STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2022AP1527-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DEBRA J. LEMMEN,

Defendant-Respondent.

APPEAL FROM AN ORDER SUPPRESSING EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL O. BOHREN, PRESIDING

BRIEF OF THE PLAINTIFF-APPELLANT

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INTRODUCTION

Wisconsin courts have consistently rejected the notion that police must witness all—or even most—of the common signs of intoxication before arresting a drunk driver. While one might expect a tipsy motorist to smell of alcohol, admit to drinking, or retain the bottle from which she sipped, our supreme court could be no clearer that probable cause does not hinge on those observations. Instead, circuit courts must assess the totality of the circumstances, gauging whether the collective facts known to police would lead a reasonable officer to believe a driver was probably impaired.

The State appeals because the circuit court wholly abandoned that standard in this case. Although officers knew that Defendant-Respondent Debra J. Lemmen had five prior drunk-driving convictions, just left a bar where she admitted to drinking, struck three parked cars while driving a vehicle that smelled strongly of alcohol, seemingly urinated in her pants, confessed to a concerned bystander that she was drunk, repeatedly lied to officers about her crash, and fell to the floor while gathering her insurance documents, the circuit court still held that police lacked probable cause to arrest her, all because they smelled no intoxicants on her person while speaking through a patio door. This Court should reverse because officers clearly had probable cause to arrest Lemmen without that one missing puzzle piece, and the circuit court would have realized that had it employed the right legal test.

ISSUE PRESENTED

Before entering her home, did police have probable cause to believe that Lemmen operated a motor vehicle while intoxicated or with a prohibited alcohol concentration?

The circuit court answered no.

This Court should answer yes and reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument is warranted. The State anticipates that the parties' arguments will be fully developed in the submitted briefs, and the issue presented involves the application of well-established principles to the facts presented.

STATEMENT OF THE CASE

The charges and procedural history

The State charged Lemmen with operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration, each as a fifth or sixth offense. (R. 21.) The charges arose when a concerned citizen contacted police after seeing Lemmen crash her Jeep into three parked cars in the middle of the afternoon, spurring an investigation that led several officers to arrest Lemmen inside her home. (R. 3:2–5.)

Lemmen later moved to suppress all evidence gathered after that warrantless entry, arguing that police unlawfully intruded into her home "under the pretext of a community caretaker investigation." (R. 38:1–2.) The court subsequently convened an evidentiary hearing where Officer Ryan Crouse testified. (R. 52:5, A-App. 8.) The following is a summary of Officer Crouse's testimony.

The hit-and-run complaint

Officer Crouse was dispatched to investigate a hit-and-run incident one afternoon after a witness called to report a Jeep that hit several parked cars and continued down the street to a nearby apartment complex. (R. 52:9–10, A-App 12–13.) Upon arrival, Officer Crouse spoke with the caller, who said she saw the Jeep strike and damage the mirrors of three parked cars. (R. 52:10, A-App. 13.) She also advised that she checked on the Jeep's driver, who responded to the effect of,

"I'm a little drunk, other than that I'm all right." (R. 52:10–11, A-App. 13–14.)

The witness pointed Officer Crouse to the nearby Jeep that had visible "scuff and scrape marks" and a folded, broken mirror on the passenger side, which were consistent with the witness's statement that the southbound vehicle's passenger side struck several parked cars. (R. 52:11–12, A-App. 14–15.) As he neared, Officer Crouse saw keys on the Jeep's floor, and he noted "the strong odor of intoxicants" coming from the vehicle's open windows. (R. 52:12, A-App. 15.)

Upon running the Jeep's license plate, Officer Crouse learned from dispatch that the vehicle owner, Lemmen, had five prior OWI convictions and lived in a nearby apartment building. (R. 52:13, A-App. 16.) After conferring with a sheriff's deputy, Officer Crouse entered that building and repeatedly knocked on Lemmen's door.[1] (R. 50 at 02:31–03:34; 52:13–14, A-App. 16–17.) Lemmen did not respond or open the door, but Officer Crouse "could hear what sounded like somebody rubbing up against the inside door" as if "somebody was touching the door from the inside." (R. 52:14.)

