STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2022AP800

CITY OF WHITEWATER,

Plaintiff-Respondent,

vs.

DOUGLAS E. KOSCH,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM CONVICTIONS ENTERED ON MAY 10, 2022, IN THE CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH 2, THE HON. DANIEL S. JOHNSON, PRESIDING

Respectfully submitted,

CITY OF WHITEWATER,
Plaintiff-Respondent

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STATEMENT ON PUBLICATION

The City of Whitewater does not request publication because the issues raised by Mr. Kosch involve the application of well settled rules of law to recurring fact situations.

STATEMENT ON ORAL ARGUMENT

The City of Whitewater does not believe oral argument is necessary because the briefs can adequately present the parties' positions.

STATEMENT OF THE CASE AND FACTS

On September 7, 2019 at 11:20 p.m. Officer Jennifer Ludlum of the City of Whitewater Police Department received a 911 complaint from a City of Whitewater dispatcher that indicated that there had been a domestic incident between a male and female at the Super 8 Motel in the City of Whitewater *R. 88: 4-5*. Officer Ludlum (Ludlum) proceeded to the Super 8 Motel. At the motel she was given a description of a vehicle from a hotel employee who indicated that it was a dark in color SUV. The hotel employee pointed to a vehicle that matched the description that was in a parking lot across the street from the motel. *R. 88: 12-15.* She then ran to her police cruiser and immediately stopped the vehicle that was leaving the area. *R. 88: 4-5*. Ludlum identified the driver as Douglas Kosch (Kosch) and noted that Kosch had slurred speech. She asked him if he had been drinking and he indicated that he had "like two beers" *R. 88: 7*. Ludlum asked Kosch to step out of the vehicle to perform Standard Field Sobriety tests. She testified that she observed 4 out of 6 clues on the Horizontal Gaze Nystagmus Test, this indicated to her that Kosch was possibly impaired by alcohol. *R. 88: 8*. Ludlum then had Kosch perform the Walk and Turn test and she observed 5 out of 8 clues, which indicated to her that Kosch was impaired. *R. 88: 8-9*. Ludlum then had Kosch attempt to perform the One Leg Stand test. Kosch put his foot down three times in less than 30 seconds, which indicated to Ludlum that Kosch was impaired. *R. 88: 9-10*. Ludlum then requested that Kosch submit to a preliminary breath test that he refused to take. *R. 88: 10*. It should be noted that at the suppression hearing, the court agreed with Kosch's attorney's argument that Ludlum made some mistakes in the administration of the field sobriety tests, but the Judge carefully excluded aspects of the tests that could affect the integrity of the results and considered only the aspects that he found were reliable. The court also found that Kosch's lack of cooperation negatively effected Ludlum's administration of the tests. *R.88: 63-70.* After the Field Sobriety Tests and refusal to submit to the Preliminary Breath Test, Ludlum formed the opinion that Kosch was under the influence of intoxicants and placed him under arrest for Operating while Intoxicated.

R. 88: 9-10. He was then taken to the Whitewater police department where he refused to take a breath test.

Kosch filed a motion to suppress alleging that Ludlum did not have reasonable suspicion for the stop, probable cause for the PBT, or probable cause to arrest Kosch. *R. 37: 1-16.*

After hearing the evidence presented at the suppression motion hearing, Judge Johnson denied the motion and stated:

> "I think reasonable inference from these facts is facts is that the officers were speaking in the lobby with an employee of the motel and in the course of executing this investigation and I think it's a reasonable inference from these facts that the employee must have been giving information about the incident because the employee, based on the testimony in this record, then pointed out a specific vehicle to the officer as being involved in the incident in question that the investigation was being conducted related to. So I believe that while it wasn't necessarily pieced together with exact specificity, looking at the totality of the record, it appears that Officer Ludlum was speaking to a hotel employee about this incident, received information about it and then was pointed out this vehicle as the person who was involved in the incident itself. It also appears that this was a hotel employee who is obviously known to Officer Ludlum, so there at least some aspects of trustworthiness related to the statements that were being given to Officer Ludlum. That person, in other words, was putting themselves in a position of being arrested for obstructing or other further investigation if they were not providing truthful information to Officer Ludlum about the incident itself, so I think I can take that into consideration as well." *R. 88: 60-62.*

Kosch demanded a refusal hearing and requested a Jury trial. *R. 8: 1.* Kosch also filed a motion to declare Wisconsin's implied consent law unconstitutional. *R. 45: 1*. The Trial court denied Kosch's motion to declare Wisconsin's implied consent law unconstitutional. *R. 60: 1*.

