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COURT OF APPEALS**

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 a Judgment of Conviction Entered in
the Winnebago County Circuit Court, the Honorable
John A. Jorgensen, Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

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

Conceding Mr. Huss's request for a PBT was relevant in this case, the state acknowledges that "a demand for a PBT after arrest is consistent ... with innocence...." (Resp. Br. at 3-4). But, the state argues, it could also be consistent with the state's theory (on appeal) that Mr. Huss was gaming the system. (Resp. Br. at 3-4). This argument only underscores that the request for the PBT is relevant evidence and doesn't explain why it should be excluded. It is for a jury to decide how much weight to assign relevant evidence. *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752, (1990) ("[i]n viewing evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence"). That the parties dispute the significance of Mr. Huss's request or the weight it should be given doesn't make it confusing, unduly prejudicial or otherwise inadmissible.

The state cites the circuit court's reasoning that the jury would be confused about the officer's legal obligation for its position that Mr. Huss's request for the PBT should not be admitted. But this rationale is unreasonable and not supported by law. PBTs, like field sobriety tests, are simply one of the many screening tools used by law enforcement to assist

police in enforcing OWI laws. While it is true that a police officer is not obligated to request a PBT, a police officer is also not obligated to conduct field sobriety tests. *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325, (Ct. App. 1994). Whether an officer chooses to conduct field sobriety tests, what ones were used and how they were conducted are routinely fodder for trial, despite not being obligated to conduct them at all. *See e.g. State v. Mueller*, 2018AP44-CR, unpublished slip op. ¶¶25-26, (Feb. 12, 2019) (Supp. App. 7); *Vill. of Little Chute v. Bunnell*, 2012AP1266, unpublished slip op. ¶8, (Nov. 14, 2012) (Supp. App. 8-12).¹ Because the issue in this case is simply the request for the PBT and there was no test and no result, the fact that a PBT result cannot be presented at trial would not be confusing. The request bears on the defendant's state of mind and the how the investigation was conducted, not on the substantive reliability of the test or how the results may be used.

For this reason, Mr. Huss's request for a PBT is analogous to a request for a polygraph test. The state makes no attempt to distinguish this case from polygraph cases or otherwise refute Mr. Huss's argument that these two situations are analogous. This Court should therefore hold that the rationale governing admissibility of requests for polygraph tests, despite the inadmissibility of polygraph test results, also governs the case at hand. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d

¹ Cited for its persuasive value pursuant to Wis. Stat. § (Rule) 809.23(3)(b).

97, 109, 279 N.W.2d 493. (Ct. App. 1979) (unrefuted arguments are conceded).

Further, the court of appeals has recognized that a request for a PBT is relevant and admissible in trials. In *State v. Delvoye*, 2017AP833-AP, ¶4, unpublished slip op. (July 3, 2018) (App. 3-6), the officer testified that he had requested a PBT from the defendant. The defense objected on the basis that this evidence should be excluded under Wis. Stat. § 343.303 and moved for a mistrial. *Id.* The court of appeals affirmed the conviction, rejecting Delvoye's argument that admitting requests for PBTs was bad public policy. *Id.*, ¶11. *Delvoye* reasoned that Wis. Stat. § 343.303 governs the admissibility of the *result* of a PBT, not a request for one. *Id.*, ¶¶10-12 (emphasis original). The court noted that "prior amendments to Wis. Stat. § 343.303 confirm that plain language of the statute's current version does not mandate the exclusion of evidence regarding requests for preliminary breath tests." *Id.* (discussing the legislative history).² What is good for the goose is good

² In 1980, the statute read: "Neither the results of the preliminary breath test nor *the fact that it was administered* shall be admissible in any action or proceeding in which it is material to prove that the person was under the influence of an intoxicant or a controlled substance." Wis. Stat. § 343.305(2)(a), (1979-80) (emphasis added). The current text reads: The plain text of Wis. Stat. § 343.303 provides "The *result* of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, ..." Wis. Stat. § 343.303 (emphasis added).

for the gander; if the state can present evidence of a request for a PBT, the defense can too.

The state argues that allowing the request for a PBT would require testimony from the officer about “the officer’s training and understanding of the legal significance of a PBT result and the substantive reliability of PBT results.” (Resp. Br. at 4). But this isn’t so. This wasn’t required in *Delvoeye*, nor would it be relevant here. The huge body case law governing suppression claims demonstrates police often act without fully understanding the legal ramifications. Simply because an officer thinks something is legal – or not – will not necessarily make it so. Regardless, a defendant has the right to examine the officer on how the investigation was factually conducted, even when the state is “unsure” if the officer understands the legal consequences if his or her acts. (Resp. Br. at 4).

The state argues that because defense counsel argued law enforcement’s approach to Mr. Huss was to “cuff them and stuff them and send them off to jail,” Mr. Huss effectively presented his defense. This argument misses the point. This statement reveals the intended defense – a rush to judgment and incomplete investigation – but because of the circuit court’s ruling Mr. Huss was stripped of his ability to present a complete defense. When an officer cannot make a determination about impairment after field sobriety tests, a PBT is often used because it will assist the officer in determining whether the suspect is impaired. *Cnty. of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). In this case, without

evidence of field sobriety tests or other overt evidence of intoxication, the officer chose to skip this step. The defense was precluded from asking the officer why she chose to skip this step, even in light of the defendant's desire to cooperate. As a result, the jury was privy only to a truncated version of how the investigation was conducted.

The jury saw that Mr. Huss refused to do the one field sobriety test the officer requested. A logical and reasonable conclusion from this evidence is that this refusal reveals a consciousness of guilt. *State v. Mallick*, 210 Wis. 2d 427, 565 N.W.2d 245 (Ct. App. 1997). If the jury had heard evidence that Mr. Huss was willing to cooperate on some level, this conclusion would have been significantly undermined. Not only does evidence of Mr. Huss's request support consciousness of innocence, it also supports the conclusion that Mr. Huss's refusal to cooperate with the field sobriety tests was a product of his mental illness (rather than either impairment or a consciousness of guilt).

Because there wasn't overwhelming evidence of guilt in this case, any additional relevant facts in Mr. Huss's favor were essential to Mr. Huss's defense. *State v. Williams*, 2002 WI 58, ¶70, 253 Wis. 2d 99, 644 N.W.2d 919. And, because the evidence of guilt was so slim – because an expert opined Mr. Huss's BAC could have been 0.077 at the time of driving – this court cannot conclude, beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *State v. Jackson*, 2014 WI 4, ¶86,

352 Wis. 2d 249, 841 N.W.2d 791. This court should reverse.

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 8th day of June, 2022.

Respectfully submitted,

Electronically signed by

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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 1354 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 8th day of June, 2022.

Signed:

Electronically signed by

Frances Reynolds Colbert

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