Having identified himself as a police officer, Officer Crouse instructed Lemmen to open her door after disclosing that he could hear her inside the apartment. (R. 50 at 03:55–04:10; 52:14, A-App. 17.) Officer Crouse knocked louder when Lemmen did not respond, reidentified himself, and demanded that Lemmen open the door. (R. 50 at 04:11–04:42; 52:14, A-App. 17.) When Lemmen refused to answer, the assisting deputy exited the building, and Officer Crouse followed to find

[1] The circuit court admitted into evidence only the viewed portions of Exhibit A, the video captured by Officer Crouse's body camera. (R. 52:39–40.) Based on the timestamps stated by defense counsel, it appears that the video was played from 2:31 to an unidentified point after 14:20, when officers entered Lemmen's home. (*See* R. 52:34–38.)

the deputy now speaking with Lemmen through her patio door. (R. 50 at 04:55–05:05; 52:14–15, A-App. 17–18.)

Officer Crouse was no stranger to drunk-driving investigations; he graduated from the police academy after four to five months of instruction, completed three additional months of field training, and served the Pewaukee Police Department for two and a half years thereafter. (R. 52:5–6, A-App. 8–9.) His education and training taught him to look for common signs of motorist impairment, which included "[o]dor of intoxication, bloodshot eyes or glossy eyes, loss of dexterity . . . and slurred speech." (R. 52:7, A-App. 10.)

Those indicators were on full display as Officer Crouse spoke with Lemmen through her patio door. When he explained that he arrived to talk about her car, Officer Crouse noted Lemmen's movements were slow, she had seemingly "urinated herself," and her speech was noticeably slurred as she answered, "I have a Jeep." (R. 50 at 05:13–05:54; 52:15, A-App. 18.) Upon notifying her of the hit-and-run complaint, Lemmen repeatedly denied striking any vehicles or doing anything wrong. (R. 50 at 05:18–05:27, 06:05–06:10, 07:02–07:06, 07:54–07:56; 52:15, A-App. 18.) But when asked what happened to her vehicle, Lemmen had no explanation for the damage it had sustained. (R. 50 at 05:28–05:48.)

Lemmen repeatedly declined to step outside at the officers' request and continuously stalled, trying to leave for the bathroom, claiming that she would come out soon, and staring at officers while standing in her living room. (R. 50 at 05:48–06:00, 06:20–06:30, 06:39–07:20.) Lemmen conceded that she just left a bar known as "Billy Ho's," where she was drinking a beer, and she denied having any more drinks since arriving home. (R. 50 at 05:58–06:05, 08:20–08:45; 52:16–17, A-App. 19–20.) Dispatch confirmed Lemmen was subject to a .02 prohibited alcohol concentration restriction. (R. 50 at 12:30–12:35; 52:18, 36, A-App. 21, 39.)

Thereafter, while retrieving her automobile insurance documents, Lemmen sat on her couch and fell to the floor. (R. 50 at 14:16–14:22; 52:20, A-App. 23.) Officers then entered Lemmen's apartment through the open patio door. (R. 50 at 14:21–14:30; 52:20, A-App. 23.) After checking on Lemmen's welfare, officers helped her to her feet, arrested her, and escorted her outside. (R. 50 at 18:15–22:47; 52:21–23, A-App 24–26.) Later, officers brought Lemmen to the hospital to interview her and secure a blood sample. (R. 52:29–30, A-App. 32–33.)

The court's ruling

The court granted Lemmen's suppression motion in an oral ruling. (R. 52:55, A-App. 58.) The court confirmed that it read *Felix*,[2] which adopted the Supreme Court's so-called "*Harris* rule" that a court need not suppress evidence obtained from a party outside her home, even after an earlier unlawful, warrantless home entry, if police had probable cause to arrest the party before the entry occurred. (R. 52:50–51, A-App. 53–54.)