On April 8, 2022, a Jury trial was held on the OWI citation along with a court trial on the refusal to submit to chemical test charges. Kosch was found guilty of the OWI by the jury and the court found that his refusal to submit to chemical test was unreasonable. *R. 91: 1*; *R. 92: 2*.

ARGUMENT

I. THE RECORD SHOWS THAT LUDLUM HAD A BASIS TO FORM A REASONABLE SUSPICION THAT A CRIMINAL OR NONCRIMINAL OFFENSE MAY HAVE BEEN COMMITTED BY SOMEONE IN THE CAR SHE STOPPED.

In *State* v. *Rutzinksi*, 2001 WI 22, ¶13, 241 Wis.2d 729, 736, 623 N.W.2d 516, the Wisconsin Supreme Court stated the legal standards for warrantless stops:

> "To date, we consistently have conformed our interpretation of Article I, Section 11 and its attendant protections with the law developed by the United States Supreme Court under the Fourth Amendment. *State v. Secrist*, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999). Under both provisions, the constitutional imperative is that all searches and seizures be objectively reasonable under the circumstances existing at the time of the search or seizure. *Whren v. United States*, 517 U.S. 806, 810 (1996); *State v. Waldner*, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). Investigative traffic stops, regardless of how brief in duration, are governed by this constitutional reasonableness requirement. *Whren*, 517 U.S. at 809-10; *State v. Guzy*, 139 Wis. 2d 663, 674-75, 407 N.W.2d 548 (1987). In accordance with this requirement, a police officer may temporarily stop a suspicious vehicle to maintain the status quo while determining the identity of the driver or obtaining other relevant information. *United States v. Hensley*, 469 U.S. 221, 226 (1985); *Guzy*, 139 Wis. 2d at 675. However, to pass muster under the Fourth Amendment and Article I, Section 11, an officer initiating an investigative stop must have, at a minimum, a reasonable suspicion that the driver or occupants of the vehicle have committed an offense. *Hensley*, 469 U.S. at 228; *Guzy*, 139 Wis. 2d at 675. As the United States Supreme Court first articulated in *Terry v. Ohio*, 392 U.S. 1, 27 (1968), this requires that the stop be based on something more than the officer's "inchoate and unparticularized suspicion or `hunch.'" At the time of the stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot. *Id.* at 21-22, 27; *Hensley*, 469 U.S. at 226; *Waldner*, 206 Wis. 2d at 55. When reviewing a set of facts to determine whether those facts could give rise to a reasonable suspicion, courts should apply a commonsense approach to strike a balance between the interests of the individual being stopped to be free from unnecessary or unduly intrusive searches and seizures, and the interests of the State to effectively prevent, detect, and investigate crimes. *Hensley*, 469 U.S. at 228; *Waldner*, 206 Wis. 2d at 56. In every case, a reviewing court must undertake an independent objective analysis of the facts surrounding the particular search or seizure and determine whether the government's need to conduct the search or seizure outweighs the searched or seized individual's interests in being secure from such police intrusion." *Hensley*, 469 U.S. at 228; *State v. McGill*, 2000 WI 38, ¶ 18, 234 Wis. 2d 560, 609 N.W.2d 795; *Waldner*, 206 Wis. 2d at 56. 2001 WI 22 ¶12-15, 241 Wis.2d 729, 736-38, 623 N.W.2d 516.

