STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP0181-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS W. BATTERMAN,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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INTRODUCTION

Thomas W. Batterman petitions this Court to review the court of appeals' one-judge opinion affirming his conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) as a second offense. *State v. Thomas W. Batterman*, No. 2022AP181-CR, 2023 WL 8227560 (Wis. Ct. App. Nov. 28, 2023) (unpublished). He raises a single issue—whether the circuit court erred in excluding evidence of the number of clues a police officer observed when Batterman performed field sobriety tests. (Pet. 4.) Batterman argues that this is an issue of constitutional law that this Court should decide. But it isn't. This is simply an evidentiary matter, and the issue is only whether the circuit court properly exercised its discretion. As the court of appeals recognized, "the circuit court applied the relevant legal standards to the facts of record and used a rational process to reach a reasonable conclusion." *Id.* ¶ 23. Review by this Court is unnecessary and unwarranted.

The State initially charged Batterman with both PAC and operating a motor vehicle while under the influence of an intoxicant (OWI) after an officer stopped him for speeding and investigated for an OWI-related offense. *Id.* ¶ 2. Batterman performed three field sobriety tests before he was arrested. *Id.* ¶ 4. Before trial, the circuit court granted Batterman's motion to exclude evidence of his performance on the horizontal gaze nystagmus (HGN) test. *Id.* ¶ 5. The court later dismissed the OWI charge on the State's motion. *Id.* ¶ 6.

The circuit court then addressed whether evidence of Batterman's performance on the walk-and-turn test and the one-legged stand test were admissible on the PAC charge. Batterman argued that the evidence was exculpatory and therefore admissible. *Id.* 8; (R. 103:88.) He asserted that since evidence of clues of intoxication on field sobriety tests is used to determine whether a person might have a prohibited alcohol concentration, the lack of clues must be relevant to

whether the person's alcohol concentration is above the limit. *Id.* Batterman apparently wanted to ask the arresting officer about his training regarding field sobriety tests. (R. 103:96.) But he provided no offer of proof of what the officer would say, and he provided nothing showing that the lack of clues on field sobriety tests indicates that a person's alcohol concentration is below the legal limit. (R. 103:96.)

The circuit court rejected the defense's argument. It concluded that while "the training that officers receive regarding the administration of field sobriety tests," may generally "indicate[] that a certain number of clues will indicate X probability that the subject has a blood alcohol concentration" exceeding the legal limit, "It is a different question scientifically as to whether the absence of clues correlates in the same way with a person having X percent probability of being below a prohibited alcohol concentration." (R. 103:100.) The court noted that "absence of proof is not proof of absence." (R. 103:100.) The court pointed out that the defense failed to provide "an empirical basis in the record for me to find that the absence of clues correlates to a lower blood alcohol concentration." (R. 103:103.) The court therefore ruled that unless the State "open[ed] the door" by referring to alcohol consumption or impairment, evidence of Batterman's performance of the field sobriety tests was inadmissible. (R. 103:103.) The State did not do so, and the evidence was not presented. The jury found Batterman guilty of PAC. *Batterman*, 2023 WL 8227560, ¶ 13.

On appeal, Batterman argued that "the circuit court erred by excluding evidence of his performance on two field sobriety tests," and that "this evidence was relevant to show that his blood alcohol concentration (BAC) did not, in fact, exceed the legal limit of .08." *Id.* ¶ 1.

The court of appeals rejected Batterman's arguments, concluding that "the circuit court applied the relevant legal standards to the facts of record and used a rational process to reach a reasonable conclusion", and therefore properly exercised its discretion when it excluded the evidence. *Id.* ¶ 23. The court concluded that the circuit court "reasonably determined that while evidence regarding Batterman's performance on the walk-and-turn and one-leg-stand tests would have been relevant as to whether Batterman was intoxicated, it was not relevant as to whether his BAC exceeded the legal limit." *Id.* ¶ 18. The court noted that while Batterman argued that "[o]bviously, the fewer clues displayed on any test, the less likely it is that a person's alcohol concentration will be above the prohibited limit," he "did not provide any evidence in support of this assertion in the circuit court, however, nor has he done so on appeal." *Id.* ¶ 19. The court of appeals also rejected Batterman's argument that exclusion of the field sobriety test evidence violated his right to present a defense, concluding that Batterman forfeited the issue by not raising it in the circuit court, and that since the evidence was not relevant, not being allowed to present it did not violate his right to present a defense. *Id.* ¶ 25–26.