Applying that rule to Lemmen's case, the circuit court questioned whether police had probable cause before entering her home, ultimately determining they did not. (R. 52:51–55, A-App. 54–58.) The court explicitly based its decision "on the lack of any real person-to-person contact with the defendant and no way to make the judgment about her." (R. 52:54, A-App. 57.) The court opined that the odor of intoxicants was a "major aspect of that officer's knowledge" in *Larson*,[3] another appellate case that examined whether police had probable cause to arrest a drunk driver. (R. 52:53–54, A-App. 56–57.)

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[2] *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775.

[3] *State v. Larson*, 2003 WI App 150, 266 Wis. 2d 236, 668 N.W.2d 338.

Although it found that officers had observed Lemmen's slurred speech, her slow movements, the odor from her car, the fact she seemingly "urinated herself," and her reduced .02 prohibited alcohol concentration limit, the court nevertheless concluded that police lacked probable cause to arrest Lemmen because "[t]he strongest evidence the State has was the alcohol odor from the car. They don't have any alcohol odor from the defendant." (R. 52:51–52, 54–55, A-App. 57–58.)

The court later issued a written order suppressing evidence. (R. 49, A-App. 3.)

The State appeals. (R. 53.)

STANDARD OF REVIEW

In reviewing a decision on a motion to suppress evidence, this Court applies a two-step standard of review. *State v. Felix*, 2012 WI 36, ¶ 22, 339 Wis. 2d 670, 811 N.W.2d 775. It first upholds the circuit court's factual findings unless clearly erroneous, and it independently applies constitutional principles to those facts, deciding de novo whether police conduct violated a defendant's constitutional right to be free from unreasonable searches and seizures. *Id*.

ARGUMENT

The circuit court erred by suppressing evidence gathered from Lemmen after police removed her from her home.

Conceding that police unlawfully entered Lemmen's apartment, the State argued below that evidence gathered after removing her from her home should not be suppressed under the so-called *Harris* exception to the exclusionary rule. (R. 52:24–26, A-App. 27–29.) The circuit court took no issue with that cited legal principle but found it inapplicable based on its view that officers lacked probable cause to arrest Lemmen when they entered her home. (R. 52:50–55, A-

App. 53–58.) This Court should reverse because officers plainly had probable cause to arrest Lemmen before entering her home, even if they did not smell intoxicants on her person.

A. Not every Fourth Amendment violation warrants evidence suppression.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures." *State v. Adell*, 2021 WI App 72, ¶ 15, 399 Wis. 2d 399, 966 N.W.2d 115. "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull,* 480 U.S. 340, 347 (1987).

The fruit of the poisonous tree doctrine dictates that evidence gathered as either an indirect or direct result of a Fourth Amendment violation is subject to the exclusionary rule if that evidence "has been come at by exploitation of that illegality." *Wong Sun v. United States*, 371 U.S. 471, 484, 488 (1963). However, "[t]he exclusionary rule is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97 (citing *Herring v. United States*, 555 U.S. 135, 141 (2009)). Whether exclusion is suitable in a specific case is a separate question from "whether the Fourth Amendment rights of the party seeking to invoke the rule were violated." *State v. Phillips*, 218 Wis. 2d 180, 210, 577 N.W.2d 794 (1998) (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)).

In *New York v. Harris*, the Supreme Court held that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after [a warrantless] arrest made in the

home in violation of *Payton*." 495 U.S. 14, 21 (1990). The *Harris* exception derives from the principle that the warrant requirement for an in-home arrest protects an individual from an unreasonable search of the home, but not from a seizure that is supported by probable cause. *Minnesota v. Olson*, 495 U.S. 91, 95 (1990). Accordingly, because the in-home arrest warrant rule—the *Payton* rule—protects the individual from an unreasonable search of the home, evidence obtained outside of the home is not subject to exclusion if probable cause supported the arrest. *Harris*, 495 U.S. at 21.

