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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STANDARD OF REVIEW.

A. The Authority Upon Which the State Relies Actually Supports Mr. Batterman's Position.

Among the cases cited by the State in support of its proposition that this Court should limit its review of the circuit court's decision to the "abuse of discretion" standard is *Martindale v. Ripp*, 2001 WI 113, 246 Wis. 2d 67, 629 N.W.2d 698. A close examination of this case reveals that it actually supports Mr. Batterman's position.

In *Martindale*, the supreme court addressed whether the testimony of an expert witness, a maxillofacial surgeon, could be admitted regarding how the mechanics of an accident occurred which led to the plaintiff's temporomandibular joint disorder. *Id*. at ¶ 2. The circuit court excluded the testimony of the surgeon based upon the defendant's argument that while the expert could testify about the plaintiff's mandibular joint disorder, the expert could not describe the underlying "mechanics" of the accident itself which supported his conclusion about what "caused Martindale's head and jaw to react" in the fashion it did. *Id*. at ¶¶ 14-17.

Ultimately, the *Martindale* court concluded that the circuit court was in error in precluding the surgeon's testimony about the mechanics of the accident because the surgeon's testimony "would have **assisted the trier of fact in understanding the evidence** and determining the issue of causation." *Id*. at ¶ 46 (emphasis added). The *Martindale* court reproached:

> As a result, the trier of fact never received an explanation of how whiplash could lead to the stretching and tearing of ligament and the displacement of the discs that are part of the TMJs. **In excluding this explanation, the circuit court deprived the jury of expert testimony that could have assisted it in sifting through the evidence and reaching its own conclusion**. 7 Blinka, *supra*, § 702.2, at 473.

Id. (emphasis added). It is important to stress that the *Martindale* court expressly recognized that it is the *jury's responsibility* to "sift[] through the evidence," and in so doing, "**reach[] its own conclusion**." In other words, the *Martindale* court expressed its faith in the jury system and acknowledged that juries should reach

their own conclusions in light of testimony unencumbered by any pre-digestion of the evidence by the court.

The *Martindale* court's faith in the jury system was, however, betrayed in the instant case. If the surgeon in *Martindale* should have been allowed to explain how the accident occurred based upon evidence of the plaintiff's injuries, then so too should Mr. Batterman have been permitted to explain why the test result—the equivalent of the injury in *Martindale*—was counter-indicated by the field sobriety test evidence—the mechanics of the accident in *Martindale*.

The lower court in *Martindale* acted much like the circuit court did in the instant case in that the circuit court's decision was premised upon the fact that the surgeon was not an expert on accident reconstruction. *Id*. ¶ 20. Admission of testimony regarding Mr. Batterman's performance on the field sobriety tests "would have assisted the trier of fact in understanding" that the blood test result was not accurate—just as the surgeon in *Martindale* need not have been an expert in accident reconstruction in order for his opinion to be relevant.

The State also relies upon *State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, for the proposition that the right to present evidence "only grants defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect." State's Response Brief at p.11. The "substantially outweighed by . . . prejudicial effect" standard is codified in Wisconsin Rule of Evidence 904.03. *See* Wis. Stat. § 904.03 (2021-22). It is well established that the exclusion of relevant evidence under a theory that it is unfairly prejudicial must be premised upon a **"*substantial*"** outweighing of that relevance by the alleged prejudice. *Id.*; D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 403.1, at p.163; *State v. Speer*, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993).

The "substantial" outweighing standard is not an easy burden to satisfy as "[t]he rules [of evidence] . . . **favor admissibility**." *Lievrouw v. Roth*, 157 Wis. 2d 332, 350, 459 N.W.2d 850 (Ct. App. 1990)(emphasis added), citing S. Salzburg & K. Redden, *Federal Rules of Evidence Manual*, 184 (4th ed. 1986). As Professor Blinka stated:

> Close cases should be resolved **in favor of admission**. The judge has no discretion to exclude evidence unless convinced that the probative value is *substantially*

> outweighed by the enumerated dangers and considerations: the rule does not extend *carte blanche* to exclude evidence arbitrarily.

D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 403.1, at p.163 (emphasis added), citing *Magyar v. Wis. Health Care Liab. Ins. Plan*, 211 Wis. 2d 296, 564 N.W.2d 766 (1997). In *Speer*, the Wisconsin Supreme Court observed that "[t]he term 'substantially' indicates that if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence **must be admitted**." *Speer*, 176 Wis. 2d at 1115 (emphasis added).

Based upon the foregoing authority, the State's reliance on *St. George* also supports Mr. Batterman's position. The standard applied in *St. George*—requiring that the admission of evidence may only be overcome by prejudice which *substantially* outweighs relevance—"favors admission" of the field sobriety test evidence since common sense dictates that a person's function declines with increasing intoxication. *See* Section II., *infra*.

B. The Appropriate Standard of Review.

Even if one considers that, under cases such as *Martindale* and *St. George*, Mr. Batterman has satisfied the standard of review suggested by the State, Mr. Batterman still maintains that this Court should adopt the *de novo* standard because (1) the facts of this case are undisputed and (2) the circuit court's decision adversely affected his constitutional right to present a defense. From Mr. Batterman's perspective, because the lower court's decision impacted upon his ability to defend the charges levied against him, a fundamental right is at issue under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 7 and 8(1) of the Wisconsin Constitution.

