STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2022AP181-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

THOMAS W. BATTERMAN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MARATHON COUNTY, BRANCH II, THE HONORABLE MICHAEL H. BLOOM PRESIDING, TRIAL COURT CASE NO. 18-CM-752

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT SHOULD HAVE ALLOWED MR. BATTERMAN TO INTRODUCE EVIDENCE AT TRIAL OF HIS PERFORMANCE ON THE FIELD SOBRIETY TESTS TO IMPEACH THE BLOOD TEST RESULT IN AN OPERATING WITH A PROHIBITED ALCOHOL CONCENTRATION PROSECUTION?

> Trial Court Answered: NO. The trial court concluded that evidence of Mr. Batterman's performance on the field sobriety tests was irrelevant because it could not "find that—that the absence of clues [on the field sobriety tests] correlates with a non-prohibited alcohol concentration in the same way that the presence of clues indicates to officers a certain percentage likelihood that there is a prohibited alcohol concentration." R103 at 101:23 to 102:2; D-App. at 106-07.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents questions of law based upon an uncontroverted set of facts which can be addressed by the application of legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the issue before this Court is premised upon the unique facts of the case and is of such an esoteric nature that publishing this Court's decision would likely have little impact upon future cases.

STATEMENT OF THE CASE

Mr. Batterman was charged in Marathon County with Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a) [hereinafter "OWI"], and Operating a Motor Vehicle with a Prohibited Alcohol Concentration, contrary to Wis. Stat. § 346.63(1)(b) [hereinafter "PAC"], arising out of an incident which occurred on April 10, 2018. R1.

Mr. Batterman retained private counsel who entered a plea of Not Guilty on his behalf to both of the foregoing counts and, on October 19, 2021, a jury trial was held before the Marathon County Circuit Court, the Honorable Michael Bloom presiding. R103.

Immediately prior to trial, the State moved to dismiss the OWI count, and the court granted its motion, dismissing the OWI charge with prejudice. R103 at 85:17 to 86:5. The dismissal of the OWI count, however, gave rise to the question of whether Mr. Batterman would be able to introduce evidence of his performance on the field sobriety tests in order to: (1) give context to why he was arrested and asked to submit to a blood test; (2) avoid the jury speculating about whether he committed another offense, such as operating while intoxicated, prior to his providing a blood sample; and (3) permit Mr. Batterman to proffer that his performance on the field sobriety tests impeached the credibility of the State's blood test results. R103 at 86:14 to 92:13; 96:6 to 98:17; D-App. at 110-16; 117-19.

After entertaining arguments from both parties regarding the admissibility of the field sobriety test evidence, the trial court concluded that: (1) the jury could be adequately instructed not to speculate and (2) it could not conclude that there was any relationship between a person's performance on the field sobriety tests and their alleged alcohol concentration. R103 at 98:18 to 104:4; D-App. at 103-09. Based upon its ruling, evidence of Mr. Batterman's performance on the field sobriety tests was excluded from trial on the ground that it was not relevant. *Id*.

The jury trial proceeded and at the conclusion of the trial Mr. Batterman was found guilty of the Operating with a Prohibited Alcohol Concentration charge. R90.

It is from the adverse decision of the lower court that Mr. Batterman appeals to this Court by Notice of Appeal filed on February 3, 2022. R99.

STATEMENT OF FACTS

On April 10, 2018, Thomas Batterman was stopped and detained in the Village of Rothschild, Marathon County, by Officer Jace Klemm of the Rothschild Police Department for allegedly operating his motor vehicle in excess of the posted speed limit. R103 at 129:4-7; 129:22-25; 131:12-14.

At the time Officer Klemm was following Mr. Batterman, he observed Mr. Batterman make a turn toward a private, gated community. R103 at 132:5-9. Upon observing Mr. Batterman enter this community, Officer Klemm activated his emergency lights and stopped Mr. Batterman. R103 at 132:10-14.