In *Felix,* the Wisconsin Supreme Court recognized that *Harris* established a per se rule regarding statements, and concluded that the "*Harris* rule [is] applicable to physical evidence obtained from the defendant outside of the home." *Felix*, 339 Wis. 2d 670, ¶ 49. The court reasoned that "[u]nder the *Harris* rule, police are sufficiently deterred from violating *Payton* because 'the principle incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, *inside the home*.'" *Id.* ¶ 40 (emphasis added) (citing *Harris*, 495 U.S. at 20). "There is no compelling reason to go further and suppress evidence lawfully obtained from a defendant outside of the home." *Id.*

B. Probable cause is a low bar that deals with plausibility, not certainty.

"Police have probable cause to arrest if they have 'information which would lead a reasonable police officer to believe that the defendant probably committed a crime.'" *Felix*, 339 Wis. 2d 670, ¶ 28 (citation omitted). A probable cause determination is made by "looking at the totality of the circumstances," and it is a "flexible, common sense measure of the plausibility of particular conclusions about human behavior." *State v. Lange*, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 766 N.W.2d 551. There must be more than a possibility or

suspicion that the defendant committed an offense, but "the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). "When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest." *State v. Kutz*, 2003 WI App 205, ¶ 12, 267 Wis. 2d 531, 671 N.W.2d 660.

Particularly relevant to Lemmen's case, our supreme court has affirmatively recognized, "Although evidence of intoxicant usage—such as odors, an admission, or containers—ordinarily exists in drunk driving cases and strengthens the existence of probable cause, such evidence is not required. The totality of the circumstances is the test." *Lange*, 317 Wis. 2d 383, ¶ 37.

C. Even without smelling intoxicants on her person, police had probable cause to arrest Lemmen before entering her home.

This Court should reverse the order suppressing evidence of Lemmen's extreme intoxication because the State proved that police had probable cause to arrest Lemmen before entering her home, and that probable cause existed even though Officer Crouse detected no odor of intoxicants on Lemmen's person as he spoke to her through a patio door from several feet away.

Officer Crouse began to form probable cause to arrest Lemmen well before the two ever had face-to-face contact. He knew from a concerned caller that a vehicle failed to stop after crashing into several parked cars. (R. 52:9–10, A-App. 12–13.) Upon his arrival, the same witness pointed Officer Crouse to the Jeep involved in the hit-and-run incident and explained how it had damaged the mirrors of three parked cars. (R. 52:10–11, A-App. 13–14.) Even more disturbing than just

leaving the accident scene, the witness stated that the Jeep's driver openly confessed that she was drunk. (R. 52:10–11, A-App. 13–14.)

Though he did not personally make those observations, Officer Crouse was allowed to rely on the civilian's account during his probable cause assessment. Wisconsin courts have consistently held that information supplied by civilians may contribute to probable cause supporting an arrest. *See, e.g., State v. Stewart*, 2011 WI App 152, ¶¶ 15–22, 337 Wis. 2d 618, 807 N.W.2d 15 (probable cause to arrest alleged cocaine dealer based on confidential informant intelligence); *State v. McAttee*, 2001 WI App 262, ¶¶ 9–15, 248 Wis. 2d 865, 637 N.W.2d 774 (probable cause to arrest homicide suspect based on confidential informant intelligence); *State v. Paszek*, 50 Wis. 2d 619, 630–31, 184 N.W.2d 836 (1971) (probable cause to arrest alleged marijuana dealer based on pharmacy clerk claiming that suspect offered to sell her drugs).

Officer Crouse was especially justified in relying on information from the concerned citizen in this case, as she made no attempt to conceal her identity and provided many details that were quickly corroborated during the officers' investigation. In assessing the weight owed to that citizen report, Wisconsin law recognizes several types of civilian informants and the degree of reliability attributed to each. On one end of the spectrum are citizen informants, or "someone who happens upon a crime or suspicious activity and reports it to police," which courts consider "among the most reliable informants." *State v. Miller*, 2012 WI 61, ¶ 31 n.18, 341 Wis. 2d 307, 815 N.W.2d 349. Slightly less credible, but still reliable "if he or she has provided truthful information to police in the past," are confidential informants who may assist officers in catching criminals despite having a criminal record themselves. *Id*. And on the complete other end of the spectrum are anonymous informants whose identity remains unknown even to police, information from whom might be considered

only if police can successfully corroborate certain details of their anonymous tip. *Id.*

