STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

CASE NO. 2025AP000684-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH M. HEROFF,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction and Order Denying Defendant's Suppression Motion Entered in Winnebago County the Honorable Scott C. Woldt, presiding

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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## ARGUMENT

### I. Officer Seaholm lacked reasonable suspicion to stop Mr. Heroff for excessive window tinting.

The state agrees that it had the burden to demonstrate that the stop here was reasonable. (State's Br. at 2 (citing *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634)). The parties also agree that to determine whether a stop was reasonable requires assessing whether the "facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or was about to commit a crime." (State's Br. at 2-3 (citing *Post*, 301 Wis. 2d 1, ¶13)).

The state failed to meet its burden to show that the stop here was reasonable. It also failed to show how Officer Seaholm's window tint training and experience could make the stop reasonable. *State v. Conaway*, 2010 WI App 7, 323 Wis. 2d 250, 779 N.W.2d 182, highlighted the importance of an officer's training and experience in assessing reasonableness for window tint traffic stops. In *Conaway*, this Court explained that the officer's testimony that he had trained on window tint and had experience stopping cars for tint violations was not relevant to whether he acted reasonably in pulling Conaway over. *Id.*, ¶¶8-11. This was true because the officer could provide no evidence that he had been correct in his assessment that windows were illegally dark in past cases. *Id.*, ¶¶8-11. The same issue exists here. Officer Seaholm provided no testimony on how often he had been correct in his suspicions about windows being illegally

dark in the past. Without that information, the court had no way of knowing if his training and experience meant that he could accurately assess how dark is too dark under the window tinting statute.

The state focuses on the *Conaway* court stating that an officer does not need to know with certainty that there was a window tint violation to pull a car over. (State's Br. at 4 and 7 (citing *Conaway*, 323 Wis. 2d 250, ¶7)). While it's true that an officer would not be required to test with a tint meter before pulling a car over, it does not mean an officer can guess that tint is illegally dark without proving he has an established point of comparison.

The *Conaway* court said an officer would have to testify that he was familiar with how dark a minimally complying window appears in order to establish a reasonable belief that the tint on the particular car he suspected was too dark. *Conaway*, 323 Wis. 2d 250, ¶7. Officer Seaholm's testimony did not establish that he was familiar with how dark a minimally complying window would be. Officer Seaholm never testified about testing windows he suspected were too dark to see if they were in fact too dark. If Officer Seaholm never checked to see if his suspicions about illegally dark windows were correct, he had no way of knowing whether he was correct in assessing how dark windows had to be to exceed statutory standards. Without that knowledge, he could not make a reliable assessment about whether Mr. Heroff's windows appeared illegally dark.

Officer Seaholm also provided no testimony about comparing cars with legal tint to those where the tint exceeded legal limits. The state says the stop

was reasonable because Officer Seaholm had difficulty seeing inside the rear window when he normally has no problem seeing into a vehicle from his squad at night. (State's Br. at 5). The state also says the stop was reasonable because Officer Seaholm observed that Mr. Heroff's windows were darker than those in a van seen at the same distance away. (State's Br. at 5). These arguments are insufficient under *Conaway*. In the first case, Officer Seaholm was comparing to what he could see when behind most cars which have no tinting at all. In the second, he was comparing to a specific van that also presumably had no tinting at all.[1] Comparing Mr. Heroff's windows to those vehicles is different than comparing to cars that are tinted but not tinted so dark as to violate legal limits.

Officer Seaholm did not establish he was familiar with what a complying tinted window looks like nor did he establish that he was comparing to that type of vehicle. Without evidence that he was able to compare to the appearance of legally tinted windows, Officer Seaholm was simply acting on a hunch that Mr. Heroff's windows were illegally dark. Reasonable suspicion demands more than a hunch. *State v. Wiskowski*, 2024 WI 23, ¶12, 412 Wis. 2d 185, 7 N.W.3d 474.

The state also relies on Officer Seaholm's testimony that when he conducted the traffic stop, he could not see into the rear window using his LED spotlight. (State's Br. at 6). This reliance is problematic for the reason discussed above. Like in *Conaway*, Officer Seaholm did not testify that he knew

[1] Officer Seaholm never indicated that he believed the van had any type of tint on its windows. (13; 59).

from confirmed experience what his LED spotlight would look like when shining through a legally tinted window. Without that knowledge, Officer Seaholm's observation could not establish reasonable suspicion.