The offense for which a stop is made can be criminal or non-criminal. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis.2d 406, 415, 659 N.W.2d 394. Here, the record clearly established that Office Ludlum had a basis to form a reasonable suspicion that an occupant of the vehicle had committed an offense.

The records showed that:

1. The City of Whitewater Police Department received a 911 complaint indicating that there had been a domestic incident between a male and female at the Super 8 Motel in Whitewater. *R. 88: 4-5*.
2. Ludlum was dispatched to the motel and upon arrival an employee of the motel pointed to a vehicle that was involved in the incident that was in a parking lot across the street from the motel. *R. 88: 63-70*.
3. Ludlum ran to her squad car and stopped the vehicle soon after it left the parking lot and identified Kosch as the driver. *R. 88: 5*.

In reviewing a Circuit Court's motion to suppress decision, the Court of Appeals applies the clearly erroneous standard to the factual findings. *State v. Smiter*, 2011 WI App 1, ¶9, 331 Wis.2d 431, 793 N.W.2d 920, 922 (2010). The review of whether the facts satisfy the reasonable suspicion constitutional standard is de novo. *State v. Powers* 2004 WI App 143 ¶6, 275 Wis.2d 456, 462 685 N.W.2d 869.

When reviewing reasonable suspicion issues, the courts will review the totality of the circumstance. *Powers*, 275 Wis.2d at 462 ¶7. Here, Office Ludlum was advised that a 911 complaint had been received. The fact that the information Ludlum received was in the context of a 911 call suggests that the circumstances involved an emergency. Here, the emergency caller reported a domestic incident involving a male and female. It is reasonable for a police officer to infer that a domestic incident involving a male and female may be a domestic dispute that may involve domestic violence or may escalate into domestic violence. Ludlum would have been negligent in her duties if she did not stop the vehicle to check if any domestic violence had taken place or was taking place. The stop was a very minimal intrusion and the fact that it involved a potential public safety matter supports the reasonableness of the stop. *Rutzinski* 241 Wis.2d 729, ¶26.

It is also important to note that Ludlum's stop was justified on the grounds that the report of a domestic incident taking place at approximately 11:20 p.m. also suggests that someone disturbed the peace or was involved in disorderly conduct which would be a violation of Whitewater ordinances and state criminal law. The City of Whitewater municipal code ordinance section 7.36.020(12) provides that:

> "No person shall, within the City limits of the City of Whitewater, disturb the peace and good order of the City in any manner."

Also, Whitewater municipal code ordinance 7.36.020(4) provides that no person shall within the City limits in a public or private place engage in violence, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances that in which the conduct tends to cause or provoke a disturbance. In addition, Wisconsin criminal statute 947.01 provides that whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

In a case involving very similar facts to this case, the Ohio Court of Appeals held that a police officer had a sufficient basis for having reasonable suspicion that a crime took place based on dispatch for a domestic dispute. *State* v. *Ronald Neff*, No. C.A. 95-CA-1 (Ohio App June 21, 1995) Court of Appeals of Ohio, Second District, Champaign. In *Neff*, a police officer was advised that individuals in a vehicle had been involved in a domestic dispute. The officer approached the driver to investigate the incident and eventually arrested him for OWI. The defendant filed a motion to suppress evidence on the basis that the officer did not have reasonable suspicion for the stop. The court held that the report of a domestic dispute provided the officer with the requisite reasonable suspicion for the initial stop.

II. LUDLUM HAD PROBABLE CAUSE TO ARREST KOSCH FOR OPERATING UNDER THE INFLUENCE

Probable cause refers to the "`quantum of evidence which would lead a reasonable police officer to believe'" that a traffic violation has occurred. *Johnson* v. *State*, 75 Wis.2d 344, 348, 249 N.W.2d 593 (1977). The evidence need not establish proof beyond a reasonable doubt or even that guilt is more probable than not, but rather, probable cause requires that "`the information lead a reasonable officer to believe that guilt is more than a possibility.'" Id. at 348-49, 249 N.W.2d 593. In other words, probable cause exists when

the officer has "reasonable grounds to believe that the person is committing or has committed a crime." Id. at 348, 249 N.W.2d 593 (quoting Wis. Stat. § 968.07(1)(d)). *State* v. *Popke*, 2009 WI 37 ¶14, 765 N.W.2d 569, 574, 317 Wis. 2d 118 (Wis. 2009).