Here, as a person who witnessed Lemmen's suspicious (and highly dangerous) driving behavior, reported it to police, and stayed on scene long enough to meet face-to-face with law enforcement, the woman who spoke with Officer Crouse fell squarely within the definition of the most reliable citizen informant. *See id.* Still, Officer Crouse took additional steps to confirm her veracity; advised that the Jeep hit several vehicles, Officer Crouse approached and inspected it, finding damage consistent with the citizen statement. (R. 52:11–12, A-App. 14–15.) And aware of the driver's supposed confession, Officer Crouse found that the Jeep smelled strongly of alcohol—an odor one would naturally expect to find coming from vehicle recently driven by a woman who admitted she was drunk. (R. 52:10–12, A-App. 13–15.)

The concerned witness's account and Officer Crouse's immediate corroboration plainly reinforced his suspicion that the Jeep's driver was probably drunk. While one might say that dangerous driving is dangerous driving, Wisconsin law appreciates a line separating mere erratic or unlawful driving from "driving that suggests the absence of a sober decision maker behind the wheel." *Lange*, 317 Wis. 2d 383, ¶¶ 24–29. Though maybe not as "wildly dangerous" as that described in *Lange*, Lemmen's driving was not just erratic or unlawful, either; one would hardly expect a sober motorist to smash into three parked cars while driving a Jeep that smelled strongly of alcohol, yet Lemmen did exactly that. *Lange,* 317 Wis. 2d 383, ¶ 24. (R. 52:9–12, A-App. 12–15.)

Lemmen's candid confession to the concerned witness was also highly inculpatory. Indeed, one might reasonably ask why Officer Crouse would doubt Lemmen's self-assessment that she was "a little drunk" when this Court has previously determined statements like Lemmen's reveal consciousness of guilt contributing to probable cause to arrest. *See, e.g., State*

v. Wille, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994) (probable cause based, in part, on police hearing suspected drunk driver utter that he had "to quit doing this").

If her reckless driving, her inculpatory admission, and the alcohol odor emitting from her Jeep were not enough to convince police that Lemmen was probably too impaired to drive, Officer Crouse's record check gave even more cause for concern. By running the Jeep's license plates, Officer Crouse found that its owner, Lemmen, had five prior operating-while-intoxicated convictions. (R. 52:13, A-App. 16.) By operation of Wisconsin law, and later verified by dispatch, Lemmen's significant drunk driving history subjected her to a reduced prohibited alcohol concentration limit of only .02, one-quarter of the standard .08 limit that applied to other drivers. (R. 52:18, A-App. 21.) Officer Crouse could consider Lemmen's lengthy drunk-driving history and reduced prohibited alcohol concentration limit during his probable cause assessment. *State v. Blatterman*, 2015 WI 46, ¶ 36, 362 Wis. 2d 138, 864 N.W.2d 26.

If any doubt remained that Lemmen drunkenly crashed her vehicle that day, her ensuing conduct and statements to police certainly did her no favors. After refusing to answer her door to officers knocking and identifying themselves, Lemmen finally spoke with Officer Crouse and a deputy through her patio door, where she slurred her words, paced through her home in what appeared to be urine-soaked pants, and admitted that she owned a Jeep but had no explanation for the damage it had sustained, insisting that she struck no vehicles that morning. (R. 50 at 05:13–05:54, 06:05–06:10, 07:02–07:06, 07:54–07:56; 52:14–15, A-App. 17–18.) Officer Crouse was entitled to consider not just the obvious physical signs of Lemmen's intoxication but also her lies suggesting consciousness of guilt. *State v. Kennedy*, 2014 WI 132, ¶ 22, 359 Wis. 2d 454, 856 N.W.2d 835 (driver's slurred speech a consideration supporting probable cause to arrest); *State v.*

Babbitt, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (driver's "slow and deliberate" walking and evidence of consciousness of guilt contributed to probable cause supporting arrest).