Mr. Batterman's point in the foregoing regard is perhaps best made by analogy. Assume, *arguendo*, that the State withheld exculpatory evidence in a criminal prosecution and a defendant was tried on, and convicted of, the related offense. There is no factual dispute in this scenario. If a question came before this Court regarding whether the defendant's constitutional right to present a defense was denied by the State withholding evidence, this Court would review the matter *de novo*. Mr. Batterman proffers that in his case the circuit court was the party which withheld, so to speak, the exculpatory evidence, and thereby interfered with his constitutional right to present a defense. Substituting the judge for the State in

the foregoing hypothetical yields the same result. In other words, there are occasions in which an evidentiary ruling will impact upon a constitutional right in a manner which merits this Court's *de novo* review of a circuit court's decision. This is precisely such a case.

II. THE RECORD SUPPORTS MR. BATTERMAN'S ASSERTION THAT THE FIELD SOBRIETY TESTS IMPEACH THE BLOOD TEST RESULT.

Mr. Batterman proffered in his initial brief that the incompatibility which exists between his performance on the field sobriety tests and the blood test result impeaches the credibility of the blood test result because, if his alcohol concentration was truly .124 g/100 mL (a result more than 50% over the legal limit), he would not have been able to perform as well as he did on the field sobriety tests. Mr. Batterman posited that his conclusion was a common sense one, *i.e.*, part of the "common stock of knowledge" which holds that as a person's ethanol concentration increases, their physical coordination, balance, and ability to follow instructions decreases.

Common-sense inferences of the type noted above may permissibly be argued to a jury. As Professor Blinka observed in his seminal treatise on the rules of evidence, an attorney's argument based upon common sense inferences "is 'coextensive with the ingenuity of counsel' in the use of proof." D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 401.1, at p.108 (emphasis added). Professor Blinka continued, "Perhaps it is more useful to think of relevancy as coextensive with rational thought and **common sense**." *Id.*

It appears that the jury agreed with Mr. Batterman's conclusion that common sense dictates there must be a diminution in physical and mental coordination when alcohol concentration increases based upon a question the jury asked during its deliberation. The record reflects that the jury sent a note to Judge Bloom during its deliberation which read: "Can we ask, did [Mr. Batterman] ask for Breathalyzer or to walk the line?" R103 at 246:24 to 247:1. This question would *only* have arisen if the jury was questioning whether the roadside field sobriety tests corroborated the blood test result admitted at trial. That is, the jury must have been questioning the accuracy of the test result and wanted to know whether Mr. Batterman's performance on the field sobriety tests (or a roadside breath test) corroborated the

reported ethanol value of the blood test.

Despite what the jury recognized as "common sense," the circuit court remarkably did not. While the lower court expressly acknowledged "that a certain number of clues will indicate X probability that the subject has a blood alcohol concentration of whatever . . . ," it continued that "[i]t is a different question scientifically as to whether the absence of clues correlates in the same way with a person having X probability of being below a prohibited alcohol concentration." R103 at 100:13-20. Not only is the court's reasoning specious, but it flies in the face of the rules of logic. More specifically, if the lower court acknowledges—as it did—that a "certain number of clues" correlates with an "X probability" of an alcohol concentration, then it ***must*** follow that the absence of that threshold level of a "certain number of clues" means that something less than "X probability" of an alcohol concentration exists.

There was no reason for the lower court to conclude that "without **an empirical basis** in the record for me to find that the absence of clues correlates to a lower blood alcohol concentration, . . ." it could not permit the admission of the field sobriety test evidence because "common sense" does not require "empirical" proof or it would not be "common sense." R103 at 103:16-18 (emphasis added).

Assume, *arguendo*, that a law enforcement officer is running a stationary radar trap on a cloverleaf highway off-ramp. The officer observes a vehicle enter the off-ramp at what he believes is a speed in excess of the recommended limit of thirty miles per hour. The officer then engages his radar gun which returns a value of ninety miles per hour for the speed of the vehicle. Thereafter, the officer detains the vehicle and cites the driver for imprudent speed. In this example, the result of the radar return—ninety miles per hour—is the equivalent of a chemical test result in an operating with a prohibited alcohol concentration prosecution.

Assume further, however, that because of the tight turning radius of the cloverleaf off-ramp, it is patently unreasonable to believe the curve could have been negotiated by any vehicle travelling at *three times* the recommended speed. Any vehicle travelling that fast would likely have flown off the radius of the ramp into the abutting culvert. In this fashion, the facts of the case relating to the "lay of the land" are inconsistent with the officer's radar result just as an individual's exceptional performance on field sobriety tests might be inconsistent with the value

of a blood test result returned by a state laboratory.