After approaching Mr. Batterman, Officer Klemm ostensibly observed that he had an odor of intoxicants about his person and glassy eyes. R36 at p.2. Based upon these observations, Officer Klemm asked Mr. Batterman to submit to field sobriety testing. *Id*. Mr. Batterman complied with the officer's request. *Id*.

The first test Mr. Batterman performed was the horizontal gaze nystagmus test. R37 at p.2. Mr. Batterman allegedly exhibited five clues of impairment on this test, however, because it was so grossly mis-administered in Mr. Batterman's opinion, he moved to suppress this test prior to trial. R37. Mr. Batterman's motion in this regard was ultimately granted and the HGN evidence was excluded from the jury's consideration. R48.

The second test Mr. Batterman performed was the walk-and-turn test. R36 at p.2. Mr. Batterman allegedly exhibited only one clue of impairment on this test. R36 at pp. 2-3.

The final test Mr. Batterman performed was the one-leg stand test on which he ostensibly presented with only two clues. R36 at p.2.

Based upon his *alleged* failure on the field sobriety tests, Mr. Batterman was placed under arrest for Operating a Motor Vehicle While Under the Influence, contrary to Wis. Stat. § 346.63(1)(a). R1 & R2. Mr. Batterman consented to a blood test and a subsequent analysis of his blood specimen yielded a result of .124 g/100 mL of ethanol. Based upon this result, he was additionally charge with Operating a Motor Vehicle with a Prohibited Alcohol Concentration, contrary to Wis. Stat. § 346.63(1)(b).

STANDARD OF REVIEW ON APPEAL

The question presented to this Court relates to whether evidence of the Appellant's performance on field sobriety tests should have been admitted at trial

in a prosecution for Operating a Motor Vehicle with a Prohibited Alcohol Concentration. This is a question of law based upon an undisputed set of facts, and therefore, merits *de novo* review by this Court. *State v. Jahnke*, 2009 WI App 4, ¶ 4, 316 Wis. 2d 324, 762 N.W.2d 696.

ARGUMENT

I. INTRODUCTION TO THE ISSUES PRESENTED.

At first blush, it appears that the issue presented by this appeal revolves solely around the question of whether the trial court failed to properly apply Wis. Stat. § 904.01—the Rule of Relevancy—to the facts of this case, *i.e.*, whether the trial court erred when it declined to allow counsel to introduce evidence of Mr. Batterman's performance on the field sobriety tests to impeach the accuracy of his blood test result. While this question *is* at issue, there exists a deeper and far more fundamental question presented by this appeal, namely: Whether the trial court impermissibly interfered with Mr. Batterman's constitutional right to present a defense? While interrelated, each of the foregoing issues will be examined separately below.

II. THE TRIAL COURT IMPERMISSIBLY INTERFERED WITH MR. BATTERMAN'S RIGHT TO PRESENT A DEFENSE.

Chief among the concerns Mr. Batterman has with the lower court's exclusion of evidence on the morning of trial relating to his performance on the field sobriety tests administered to him by Officer Klemm is that it interfered with his fundamental constitutional right to present a defense.

A thread of long-standing and well-established common law decisions which jealously guard an accused's "right to present a defense" is tightly woven throughout our constitutional jurisprudence.[1] It first emanates from multiple sources within the language of the Bill of Rights, finding its taproot within Fifth, Sixth, Ninth, and Fourteenth Amendment notions of due process and fundamental fairness. The fact that so vast an expanse of constitutional soil is tilled when examining the right to present a defense is evidence of the right's "bedrock" nature.