Ludlum had ample reasons to believe the Kosch had operated under the influence when she arrested him. After stopping the vehicle, Ludlum talked to Kosch and observed he had slurred speech and he stated he drank two beers. *R.88: 7*. Ludlum then asked Kosch to perform field sobriety tests. As described in more detail in the Statement of the Case, those tests showed he was impaired. *R.88: 8-10*. It was appropriate for the circuit court to admit the field sobriety tests evidence even though mistakes were made in their administration. *City of West Bend* v. *Wilkens*, 2005 WI App 36 ¶24, 22, 278 Wis.2d 643, 655, 693 N.W.2d 324.

Based upon these observations, Ludlum requested that Kosch submit to a preliminary breath test which he refused. *R.88: 11*. Ludlum had the right to request the preliminary breath test because she had observed sufficient indications of impairment to meet the "probable cause to believe" standard for requesting a preliminary breath test as set forth in *County of Jefferson* v. *Renz, 603 N.W.2d 541, 231 Wis.2d 293, 317* ¶49, which is a quantum of proof that is less than probable cause to arrest. In *Renz* the indications of impairment the officer observed prior to requesting the PBT were comparative to those observed by Ludlum. *Renz* at 316 ¶48-49. Based upon her interaction with Kosch, Ludlum formed the opinion that he was under the influence of intoxicants and placed him under arrest. *R.88: 11*.

III. THE TRIAL COURT DID NOT ERR IN DENYING KOSCH'S MOTION TO DECLARE WISCONSIN'S IMPLIED CONSENT STATUTE UNCONSTITUTIONAL

A state statute is presumed to be constitutional, and to invalidate a statute a party must prove beyond a reasonable doubt it is unconstitutional. *State* v. *Wood*, 2010 WI 17, ¶15, 323 Wis.2d 321, 780 N.W.2d 63.

The court in *State* v. *Levanduski*, 393 Wis.2d 674, 948 N.W.2d 411, 2020 WI App 53, addressed Wisconsin's implied consent law and how it relates to Fourth Amendment constitutional rights to refuse to submit to a blood draw. The defendant in *Levanduski* argued that using her refusal to submit to a warrantless blood draw as proof against her violated the Fourth Amendment. *Levanduski*, 393 Wis.2d at 666 ¶10-14. The *Levanduski* court disagreed and stated that there have been several decisions approving the general concept of implied consent laws that impose civil penalties. *Id.* at 416. In *Levanduski*, the court resolved an issue arguably left open by *Birchfield v. North Dakota,* 579 U.S. 438, 136 S.Ct. 2160 (2016), by holding that when an officer reads Wisconsin's "Informing the Accused" form to an OWI suspect, and the suspect refuses a blood draw, the refusal can be used against him or her at trial. Specifically, § 343.305(3)(a) states that "upon arrest for a violation of § 346.63(1) a law enforcement officer may request the person to provide one or more samples of his or her blood, breath or urine." If an officer determines that a sample is necessary, he or she must read the "Informing the Accused" form provided in § 343.305(4), which states in part: "If you refuse to take any test that this agency requests, your operating privileges will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court." Wis. Stat. § 343.305(4). The defendant in *Levanduski* argued that using a person's refusal to submit to a warrantless search violates the Fourth Amendment. However, the court in *Levanduski* noted that numerous decisions have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences. Relying primarily on *Birchfield* and *State v. Dalton*, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120, the court concluded that imposing civil penalties and evidentiary consequences for refusals are lawful under the Fourth Amendment as they are distinct from criminal penalties. *Levanduski* at 685 ¶15.