Batterman now seeks review on a single issue—whether the circuit court erroneously exercised its discretion when it excluded evidence of his performance on the walk-and-turn and one-legged stand tests. (Pet. 4.) He argues that this case presents a real and significant issue of constitutional law that is novel yet likely to recur, and that the court of appeals' decision conflicts with another court of appeals' decision. (Pet. 7–10.)

However, the issue is simply whether the circuit court erroneously exercised its discretion when it excluded the evidence after Batterman failed to provide any basis for his assertion that a person's lack of clues on a field sobriety test is relevant to show that his alcohol concentration is not above

0.08. This case does not satisfy any of the criteria for review, so this Court should deny Batterman's petition.

ARGUMENT

1. This Court should deny review because the petition does not satisfy the criteria in Wis. Stat. § (Rule) 809.62(1r).

a. This case does not present a real and significant issue of constitutional law.

Batterman argues that this case presents a "real and significant issue of constitutional law." (Pet. 7–8.) Specifically, he points to the court of appeals' conclusion that his constitutional right to present a defense was not violated because the evidence was not relevant. (Pet. 7.) Batterman complains that the court of appeals erred because it "*never* analyzed whether, under *State v. Pulizzano*, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990), the probative value of the evidence Mr. Batterman sought to admit was substantially outweighed by the danger of unfair prejudice." (Pet. 7.)

Apart from the fact that, as noted by the court of appeals, this issue was forfeited in the circuit court, Batterman's argument is plainly wrong. The constitutional right to present a defense means only the right "to present *relevant* evidence not substantially outweighed by its prejudicial effect." *Pullizano*, 155 Wis. 2d at 646 (emphasis added). The court of appeals concluded that the circuit court properly exercised its discretion in finding that the evidence was not relevant, so Batterman's constitutional right to present a defense was not implicated. *Batterman*, 2023 WL 8227560, ¶ 26. Whether the evidence was relevant is not a real and significant question of federal and constitutional law, so review by this Court is unwarranted.

b. The question presented is not a novel issue with statewide impact.

Batterman argues that the issue he presents has statewide impact because, "There exist ***no*** decisions of this Court which directly address whether field sobriety tests can be used to impeach the reported value of a blood ethanol test result." (Pet. 8.) However, neither the circuit court nor the court of appeals concluded that evidence of field sobriety tests is never admissible. The courts merely recognized that Batterman did not present "any evidence to support a determination that the number of clues observed by the officer in this case showed a particular probability that Batterman did not have a PAC." *Batterman*, 2023 WL 8227560, ¶ 19; (R. 103:103.) Review of the circuit court's discretionary decision to exclude evidence will not have statewide impact, so review by this Court is unwarranted.

c. The question presented is not likely to recur.

Batterman argues that the question presented is likely to recur unless this Court grants review. (Pet. 8–9.) However, again, the issue here is only whether the circuit court erroneously exercised its discretion when it excluded evidence in the absence of a sufficient showing that the evidence was relevant. Review by this Court on that issue is unwarranted.

d. The court of appeals' decision does not conflict with another court of appeals' decision.

Batterman argues that the court of appeals' decision conflicts with the decision in *Columbia County v. Smits*, No. 2023AP241, 2023 WL 8468885 (Wis. Ct. App. Dec. 7, 2023)

(unpublished).[1] It does not. In *Smits*, a civil case involving a first offense PAC charge, the jury heard evidence that the driver "showed clues indicating his having consumed intoxicants on two of the three field sobriety tests." *Id.* ¶ 13. The court of appeals concluded that there was sufficient evidence at trial from which a jury could have reasonably inferred that the driver's alcohol concentration was above 0.08, including the other evidence "of his having consumed intoxicants." *Id.*

Batterman argues that in *Smits*, the court of appeals concluded that evidence of field sobriety tests is relevant, but here the court of appeals concluded that it is not. (Pet. 9–10.) But that is because critical facts governing the relevance inquiry were different here, not because the court of appeals applied a different rule in this case. The issue in *Smits* was whether evidence of field sobriety test performance and other non-chemical evidence of intoxication, was sufficient, in conjunction with a BAC result of 0.08±.005, for a factfinder to resolve in favor of conviction any doubt (under a clear and convincing evidence standard) created by a borderline BAC test that falls within the margin of error. *See Smits*, 2023 WL 8468885, ¶¶ 1, 13.