Among the seminal federal cases which examine the constitutional right to present a defense is *Chambers v. Mississippi*, 410 U.S. 284 (1973). In *Chambers*,

[1]The right to present a defense is not solely a federally guaranteed right, but it is also woven through the tapestry of the Wisconsin Constitution in Article I, § 7.

the defendant, who was charged with homicide, attempted to raise a defense in which he wanted to (1) treat another individual who confessed to the crime with which Chambers was charged as a hostile witness and (2) introduce the testimony of other witnesses who heard this individual confess to the murder. *Id*. at 291-94. The state, however, moved the circuit court to bar Chambers' defense on the grounds that the Mississippi rules of evidence relating to treating an individual as an adverse witness and admitting hearsay evidence barred Chambers from raising either defense since he could not satisfy their substantive prerequisites. *Id*. at 292-93. The trial court concurred with the state and Chambers appealed his case to the United States Supreme Court. Chambers argued that a state evidentiary rule could not be applied in such a manner as to interfere with his Fourteenth Amendment due process right to present a defense and confront his accusers. *Id*. Relying on *In re Oliver*, 333 U.S. 257 (1948), *inter alia*, the Chambers' Court concluded that Chambers had been denied his due process right to present a defense, and in so finding, reminded the parties that the most fundamental of trial rights includes the right of an accused to have "an opportunity to be heard in his defense. . . . " *Chambers*, 410 U.S. at 294, quoting *In re Oliver*, 333 U.S. at 273. Thus framed, a state evidentiary rule must fail if it runs afoul of the accused's right to present a defense.

Another significant decision which examined the pervasive importance of the right to present a defense is *Rock v. Arkansas*, 483 U.S. 44 (1987). The accused in *Rock* was charged with the manslaughter of her husband. *Id*. at 45. Because the defendant could not remember the events surrounding the night of her husband's murder, she had her memory hypnotically refreshed. *Id*. at 46. When the prosecution learned that the defendant's testimony had been hypnotically refreshed, it moved the trial court to exclude her testimony under an Arkansas rule of evidence which allowed the witness to testify only to those matters which were actually "remembered." *Id*. at 47. The trial court granted the state's motion and the case was appealed to the U.S. Supreme Court. *Id*. On appeal, Rock argued that the lower court's ruling interfered with her constitutional right to testify on her own behalf. *Id*. at 49. Noting that "the most important witness for the defense in many criminal cases is the defendant himself," the Supreme Court held that Rock's Sixth Amendment and Fourteenth Amendment rights had been violated when she was precluded from testifying regarding her refreshed recollection of the events. *Id*. at 52. The *Rock* Court observed that an accused enjoys a "right to present his own version of events in his own words." *Id.*

In Wisconsin, *State v. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, is instructive on the paramount importance afforded the right to present a defense. In *George*, the defendant was charged with having illicit sexual contact with a five-year old child named Kayla. *Id*. ¶¶ 7-8. As part of his defense, the defendant wanted to admit evidence that Kayla had prior sexual contact with two

other children. *Id.* ¶ 11. The State sought to preclude the defendant from presenting this evidence under Wisconsin's Rape Shield Law. *Id.* ¶ 12. Acknowledging the important and necessary protections the Rape Shield Law provides victims of sexual assault, the Wisconsin Supreme Court nevertheless held that the accused's right to present a defense superseded the statute when it observed that Article I, § 7 of the Wisconsin Constitution "'grant defendants a constitutional right to present evidence.'" *George*, 2002 WI 50, ¶ 14 (citing *State v. Pulizzano*, 145 Wis. 2d 633, 645, 456 N.W.2d 325 (1990)). Stringent protections are rightfully afforded the victims of such heinous crimes as sexual assault, but even the strong public policy underlying the Rape Shield Law cannot survive a confrontation with an accused's right to present a defense because the latter is so fundamental to the guarantee of a fair trial. As the *George* Court noted:

> "'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973), or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *California v. Trombetta*, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984); . . . . '"

George, 2002 WI 50, ¶ 14 n.8. Too fine a point cannot be made on the *George* Court's observation that the legislatively-mandated Rape Shield Law does not preclude a defendant's right to present a defense regarding the alleged minor victim's previous sexual encounters. Thus framed, the fact that the circuit court below felt that because Mr. Batterman's defense was not empirically based, it was not germane to Mr. Batterman's attack on the blood test result, should not survive as a reason to preclude Mr. Batterman from presenting a defense.[2] R103 at 103:13-20; D-App. at 108.

