it was more likely than not that Mr. Huss was impaired due to an intoxicant, nor did she need to rule out innocent explanations for his unusual behavior.[4] *See e.g. State v. Lange,* 2009 WI 49, ¶33, 317 Wis. 2d 383, 766 N.W.2d 551; *State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125. But Officer Collins might have

[3] Although Officer Collins was involved in Mr. Huss's mental commitment, she testified that she had no recollection of that when she was conducting the OWI investigation. (109:89).

[4] Mr. Huss challenged whether there was probable cause to arrest below but does not renew this challenge on appeal. (47).

recognized Mr. Huss's ramblings for the paranoid delusions they were and rather than screaming at Mr. Huss and arresting him, she might have employed de-escalation techniques so that she could have more effectively evaluated whether he exhibited any of the classic signs of impairment.[5] Her decision to move straight to arrest without attempting either more field sobriety tests or a breath test – particularly in light of Mr. Huss's requests for one – demonstrates a shallow investigation and rush to judgment.

The evidentiary ruling in this case severely handicapped the defense from presenting its theory that Mr. Huss's arrest that night was more a product of a rush to judgment than a contemporaneous conclusion that he was actually impaired. While Officer Collins's decision to arrest without attempting to gather more evidence of impairment doesn't affect the lawfulness of the arrest, it should have made it more difficult for the state to prove its case at trial. As it was, the state was able to argue, contrary to fact, that Mr. Huss was entirely uncooperative and as such there was no way law enforcement could have gathered more information (*see* state's closing: "[Mr. Huss's] lack of cooperation didn't give any

[5] *See e.g.* The United States Bureau of Justice Assistance Police Mental Health Collaboration Toolkit (…[t]hrough effective training, officers learn to identify signs and symptoms of mental illnesses, and how to utilize a range of stabilization and de-escalation techniques, and they learn about disposition options, community resources, and legal issues…) *available at:* https://bja.ojp.gov/program/pmhc/training .

chance to more precisely measure his intoxication at the time.") (109:193).

Evidence of the requests for a breathalyzer and the refusal to perform one shows a rush to judgment on the part of law enforcement as well as consciousness of innocence on the part of Mr. Huss. The presentation of this evidence was essential to his defense and its exclusion denied Mr. Huss his constitutional right to present a defense.

CONCLUSION

For the reasons stated in this brief, Mr. Huss respectfully requests that this Court remand to the circuit court with directions to vacate the judgment of conviction and order a new trial.

Dated this 21st day of March, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3793 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 one or more initials or other appropriate pseudonym or designation 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 21st day of March, 2022.

Signed:
Electronically signed by
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