To her credit, Lemmen did not lie about everything that morning, but her limited honesty with police did not help her. She openly admitted to Officer Crouse that she was drinking at a bar before returning home that day, where she had no additional drinks. (R. 50 at 05:58–06:05, 08:20–08:45; 52:16–17, A-App. 19–20.) While not a probable cause requirement, *Lange*, 317 Wis. 2d 383, ¶ 37, Lemmen's admission only reinforced what was already rather obvious given that she—a perennial drunk driver subject to a reduced prohibited alcohol concentration limit—crashed her Jeep into three parked vehicles, fled the scene without notifying police, left her Jeep reeking of booze in a nearby parking lot, told a concerned onlooker that she was drunk, retreated to her home without changing her urine-soaked pants, paced through her apartment rather than answering the officers' constant knocking, and repeatedly lied to police about hitting several parked cars: Lemmen had consumed too much alcohol to be on the road that day, especially for someone prohibited from driving with even a negligible blood alcohol concentration.

If even that wasn't enough, there was the final straw that led police to enter Lemmen's apartment: Officer Crouse saw Lemmen fall completely to the floor while attempting to sit on her living room couch. (R. 50 at 14:16–14:22; 52:20, A-App. 23.) Undoubtedly one of the most obvious indicators of impairment that he observed that day, Officer Crouse could consider Lemmen's ailing balance and coordination when assessing whether he had probable cause to arrest her for drunk driving. *Babbitt*, 188 Wis. 2d at 357.

Yet despite the mountains of evidence presented, the circuit court held that officers still lacked probable cause to arrest Lemmen because they could not smell alcohol on her

person before entering her home. (R. 52:54–55, A-App. 57–58.) There are two apparent reasons the circuit court's decision warrants reversal.

First, the circuit court's decision plainly defies binding precedent. The supreme court could be no clearer that the odor of intoxicants, while routinely detected during drunk-driving investigations, is not required for probable cause. *Lange*, 317 Wis. 2d 383, ¶ 37. Instead, the court reaffirmed that the test remains the "totality of the circumstances." *Id.*

Here, the circuit court paid mere lip service to that test. It appeared initially inclined to consider the totality of the circumstances as required, recounting that officers (1) spoke to a witness who saw Lemmen crash her Jeep into several cars, (2) smelled alcohol coming from Lemmen's vehicle, (3) heard Lemmen's slurred speech, (4) noticed Lemmen's "strained" and "slow[ed]" movements, (5) observed that Lemmen was nervous and had seemingly "urinated herself," and (6) learned Lemmen was subject to a reduced prohibited alcohol concentration limit. (R. 52:51–52, A-App. 54–55.) Unfortunately, the court then abandoned the totality of the circumstances to hyperfixate on one missing puzzle piece: the lack of alcohol odor coming from Lemmen's person. (R. 52:52, 55, A-App. 55, 58.)

Given its earlier recitation of facts that collectively supported probable cause to arrest Lemmen, the court's ensuing comments appeared to elevate the odor of alcohol emitting from a drunk-driving suspect as dispositive in its probable cause analysis. In other words, the court seemed to base its decision entirely on the existence (or absence) of one single fact: police would have had probable cause to arrest Lemmen if officers smelled alcohol on her person, but they came up short without it. But that is the antithesis of a totality-of-the-circumstances test circuit courts are required to employ, and it is certainly not supported by any authority referenced by the circuit court.

In reaching its decision, the circuit court seemed to draw a bright-line rule from *State v. Larson*, 2003 WI App 150, 266 Wis. 2d 236, 668 N.W.2d 338, that probable cause to arrest a drunk driver cannot exist without the odor of intoxicants coming from the person—a fact it labeled "a major aspect of that officer's knowledge" in that case. (R. 52:53–54, A-App. 56–57.) But this Court held no such thing in *Larson*, and even if it had, the supreme court's later decision in *Lange* leaves no question that the odor of intoxicants is *not* an absolute prerequisite for probable cause to arrest an impaired motorist. *Lange*, 317 Wis. 2d 383, ¶ 37.

