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**COURT OF APPEALS**

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV**

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**Appeal No. 2023AP992  
Jefferson County Circuit Court Case Nos. 2021CV84**

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**CITY OF WATERTOWN,**

Plaintiff-Respondent,

v.

**ANDREW WIEST,**

Defendant-Appellant.

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**AN APPEAL FROM THE JUDGEMENT OF  
CONVICTION FOLLOWING JURY TRIAL IN CIRCUIT  
COURT FOR JEFFERSON COUNTY, THE HONORABLE  
WILLIAM HUE, JUDGE, PRESIDING**

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**THE REPLY BRIEF OF THE DEFENDANT-APPELLANT  
ANDREW WIEST**

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## ARGUMENT

Initially, the City argues the admission by Mr. Wiest that he had previously operated a motor vehicle is sufficient to establish he was impaired at the moment of operation. The problem with this argument is there is absolutely nothing in the record establishing when Mr. Wiest operated the vehicle. The City has the burden of establishing Mr. Wiest was impaired at the moment of operation. Without evidence of when the operation occurred, the City's argument fails.

Additionally, the City compares Mr. Wiest's case to the facts in *State v. Mertes*, 2008 WI App 179, 315 Wis.2d 756, 762 N.W.2d 813 , *State v. Viliunas*, 2013 WI App 41, 346 Wis.2d 734, 828 N.W.2d 594 and *State v. Mulvenna*, 2020 WiApp 55, 948 N.W.2d 502, and contends that the circumstantial evidence in each case is similar to that herein, arguing the evidence herein is sufficient to support the verdict. However, a close examination of each of the above cases reveals the circumstantial evidence of operation in each case is significantly greater than that herein.

Starting with *Mertes*, the officers found Mr. Mertes behind the wheel of his vehicle at gas pumps. Mertes admitted they had driven from Milwaukee and had been at the location for ten minutes. *Mertes*, ¶14. Unlike, Mr. Wiest's case, the officer in

*Mertes* had a specific time frame as to when the vehicle had been operated. The inference could be made that since the vehicle had been at the location for only 10 minutes, and since *Mertes* was behind the wheel, he must have driven the vehicle to the location 10 minutes earlier. Unlike *Mertes*, in Mr. Wiest's case, the evidence is unclear as to how long Mr. Wiest's vehicle was at the location. The City's witness could not establish a timeline when the vehicle arrived at the location, nor for how long the vehicle had been at the location. Thus, the City did establish, even circumstantially, the moment of operation.

Additionally, *Viliunas*, does not provide the support the City suggests. In *Viliunas*, the officer reported seeing a running vehicle in the ditch with the defendant behind the wheel. The defendant argued the vehicle was not running and someone else drove the vehicle into the ditch. The fact the vehicle was in the ditch is significantly different than a person sleeping in a vehicle parked on the road. An inference could be drawn that the vehicle in the ditch and running was recently driven to the location. Again, the evidence adduced in Mr. Wiest's case shows his vehicle was not running when the officer arrived, and as indicated *supra*, the evidence was unclear as to the moment of operation.

In *Mulvenna*, there was a call that a person tipped over a motorcycle. The inference was the complainant actually witnessed the motorcycle tipping over, and the motorcycle was facing southbound in the northbound lane. When officers arrived Mulvenna was lying on the grass next to the motorcycle, which was registered to him. Here, the witness who made the call established the timeline for the operation. Contrast that to the facts here where there was no testimony of a witness to the operation.

None of the cases cited by the City bolster their argument. The City had failed to establish operation. Because of this, the evidence adduced at trial was insufficient to support the conviction.

### CONCLUSION

For these reasons, this court should vacate the judgment of conviction and dismiss the charges.

Dated this 22nd day of December, 2023.

Respectfully Submitted

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**FORM AND LENGTH CERTIFICATION**

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 9 pages. The word count is 1204.

Dated this 22nd day of December, 2023.

Respectfully Submitted

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**CERTIFICATION OF COMPLIANCE WITH RULE  
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of December, 2023.

Respectfully submitted,

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