Missouri v. McNeely, 569 US 141 (2013), reinforces the legal precedent of imposing civil penalties for violating the State's implied consent law. Specifically, the court in *McNeely*, citing *Neville* stated:

> States have a broad range of legal tools to enforce their drunk driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense . . . Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution . . . see also South Dakota v. Neville, 459 U.S. 553, 554, 563–564, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination). *McNeely* at 160-161.

Defense counsel argues that this passage was misinterpreted by *Levanduski* and argues that *McNeely* was not a case which directly addressed the constitutionality of implied consent laws. However, by inference to the *McNeely* court's citation to *Neville*, it can be concluded that the *McNeely* court decided that implied consent laws are not a violation of Fourth or Fifth Amendment rights, but rather are an effective tool States can use to ensure the safety of their roadways.

In the case of *State v. Lemberger*, 2017 WI 39, 369 Wis.2d 224, 880 N.W.2d 183, the Wisconsin Supreme Court rejected a claim that trial counsel provided ineffective assistance in failing to challenge the prosecutor's comment on the defendant's refusal to take a breath test. *Lemberger* held that at the time of the trial that, upon his lawful arrest for drunk driving, the defendant had no constitutional or statutory right to refuse to take the breathalyzer test and that the state could comment at trial on his improper refusal to take the test. *Lemberger* 2017 WI 39 ¶29, 880 N.W.2d at 240. The court also noted that the decision in *Birchfield*, confirmed that persons lawfully arrested for drunk driving have no right to refuse a breath test. *Id.* at 636.

Kosch's argument suggests that the court of appeals in *Levanduski* ignored *Griffin* v. *California*, a United States Supreme Court case decided 58 years ago, when deciding *Levanduski*. The court should reject that suggestion. However, if the court does consider that the issue needs to be decided, this court should hold that the *Griffin* decision does not provides a basis for finding Wisconsin's implied consent statute unconstitutional for the reasons stated in *Levanduski*.

IV. THE TRIAL COURT DID NOT ERR IN DENYING KOSCH'S MOTION FOR A MISTRIAL BASED ON ALLEGEDLY IMPROPER CLOSING ARGUMENTS BY THE PLAINTIFF

A. THE PROSECUTIONS COMMENTS WERE NOT IMPROPER

It is the plaintiff's position that the prosecutor's statements were not improper, rather they were general comments suggesting how important the Jury's role is in society and how important it is for operating under the influence law to be enforced. Attorneys are entitled to significant latitude in closing arguments to the jury. *State v. Wolf*, 171 Wis.2d 161, 167, 491 N.W.2d 498 (Ct App. 1992). Attorneys may appeal to the experience and common sense of jurors in closing arguments and jurors are instructed to use their common sense and experience in deciding cases. Wis. JI – Civil 215 (credibility of witnesses; weight of evidence).

In the case of *State* v. *Mader*, (Wis. App 2023) No. 2022AP382-CR (June 7, 2023), which is recommended for publication and is cited for persuasive value in case it is not published, a defendant argued that he should be given a new trial due to ineffective attorney assistance at trial because among other things his attorney did not object to the prosecution's reference to the prevalence of sexual assault in the community as reflected by juror's responses during voir dire was a reason to find a witnesses testimony credible. The court held that that the prosecutor's comments in his closing argument were proper, stating "Attorneys are accorded "considerable latitude in closing arguments." State v. Burns, 2011 WI 22, ¶48, 332 Wis.2d 730, 798 N.W.2d 166. A "prosecutor may 'comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" State v. Draize, 88 Wis.2d 445, 454, 276 N.W.2d 784 (1979) (quoting Embry v. State, 46 Wis.2d 151, 160, 174 N.W.2d 521 (1970)). However, a prosecutor crosses "[t]he line between permissible and impermissible argument" when "suggest[ing] that the jury should arrive at a verdict by considering factors other than the evidence." State v. Neuser, 191 Wis.2d 131, 136, 528

N.W.2d 49 (Ct. App. 1995). The State's comments did not amount to a request that the jury find Mader guilty based on matters not in evidence. Instead, the State simply asked the jurors, in evaluating Beverly's credibility, to consider their experience and knowledge of sexual assault and delayed reporting. We have previously declined to consider similar references to matters within jurors' experience improper. See State v. Nielsen, 2001 WI.App. 192, ¶¶47, 50, 247 Wis.2d 466, 634 N.W.2d 325 (holding that prosecutor's reference to reactions of "[c]itizens out on the street ... when questioned as to why didn't you report [an assault] right away" in closing argument was not improper because it merely "appealed to the jurors to use their common experience and general knowledge of the average person's reaction to frightening events"). State v. Mader (Wis. App. 2023).