The point of all of the foregoing cases is that when there is a conflict between a state statute regarding the admission of evidence and the accused's right to present a defense, it is the right to present a defense which must prevail. Presumably, even though the lower court did not expressly mention Rule 904.02—the rule of evidence precluding the admission of irrelevant evidence at trial—the circuit court concluded that evidence of Mr. Batterman's performance on the field sobriety tests was not relevant to whether his blood test result was accurate. For the reasons set forth immediately below, the court's conclusion in this regard was clearly erroneous.

[2]For a more thorough treatment of just how field sobriety tests are relevant to whether a blood test result is accurate (or inaccurate, as the case may be), see Section III., *infra*.

Field sobriety test evidence is wholly relevant to whether an ethanol test result is accurate and the court may not exclude the same without violating Mr. Batterman's constitutional right to present a defense. If a hearsay statute cannot preclude the admission of evidence in a homicide case; if a statutory rule against the admission of hypnotically-refreshed testimony cannot bar a defendant's testimony; and a Rape Shield Law cannot exclude evidence of a victim's prior sexual contacts, then surely, evidence of field sobriety testing cannot likewise be barred in a prosecution for operating a motor vehicle with a prohibited alcohol concentration. There is simply no rational bases upon which a valid distinction can be drawn between the foregoing body of law and the instant case if Mr. Batterman's fundamental right to present a defense is to remain intact. The lower court should have considered its decision in light of Mr. Batterman's right to present a defense, yet it rejected counsel's argument in this regard. This error renders the circuit court's decision reversible.

III. THE FIELD SOBRIETY TEST EVIDENCE IN THE INSTANT CASE WAS RELEVANT AND THEREFORE ADMISSIBLE UNDER RULE 904.01.

Wisconsin Statutes § 904.01 defines "relevant evidence" as evidence which has "***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. § 904.01 (2021-22)(emphasis added). The express use of the word "any" in the relevancy statute plainly sets a very low bar for determining whether evidence is admissible.

In his seminal treatise on the Wisconsin Rules of Evidence, Professor Blinka comments that "[r]elevance is not an inherent characteristic of any item of evidence; rather, **it involves the relationship between an item of evidence and the proposition it is offered to prove**." D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence,* § 401.1, at pp. 106-07 (4th Ed. 2017)(emphasis added). In terms of "relationships," it cannot be doubted that there is a well-understood and long-standing causal connection between a person's consumption of alcohol and their ability to think clearly and maintain their physical coordination. If no such relationship existed, governments would not have promulgated laws against public intoxication, impaired operation of a motor vehicle, intoxicated possession of a firearm, *etc*. Given the veracity inherent in this observation, Rule 904.01 permits the admission of evidence which "involves the relationship between" field sobriety tests and an ethanol test result if the former has "*any* tendency" to impeach (or

support, if you are the prosecution) the latter.

Mr. Batterman's point in the foregoing regard is perhaps best made by analogy. Assume, *arguendo*, that a law enforcement officer arrests an individual for an operating while intoxicated violation. During the search incident to arrest of the defendant's motor vehicle, the officer locates an open, half-empty bottle of vodka. This vodka bottle represents *direct* evidence that the defendant possessed open intoxicants. On the other hand, it only represents *circumstantial* evidence that the accused was intoxicated while he drove his motor vehicle. Is there any reasonable universe in which a trial court would exclude evidence of the open bottle of vodka simply because no witness ever saw the defendant *actually* consuming the same? It is highly doubtful. Obviously, a trial court would permit the State to introduce evidence of the vodka bottle because it has a relationship to an element of the crime being prosecuted and has a "tendency" to establish that the accused was impaired or had been consuming alcohol at the time he operated his vehicle. The instant case is no different from this hypothetical. The State was attempting to prove that Mr. Batterman had a prohibited alcohol concentration when he drove, and while his physical coordination and mentation are not *direct* evidence of whether he was above the prohibited alcohol concentration, they at least provide *circumstantial* evidence that the alleged alcohol concentration is not accurate given how well he performed on the tests. After all, there was a *reason* the State moved to dismiss the OWI charge prior to the jury trial. That reason was based, at least in part, on the State's belief that the field sobriety test evidence did not support such a charge.