Employing the lower court's logic to the circumstances of the speeding hypothetical, the accused would never be able to argue that the radar return was inaccurate *despite the fact that the actual physical environment was wholly inconsistent with the radar result*. Adopting the lower court's reasoning that "empirical" evidence would be required means that, in the speeding hypothetical, the defendant would need to retain a physicist to testify regarding such things as the coefficient of friction, angular momentum, centripetal force, *etc*., before the radar result could be impeached. This makes no sense. Evidence regarding the "lay of the land" is entirely relevant, and therefore, should be admissible regardless of whether it is the radius of a cloverleaf impeaching a radar result or field sobriety tests impeaching a blood test result. Put another way, if a person tosses a ball in the air, the common stock of knowledge dictates that it will follow an arced path through the sky and eventually return to earth. One need not retain a physicist to provide "empirical" evidence that the ball will return to the ground, just as one should not be required to provide "empirical" evidence to establish that as a person's ethanol concentration increases, their ability to perform physical and mental tasks diminishes. The circuit court's reasoning is faulted to the point that its prohibition against Mr. Batterman presenting evidence of his performance on the field sobriety tests impermissibly interfered with his right to present a defense.

Regarding Mr. Batterman's invocation of his right to present a defense, the State attempts to factually distinguish cases upon which Mr. Batterman relied in his initial brief, including *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Rock v. Arkansas*, 483 U.S. 44 (1987). State's Response Brief at pp. 12-14. The State, however, misapprehends Mr. Batterman's argument in that Mr. Batterman never offered either of these cases for the premise the State uses to distinguish them, to wit: that his "right to testify" was denied. State's Response Brief at p.13. Instead, cases like *Chambers*, *Rock*, and *In re Oliver*, 333 U.S. 257 (1948), were cited for their underlying proposition that the right to present a defense is among the most bedrock and fundamental of all constitutional rights.

III. THE STATE'S POSITION IS ILLOGICAL.

In a barely comprehensible argument, the State premises a portion of its rebuttal argument upon *State v. Kothbauer*, No. 2020AP1406-CR, 2022 Wisc. App.

LEXIS 374 (Ct. App. May 3, 2022)(unpublished). State's Response Brief at pp. 14-15. Apparently, it relies on *Kothbauer* for the proposition that "strict compliance" with the National Highway Traffic Safety Administration's protocols for administering field sobriety tests is not required. State's Response Brief at p.15. What, precisely, this has to do with the issue Mr. Batterman raises in this appeal is beyond him. The State simply drones on in its brief about how "strict compliance" is not required, but never quite places a bow on its argument and how it actually fits this case.

What the State does do, however, is to claim that Mr. Batterman cannot "have his cake and eat it too" because the lower court excluded the improperly administered horizontal gaze nystagmus [hereinafter "HGN"] test, and therefore, if Mr. Batterman wanted to have the field sobriety test evidence admitted to impeach the blood test result, he must accept the admission of *all* of the field tests, including the HGN. State's Response Brief at pp. 15-16. In a churlish comment, the State characterizes the lower court's exclusion of the HGN test as "inappropriately" made, and then proffers that somehow, if Mr. Batterman wanted to have the remaining field sobriety test evidence admitted, he should have to accept the admission of the HGN evidence as well. State's Response Brief at pp. 15. How does this follow? The State's assertion does not simply border on the absurd, it leaves that boundary *well* over the horizon.

The officer in this case mis-administered the HGN test to the point where the lower court believed the HGN test to be unreliable and therefore in need of exclusion. This decision has *no impact whatsoever* on the reliability of the remaining field sobriety tests. They are wholly independent of one another. Thus, Mr. Batterman *can* "have his cake and eat it too" in the sense that the *unreliable* test is excluded and the remaining *reliable* tests may be—or, more correctly, should have been—admitted. The State must come to realize that the litigation of a criminal matter is not a playground game of "tit-for-tat" engaged between children. Admission of the remaining field sobriety tests would have done *nothing* to rehabilitate the mis-administered HGN test, and therefore, the State's inane argument to the contrary should be rejected outright.

In yet another gross misunderstanding of the law, the State attempts to color Mr. Batterman's argument as an act of jury nullification. State's Response brief at pp.19-21. "Jury nullification" occurs when a jury is asked to return a verdict against

the law (for it being unjust) even in the face of the factual guilt of the accused. *State v. Bjerkaas*, 163 Wis. 2d 949, 961, 472 N.W.2d 615 (Ct. App. 1991). In other words, the "justness" of the law is argued to the jury rather than the factual innocence of the defendant.

There is simply *no part whatsoever* of Mr. Batterman's argument wherein he was or is asking to argue that Wisconsin's prohibited alcohol concentration statute is unjustly applied in the instant case. The State is confusing nullification with the question of whether the field sobriety test evidence was relevant on the issue of whether the blood test result was accurate. This is an entirely factual question which has absolutely nothing to do with the justness of the statute under which Mr. Batterman was prosecuted. Any nullification argument made by the State is, therefore, a distraction which this Court should disregard.

CONCLUSION

Mr. Batterman respectfully requests that this Court reverse the decision of the court below for the reasons set forth above and in his initial brief.

Dated this 3rd day of July, 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 2,940 words.

Dated this 3rd day of July, 2022.

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