The plaintiff's attorney did not suggest that the jury assume the role of a police officer, rather plaintiff's counsel asked the jury to do exactly what jurors are instructed to do, which is to find the defendant guilty if the proof showed he was guilty. "Law enforcement" is a broad phrase that fairly encompasses the concept that a jury finding a defendant guilty if the proof showed he was guilty is enforcing the law.

Here, the prosecutors comments about the effect of the jury's decision are similar to those made by the prosecutor in *State* v. *Camacho,* 501 N.W.2d 380, 176 Wis.2d 860 (Wis. 1993). In *Camacho,* a prosecutor argued that if the Jury were to find the defendant not guilty it would in effect mean the arresting deputy should have been charged and put on trial. The Supreme Court ruled that the argument was not improper. *Camacho* 176 Wis.2d at 886.

B. IF THIS COURT FINDS THAT THE PROSECUTOR'S STATEMENTS IN HIS CLOSING ARGUMENT WERE IMPROPER, THE COURT SHOULD FIND THAT JUDGE JOHNSON DID NOT ERR IN REFUSING TO GRANT A MISTRIAL

A motion for mistrial for improper statements in closing arguments is addressed to the sound discretion of the trial court and will not be reversed unless there is clear evidence that the court erroneously exercised its discretion, and the defendant is prejudiced.

Camacho 176 Wis.2d at 886. The court must determine whether the remarks "so infected the trial with unfairness that as to make the resulting conviction a denial of due process." *State* v. *Wolft*, 171 Wis.2d 161, 167, 491 N.W2d 498, 501 (Ct.App. 1992). Whether the prosecutor's statements affected the fairness of the trial is to be determined by reviewing the statements in context. *State* v. *Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d 49 (Ct.App 1995). In engaging in this exercise, the court must consider the character of the remarks in their proper context, any admonition the court made to the jury, the strength of the evidence apart from the contested remarks, and all other factors which may be relevant in determining the effect of the statements to the jury. *State* v. *Spring*, 48 Wis.2d 333, 339-40, 179 N.W.2d 841 (1970). Unless there are reasons to conclude otherwise, the reviewing court will presume that a jury acted in accord with properly given admonitory instructions. *State* v. *Pitsch*, 124 Wis.2d 628, 645, 369 N.W.2d (1985). Even if the prosecutor's statements during closing arguments are improper, reversal is not warranted if there is sufficient evidence of guilt independent of the remarks to justify the conviction. *State* v. *Dimaggio*, 49 Wis.2d 565, 579-80, 182 N.W.2d 466, 475 (1971).

Judge Johnson addressed the prosecutor's closing argument statements by the following curative instruction:

> I'm simply going to preface my remarks by simply saying that these jury instructions are important and obviously the laws in our state are important. It's important that you consider this case only based on the laws that exist in our state and not based on any emotion. Regardless of whether we do or do not have an OWI problem or -- in this state or in this county, that's not something you should or can consider in determining the guilt or innocence of the defendant here today. You're to look solely at the facts of this case and ultimately make findings regarding what you believe the facts are, apply the law that I'm going to give you to those facts in these instructions and then base your verdict solely on the facts and the law as you find -- the law as I give to you…
>
> It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is or ought to be, you must base your verdict on the law I give you in these instructions. Apply that law to the facts in the case which have been properly proven by the evidence. Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict…
>
> Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion. Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence. Draw your own conclusions from

> the evidence, and decide upon your verdict according to the evidence, under the instructions given you by the court. *R.92: 159-165*