Rule 904.01 "was intended to **broadly** define relevancy." *State v. Hungerford*, 84 Wis. 2d 236, 257, 267 N.W.2d 258 (1978)(emphasis added). As the Wisconsin Supreme Court has observed, "[t]he criterion of relevancy is whether or not the evidence adduced tends to cast **any** light upon the subject of the inquiry," and if so, it is relevant and admissible. *Zdiarstek v. State*, 53 Wis. 2d 420, 428, 192 N.W.2d 833 (1972); *see also, Oseman v. State*, 32 Wis. 2d 523, 526, 145 N.W.2d 766 (1966). In *State v. Alles*, 106 Wis. 2d 368, 316 N.W.2d 378 (1982), the supreme court noted that even if "the evidence introduced at trial may not [be] the most probative evidence available," it is "nevertheless relevant" if it assists the trier of fact at getting to the truth of the matter. *Id*. at 381 n.4.

In fact, Rule 904.01 is to be so broadly construed, it was actually intended to *constrain* a trial court's power to exclude evidence. As Professor Blinka has

observed:

> The **expansive definition** of relevancy in Wis. Stats. § 904.01 is the true cornerstone of the Wisconsin Rules of Evidence. Together with Wis. Stats. § 904.02, it represents a mandate that all evidence proffered at trial must be probative of some fact in issue; where the evidence possess such probative value, it should be admitted unless specifically excluded by some other rule. **The overarching purpose of the relevancy provisions in ch. 904 was to limit the power of the trial judge to exclude evidence on relevancy grounds**.

D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 401.1, at p.108 (footnotes omitted; emphasis added).

Apart from the intended breadth Rule 904.01 was to have, proof that field sobriety tests are relevant regarding whether a person has a prohibited alcohol concentration is borne out by two additional examples. The first of these pertains to § 885.235 which provides that "evidence of the amount of alcohol in the person's blood . . . is admissible on the issue of whether he or she was under the influence of an intoxicant . . . ." Wis. Stat. § 885.235(1g) (2021-22). "Under the influence" is defined as a person being "less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." Wis. JI-Crim. 2663 (Rev. 07/2020). If an alcohol concentration may be used to prove a lack of "clear judgment" and "steady hand," what reason is there to believe that the inverse is not equally true? Mr. Batterman will offer his point in this regard by an example *in extremis*. Suppose that an individual displays zero clues of impairment on all three of the standardized field sobriety tests, but for purposes of this hypothetical, is nevertheless arrested for operating while intoxicated. If the person agrees to submit to a blood test and a later analysis of his blood specimen yields a result of .42 g/100mL, no one could reasonably argue that these two results are intractably at odds with one another. Either there has been a problem with the officer's administration and/or interpretation of the field sobriety tests *or* the laboratory's analysis of the defendant's blood sample is in error. Under the theory adopted by the lower court in this case, if the State elected to proceed merely upon the prohibited alcohol concentration charge, the defendant in this example would not be allowed to impeach the State's blood test result with evidence of his "clear judgment" and "steady hand" during the administration of the field sobriety tests. What sense does this make? If § 885.235 permits the inference of impairment to go in one direction, then surely, § 885.235 provides evidence that the inference could

go in the other direction as well.

The second example relates to the "real world" method of prosecuting operating while intoxicated related offenses. More specifically, in summarizing cases to juries during closing argument, prosecutors will far more often than not argue that the test result introduced during the State's case-in-chief must be an accurate reflection of the defendant's blood alcohol concentration because the defendant would not have performed as poorly on the field sobriety tests as s/he did *unless* the person was, in fact, at the introduced alcohol concentration. Put in lay terms, the State will often proffer to the jury that "the test result must be accurate or why else would Ms. 'X' have exhibited so many clues of impairment during the field sobriety tests?"