To be clear, *Larson*'s holding that police lacked probable cause to arrest the defendant did not hinge on the mere absence of intoxicant odors coming from a driver. Rather, this court employed the correct totality-of-the-circumstances test in *Larson*, and it held that officers lacked probable cause to arrest because they had nothing but two tipster reports that a person parked outside their apartment building in a truck was driving while intoxicated. *Larson*, 266 Wis. 2d 236, ¶ 16. In elaborating on the lack of information known to police at the time, this Court observed that the arresting officer had "not yet smelled the odor of intoxicants on Larson's breath, detected his slurred speech, or even obtained his concession that he had been driving the maroon and silver truck." *Id.*

No part of *Larson*'s holding could logically be construed as elevating intoxicant odor to a dispositive requirement for a probable cause finding as the circuit court seemed to believe in Lemmen's case. *Larson* said nothing of the sort; this Court simply clarified that the two generic tipster reports, standing alone, were insufficient to establish probable cause to arrest without additional observations that might corroborate those tips, such as intoxicant odors, slurred speech, or a driver's admission that he actually drove. *Id.*

In Lemmen's case, Officer Crouse made significantly more observations that corroborated the concerned witness's report and independently verified that Lemmen was too drunk to drive. Whereas the officer in *Larson* heard no slurred speech from the driver nor garnered any admission about driving, Officer Crouse heard Lemmen's slurred speech, and she openly admitted that she had just driven home from a local bar where she was drinking. (R. 50 at 05:58–06:05, 08:20–08:45; 52:15–17, A-App. 18–20.)

That highlights the second problem with the circuit court's analysis: an odor of intoxicants coming from Lemmen's person, at best, would have only confirmed evidence already known to police. Admittedly, smelling alcohol on Lemmen's breath might have convinced Officer Crouse that she was drinking that day, but Lemmen already openly admitted that she just came home from drinking at a bar. (R. 50 at 05:58–06:05, 08:20–08:45; 52:16–17, A-App. 19–20.) This illustrates why a probable cause analysis that fixates on a single fact is problematic; if the odor of intoxicants were truly dispositive, any officer who temporarily loses his or her sense of smell while suffering from the common cold could never arrest any drunk driver, even if he or she admitted to consuming dozens of alcoholic beverages right before getting behind the wheel.

Ultimately, the legal analysis fueling the circuit court's decision to suppress evidence in Lemmen's case defied both common sense and binding caselaw. When a suspected drunk driver concedes that she was just drinking beer at a bar, there is no reason to doubt that admission just because an officer cannot smell alcohol on her breath, especially when that person has long history of drunk-driving convictions and just crashed into three parked cars in a vehicle that smelled strongly of alcohol. To disregard all of those inculpatory facts simply because officers smelled no alcohol on a driver's breath is to disobey the firmly established body of caselaw requiring that the totality of the circumstances be considered in

evaluating whether police have probable cause to arrest. *Lange*, 317 Wis. 2d 383, ¶ 37. Unfortunately, the circuit court did precisely that in Lemmen's case when it improperly elevated one potential clue of impairment above all others.

D. Evidence gathered from Lemmen after police removed her from her home should not have been suppressed.

While the State conceded below that the warrantless entry to her home was not justified by exigent circumstances of an unexpected, drunken fall, it nevertheless proved that officers had probable cause to arrest Lemmen before entering her apartment. *See supra* pp. 13–20. Assuming this Court agrees, then by application of the *Harris* exception to the Fourth Amendment exclusionary rule, the circuit court shouldn't have suppressed evidence gathered from Lemmen once she was removed from her home—namely, the chemical test results derived from her post-arrest blood draw and any statements she made during her post-arrest interview. *Felix*, 339 Wis. 2d 670, ¶¶ 46–49. Because the circuit court suppressed all that evidence due to its misguided probable cause assessment, this Court should reverse.

CONCLUSION

This Court should reverse the circuit court's order granting Lemmen's motion to suppress evidence.

Dated this 21st day of December 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,045 words.

Dated this 21st day of December 2022.

Electronically signed by:

John W. Kellis
JOHN W. KELLIS
Assistant Attorney General

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

Dated this 21st day of December 2022.

Electronically signed by:

John W. Kellis
JOHN W. KELLIS
Assistant Attorney General

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2022AP1527-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DEBRA J. LEMMEN,

Defendant-Respondent.

APPENDIX OF THE PLAINTIFF-APPELLANT

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § (Rule) 809.23 (3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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