Batterman's problem is that, unlike in *Smits*, here there is no borderline BAC range the resolution of which could matter. Even giving Batterman the full benefit of the margin of error of the BAC test, whether because of his field sobriety test performance or whatever other evidence he thinks is relevant, his BAC was still far above 0.08 according to uncontradicted scientific evidence, i.e., it was 0.124, over eight times the margin of error the expert in *Smits* testified applies to a blood alcohol test. *Smits*, 2023 WL 8468885, ¶ 4. Other behavioral indicators of intoxication are therefore not

[1] The *Smits* decision is appended to Batterman's petition at 132–40.

relevant under the circumstances of this case where Batterman was convicted only of PAC (not OWI, where evidence of intoxication, as opposed to BAC, would matter). The court of appeals' decision recognizing that Batterman failed to provide anything supporting his assertion of relevance does not conflict with *Smits*, so review by this Court is unwarranted.

2. As the court of appeals recognized, the circuit court properly exercised its discretion when it excluded the field sobriety test evidence.

Batterman argues that the field sobriety test evidence was relevant and should have been admitted. (Pet. 15–19.) But the issue is whether the circuit court erroneously exercised its discretion when it concluded that the evidence was inadmissible. Batterman ignores that as the circuit court recognized, he failed to provide "an empirical basis in the record for me to find that the absence of clues correlates to a lower blood alcohol concentration." (R. 103:103.) And he ignores that as the court of appeals recognized, he did not present "any evidence to support a determination that the number of clues observed by the officer in this case showed a particular probability that Batterman did not have a PAC." *Batterman*, 2023 WL 8227560, ¶ 19.

In his petition, Batterman argues that field sobriety tests are relevant to proving that a person did not have a prohibited alcohol concentration because under Wis. Stat. § 885.235(1g), "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. . . ." (Pet. 16; Wis. Stat. § 885.235(1g) (2023–24).) But Batterman did not make that argument in the circuit court, so he cannot show that the circuit court somehow erred by not considering it. And Wis. Stat. § 885.235 explicitly refers to a person's alcohol concentration being relevant to whether the person is under

the influence of an intoxicant. It says nothing suggesting that the lack of clues on field sobriety tests is relevant to proving that a person's alcohol concentration was below the legal limit.

Batterman also argues that the evidence was relevant because in this case a prospective juror said he did not see why a person who "pass[es]" field sobriety tests should be charged with PAC. (Pet. 19.) However, Batterman did not make that argument in the circuit court. And as the court of appeals recognized, a person "may have a blood alcohol level of .1% or higher and yet reveal no outward signs of intoxication." *Batterman*, 2023 WL 8227560, ¶ 18 (citing *Doering v. WEA Ins. Grp.*, 193 Wis. 2d 118, 146 n.31, 532 N.W.2d 432 (1995)). In addition, a juror's confusion about or frustration over the law is hardly a reason to admit evidence. It instead vividly demonstrates why even if the evidence had any probative value, it would properly have been excluded, because the danger of confusion of the issues and misleading the jury would substantially outweigh the evidence's probative value. Wis. Stat. § 904.03. And again, Batterman made no offer of proof and provided no evidence supporting his assertion that the lack of clues on field sobriety tests indicates an alcohol concentration below the legal limit.

As the court of appeals recognized, "in determining that Batterman's performance on the walk-and-turn and one-leg-stand tests was not relevant to the PAC charge, the circuit court applied the relevant legal standards to the facts of record and used a rational process to reach a reasonable conclusion," and therefore properly exercised its discretion by excluding this evidence. *Batterman*, 2023 WL 8227560, ¶ 23. Batterman has not shown, in the absence of any evidence that the lack of clues on field sobriety tests shows an alcohol concentration below the legal limit, that the circuit court erroneously exercised its discretion. And since a person's constitutional right to present a defense involves only the

right to present relevant evidence, *Pullizano*, 155 Wis. 2d at 646, Batterman's failure to show that the evidence was relevant means that the circuit court's decision did not violate his right to present a defense, even if Batterman had not forfeited that claim.

CONCLUSION

This Court should deny review.

Dated this 9th day of February 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2475 words.

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 9th day of February 2024.

Electronically signed by:

Michael C. Sanders
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