What is telling about the foregoing example is that it represents a "two-way street." That is, if an individual's performance on the field sobriety tests can be used to bolster the accuracy of a blood or breath test result during the State's closing argument, the reverse proposition should be equally arguable. It would be patently unfair—and moreover, disingenuous—to permit the State "to have its cake and eat it too" by allowing it to argue that the field sobriety tests buttress, support, or reinforce the blood or breath test result, but then not permit the defendant to proffer that the blood or breath test result must not be accurate given how well the defendant performed during the administration of the field tests. Exemplary performance on the field tests is ***counterindicative*** of a high test result, and is, therefore, relevant evidence.

Moreover, it is well known that a jury is permitted to draw upon the "common stock of knowledge" when rendering a verdict. For at least ninety-years or more, things which are of "common knowledge" need not be specifically proved. *See generally*, *Christiansen v. Schenkenberg*, 204 Wis. 323, 329, 236 N.W. 109 (1931). Insofar as the "common stock of knowledge" relates to the Rule of relevancy, Professor Blinka has observed that "[r]elevancy, then, is 'coextensive with the ingenuity of counsel' in the use of proof. Perhaps it is more useful to think of relevancy as coextensive with **rational thought and common sense**." D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 401.1, at p.108 (emphasis added).

Thus, when a jury retires to deliberate on a prohibited alcohol concentration

offense where the returned value is .124 g/100mL of ethanol—more than fifty percent above the prohibited limit of .08 g/100mL—if it has been permitted to hear evidence of the accused's physical coordination and mentation which is inconsistent with this result, one of the conclusions it may permissibly draw is that the inconsistency between the two elements of each party's case is potentially due to the test result's inaccuracy. This is a permissible conclusion because, as part of the common stock of knowledge, it is well known that the higher an ethanol test result climbs, the far more likely it becomes that the individual will exhibit outward signs of impairment, such as demonstrating poor coordination on field sobriety tests or difficulty in thinking clearly. When evidence of poor coordination and mentation does *not* exist, then the common stock of knowledge allows for an inference, *inter alia*, that the test result may not be accurate.

That the foregoing "common sense" conclusion is true became evident during the lower court's *voir dire* of the jury panel in this case. During its *voir dire*, the court asked the prospective jurors, "Would anyone have a hard time convicting the defendant of operating with a prohibited alcohol content if they didn't see any signs of impairment?" R103 at 12:2-4. One of the prospective jurors raised his hand and commented, "Yeah. I understand the limited amount, but if you can pass all the tests, and you can see everything just fine, I don't see why he should be charged." R103 at 12:6-9. Clearly, this juror understands the point made by Mr. Batterman above, *i.e.*, a person's performance on the field sobriety tests is relevant evidence of whether the test result is accurate.

In the same vein, and perhaps even more tellingly, after the jury had retired for deliberations, it sent a handwritten note to the judge inquiring, "Can we ask, did [Mr. Batterman] ask for [a] Breathalyzer or **to walk the line**?" R103 at 246:24 to 247:1 (emphasis added). The jurors' request for further clarification regarding the administration of a walk-and-turn test clearly demonstrates that it was considering whether the blood test result was, in fact, accurate, and provides proof of its concern regarding whether Mr. Batterman's test result was consistent with his behavior. The outcome of the trial below may have been far different if the jurors had been able to consider evidence of the field sobriety tests as it compared to Mr. Batterman's blood alcohol concentration result. Again, the jury was attempting to draw upon the "common stock of knowledge" when rendering its verdict, and because of the lower court's ruling, was impeded in its effort to do so.

In the end, a performance on field sobriety tests which is inconsistent with the blood test result is relevant evidence that the reported alcohol concentration is not accurate. Mr. Batterman was not permitted to draw upon such an inference despite its relevancy to the question at issue, and this violated not only his constitutional right to present a defense, but violated Rule 904.01 as well.