If the prosecutor's comments were improper, this instruction as well as the other standard instructions given to the jury, clearly cured any prejudice to the defendant's case and assured that he received a fair trial. The finding of guilt made by the jury was clearly strongly supported by the evidence in the record showing that the defendant was guilty of the OWI charge. This included:

(1) The defendant had slurred speech. *R.88: 7*.
(2) The defendant admitted he had been drinking beer. *R.88: 7*.
(3) The standardized field sobriety tests indicated that the defendant was impaired. *R.88: 8-10*.
(4) The defendant refused to submit to a chemical test for intoxication. *R.92: 152*.
(5) Ludlum's opinion that she believed Kosch was under the influence of intoxicants. *R.88: 11*.

It is clear that the defendant would have been found guilty of operating under the influence regardless of any improper comments by the prosecutor. The prosecution presented a strong case for the City and there was almost no evidence in the record that would support a finding that Kosch was not under the influence.

Also, even if the prosecutor's statement should not have been made because they were not based on evidence in the record, the comments about OWI being a dangerous life threatening offense were true and thus should be taken into account in the analysis. The Supreme Court of the United States has made similar comments in decisions. See *Missouri* v. *McNeely*, 133 S.Ct. 1552 at 1565 (2013) plurality where the Supreme Court stated "drunk driving continues to exact a terrible toll on our society."

V. LUDLUM'S STOP OF KOSCH'S VEHICLE WAS ALSO VALID BECAUSE SHE HAD REASON TO CHECK ON THE OCCUPANTS BASED ON HER COMMUNITY CARETAKER FUNCTION

Even if Ludlum did not have a reasonable suspicion to stop the vehicle, the stop was valid because it clearly was within the scope of her community caretaker function. Police may conduct a seizure within the meaning of the Fourth Amendment without probable

cause or reasonable suspicion "provided that the seizure based on the community caretaker function is reasonable." *State v. Truax*, 2009 WI APP 60, ¶9, 318 Wis.2d 113, 767 N.W.2d 369. A seizure is justified based on the community caretaker exception if two requirements are met: (1) The police activity must be a "bona fide community caretaker activity", and; (2) The public need and interest must outweigh the intrusion upon the privacy of the individual. *State v. Kramer*, 2009 WI 14, 21, 315 Wis.2d 414, 769 N.W.2d 598. The *Kramer* court (which includes an excellent discussion of the community caretaker function) held that a community caretaker function is bona fide when, under the totality of the circumstances, an objectively reasonable basis for the community caretaker function is shown, and "that determination is not negated by the officer's subjective concerns." *Id*. at 30-32. The court will determine whether an officer's community caretaker function was reasonable by "balancing a public interest or need that is furthered by the officer's conduct against the degree of and nature of the restriction upon the liberty interest of the citizen." *Id.* ¶40. In balancing these interests, the court considers the following factors: (1) The degree of public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished. *Id*. at ¶41.

Here, a report of a domestic incident suggests the possibility of domestic violence. Investigating possible domestic violence is clearly an important community caretaker function of the police. The intrusion caused by Ludlum stopping the Kosch vehicle to check to see if everything was okay was a minimal disruption that potentially would have taken a few minutes if there had been no problems. All the factors the court should consider that support that Ludlum's actions were reasonable.

(1) Degree of public interest and exigency of the situation.

The public has a great interest in quick police intervention in domestic incidents. It can prevent a minor argument from spiraling into domestic violence.

(2) The attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed.

Here, the late time of day, the 911 call and the report of a domestic incident support the decision of officer Ludlum to take the minimal action of stopping a vehicle to check on the occupants.

(3) Whether an automobile is involved.

Stopping an automobile is far less intrusive than entering a residence and therefore supports the minimal intrusion of stopping the car by Ludlum.

(4) The availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Here, there was no effective alternative to stopping the vehicle. It had begun to drive away and the only option Ludlum had was to stop it to check on the occupants.