IV. INCONSISTENCY IN THE COURT'S LOGIC.

There is a final observation Mr. Batterman would make regarding the lower court's ruling in this matter. The court precluded the admission of any testimony that related to the field sobriety tests on the ground that it could not "find that—that the absence of clues [on the field sobriety tests] correlates with a non-prohibited alcohol concentration in the same way that the presence of clues indicates to officers a certain percentage likelihood that there is a prohibited alcohol concentration." R103 at 101:23 to 102:2; D-App at 106-07. There is an inherent and obvious tension in the court's logic, however.

More specifically, the court's statement acknowledges that "the presence of clues indicates . . . a certain percentage likelihood that there is a prohibited alcohol concentration." *Id*. The lower court's recognition of the truth inherent in this observation is supported by NHTSA's *DWI Detection and Standardized Field Sobriety Testing (SFST) Manual*, which repeatedly provides ***specific*** percentages of the chance that an individual has an alcohol concentration above .08% based not only upon a subject's performance on each of the standardized tests individually, but on the tests collectively as well. NHTSA Manual, Session VIII, at pp. 9-22.

The problem inherent in the court's ruling is that if there is a correlation between the clues exhibited and a person having "a certain percentage likelihood that there is a prohibited alcohol concentration," the lower court should have understood that its recognition of this "side of the coin" ***must include*** the acknowledgement of the opposite side of the coin, namely that despite the exhibited number of clues, there always exists a percentage possibility that the alcohol concentration is ***not*** correlated to the number of observed clues because ***none*** of the field sobriety tests are 100% accurate.

For example, NHTSA claims that the horizontal gaze nystagmus test is correct 88% of the time in predicting an alcohol concentration above .08%. NHTSA

Manual, Session VII, at p.9. If this is true, one must conclude that in twelve percent of cases the clues do ***not*** correlate to an alcohol concentration above .08%. Similar percentages regarding the relationship between observed clues and alcohol concentration on the other standardized field tests are also claimed by NHTSA.[3] Obviously, the fewer clues displayed on any test, the less likely it is that a person's alcohol concentration will be above the prohibited limit. Thus, the lower court's assertion "that the absence of clues [does not] correlate[] with a non-prohibited alcohol concentration" cannot be true. The proof of this conclusion is in the pudding in that NHTSA has described a correlation between the number of clues displayed and a subject's alcohol concentration being at or above .08%. Since NHTSA has established a threshold number of clues for making this determination, then any number of clues fewer than the requisite number established by NHTSA for establishing that a person has an alcohol concentration above .08% must necessarily diminish that chance, thereby demonstrating the inconsistency inherent in the lower court's logic when it claimed it could not conclude "that the absence of clues [on the field sobriety tests] correlates with a non-prohibited alcohol concentration." This contradiction is inherent in, and must follow from, the court's recognition that "the presence of clues indicates . . . a certain percentage likelihood that there is a prohibited alcohol concentration."

Distinct and apart from the constitutional and relevancy problems identified in Sections II. & III., *supra*, the lower court's own "logic" in excluding evidence of the field sobriety tests in this case cannot be resolved with itself. As such, this Court should set aside the verdict below and remand this matter to the lower court for a retrial in which Mr. Batterman would be allowed to submit evidence to the jury regarding his performance on the field sobriety tests.

CONCLUSION

Mr. Batterman respectfully requests that this Court reverse the decision of the court below on the grounds that (1) the trial court unconstitutionally interfered with his fundamental right to present a defense when it excluded evidence of his performance on the field sobriety tests, and (2) erroneously applied Rule 904.01 by concluding that the field sobriety test evidence was not relevant to the question of

[3]For the walk-and-turn test, NHTSA claims a 79% accuracy rate "at detecting subjects at or above 0.08 BAC." NHTSA Manual, Session VII, at p.17. The one-leg stand test allegedly has an 83% accuracy rate "at detecting subjects at or above 0.08 BAC." *Id.* at p.22.

whether Mr. Batterman had a prohibited alcohol concentration when he operated his motor vehicle.

Dated this 19th day of April, 2022.

Respectfully submitted:
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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,384 words.

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on April 19, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 19th day of April, 2022.

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