It is important to recognize that Wisconsin Courts have found police seizure based on the community caretaker function valid under much less important public interest considerations. In *Brier* v. *State*, 76 Wis.2d 457, 251 N.W.2d 461 (1977), The Supreme Court held that a police officer's actions of looking into a garage was justified under his community caretaker function of investigating a noise complaint. *Id*. at 461. In *Kramer*, the court held that it was appropriate for an officer to make a stop of a vehicle legally parked on the side of the road with its flashers activated to check on the occupants. *Kramer* at 46. In *State* v. *Ziedonis*, 707 N.W.2d 565, 2005 WI APP 249, 287, Wis.2d 831 (Wis. 2005), the court held that police were justified, based on the community caretaker function, in entering a home based on facts arising from a loose Rottweiler dog complaint. *Ziedonis* at ¶34.

The Supreme Court of South Dakota, in a case with strikingly similar facts to this case, held that an officer was authorized to stop a vehicle based on his community caretaker function. In *State* v. *Short Bull*, 928 N.W.2d 473 (2019), a police dispatcher received a call from a hotel indicating that there was domestic dispute at the hotel. A police officer was

dispatched to the hotel and was told a vehicle that was involved was in the hotel parking lot. The officer stopped the vehicle in the lot and determined that the driver appeared to be under the influence. After further investigation the driver was placed under arrest for OWI. The driver filed a motion to suppress that challenged the legality of the stop. The court did not decide the reasonable suspicion issue because the defendant did not properly present it, however, the court decided that the stop by the officer was justified under his community caretaker function. The court stated "applying these principles here, we conclude that officer Hold was acting in his community caretaker roll when he stopped Short Bull's vehicle in the hotel parking lot. The information relayed to him described a potentially dangerous situation. The dispatcher advised officer Holt of a "disturbance" at the hotel, which he could reasonably infer was a domestic disturbance involving a couple. Domestic disputes can, in some instances, escalate into violent confrontations involving injury or death to one or both parties. See *United States* v. *Rodriguez*, 601 F.3d 402, 408 (5th Cir. 2010) ("[D]omestic disputes often involve high emotions and can quickly escalate to violence") 928 N.W.2d 473 ¶.18.

Kosch may argue that the court should not consider the community caretaker basis for the stop because it was not argued by the City at the trial court level. Because the trial court found that Ludlum had reasonable suspicion basis for the stop on, the City did not need to rely on a community caretaker argument. However, the court of appeals can affirm a circuit court decision on grounds different than those relied on by the trial court. See *Vanstone* v. *Town of Delafield*, 191 Wis.2d 586, 595, 530 N.W.2d 16, 20 (Ct.App.1995).

VI. THE TRIAL COURT DID NOT ERR IN FINDING KOSCH'S REFUSAL UNREASONABLE

Kosch argues that the circuit court erred by holding that Kosch's statement he would not consent to a breath alcohol test without a lawyer constituted a legal refusal. He claims that it did not constitute a legal refusal because Ludlum did not inform him that he had no right to consult an attorney before making a decision regarding chemical testing.

The Supreme Court has clearly held that police officers are under no affirmative duty to advise defendants that the right to counsel does not apply in the informed consent statute context. *State* v. *Reitter*, 227 Wis.2d 215, ¶53, 595, 660 N.W.2d 646 (Wis. 1999). *State* v. *Lemberger*, 2017 WI 39 ¶27, 893 N.W.2d 240.

Also, for reasons previously argued in this brief, Kosch's claim that the refusal should be found reasonable because Ludlum did not have a reasonable suspicion or probable cause should be rejected.

CONCLUSION

For the reasons stated in this brief, the City of Whitewater requests that the judgments of the circuit court be affirmed.

Dated at Whitewater, Wisconsin, June 26, 2023

Respectfully submitted,

City of Whitewater, Plaintiff
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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 7,423 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: June 26, 2023.

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(3)(b) and that contains, at a minimum:

1. a table of contents;
2. the findings or opinion of the circuit court; and
3. portions of the record essential to an understanding of the issues raised, including oral or written rulings 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 of 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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