Even more importantly, the state cannot rely on observations Officer Seaholm made *after* stopping Mr. Heroff to establish that the stop was reasonable. *See State v. Richey*, 2022 WI 106, ¶1, 405 Wis. 2d 132, 983 N.W.2d 617 (the Fourth Amendment requires police have particularized reasonable suspicion that a traffic violation took place *before* performing a traffic stop) (emphasis added).

Officer Seaholm's statements about what he could see also contradicted each other. He said the rear window appeared completely black but also said he could see a silhouette from the light coming through the vehicle and could see something hanging from the car ceiling. (9:26-27). These inconsistent statements make his testimony unreliable. *See Alexander v. Meyers*, 261 Wis. 384, 387, 392, 52 N.W.2d 881 (1952) (inconsistent statements can call the reliability of testimony into question); *Mandella v. State*, 251 Wis. 502, 514, 29 N.W.2d 723 (1947) (inconsistent and contradictory testimony is considered unreliable and incredible).

The state noted in its brief that Officer Seaholm did not immediately stop Mr. Heroff for dark windows but rather followed him and continued observing his vehicle. (State's Br. at 5). The fact Officer Seaholm waited to pull Mr. Heroff over indicates he did not feel certain in his assessment that Mr. Heroff's windows were illegally dark. Further, the fact that Officer Seaholm did not stop Mr. Heroff right away

does nothing to cure the *Conaway* problem discussed above. Specifically, Officer Seaholm provided no record of accurately identifying windows that were illegally dark. Without such a background, Officer Seaholm had no way of knowing whether Mr. Heroff's windows were illegally dark. The fact that Officer Seaholm did not stop Mr. Heroff immediately does nothing to cure this problem.

## II. Officer Seaholm did not have reasonable suspicion to stop Mr. Heroff for an item hanging from his car ceiling.

For the reasons discussed in his initial brief, Officer Seaholm did not have reasonable suspicion to stop Mr. Heroff for an item hanging from his car ceiling.

Further, the state did not argue in the circuit court or in its brief to this Court that an item hanging from the car ceiling provided reasonable suspicion to stop Mr. Heroff. Because the state failed to argue this, it should be deemed conceded. *See Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶23, 303 Wis. 2d 258, 735 N.W.2d 93 ("arguments raised for the first time on appeal are deemed waived."); *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.,* 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

The state also concedes two other issues. First, in denying the suppression motion, the circuit court mentioned that there were multiple bars in the area where Mr. Heroff was stopped. (59:14-15). The state does not argue that the fact bars were in the area was relevant to the assessment of whether the stop was reasonable. This argument is waived because it was

not raised. *See Kolupar,* 2007 WI 98, ¶23 (arguments not raised in the circuit court are deemed waived.). The state is correct to not argue this because the basis for the stop was window tinting and there was no evidence presented indicating the stop was for suspicion of OWI.

Second, the state concedes that speeding cannot form the basis for reasonable suspicion for the stop. Officer Seaholm's report stated Mr. Heroff's car appeared to be speeding as it turned. (13:22). The report does not indicate if Officer Seaholm actually believed Mr. Heroff was exceeding the speed limit or just thought he took a turn fast. (13). Officer Seaholm provided no information about Mr. Heroff speeding at the suppression hearing and the circuit court did not base its suppression decision on Mr. Heroff speeding. (59). Officer Seaholm always asserted he pulled Mr. Heroff over for tinted windows and never claimed he pulled Mr. Heroff over for speeding. (13; 59). The state did not argue at the circuit court level or in its brief to this Court that there was evidence to establish reasonable suspicion to pull Mr. Heroff for speeding. There is insufficient evidence to show that speeding could be the basis for the stop and because the state did not raise the issue at either the circuit court level or in its brief, it has conceded that speeding could not form the basis for the stop. *See Kolupar,* 2007 WI 98, ¶23 (arguments not raised in the circuit court are deemed waived); *Charolais Breeding,* 90 Wis. 2d at 108-09 (unrefuted arguments are deemed conceded).

## CONCLUSION

For the reasons stated above and in his initial brief, Mr. Heroff respectfully requests that this Court reverse the circuit court's holding that the traffic stop was supported by reasonable suspicion and remand with directions that the circuit court suppress all evidence from the traffic stop.

Dated this 24th day of September, 2025.

Respectfully submitted,

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## CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,670 words.

Dated this 24th day of September, 2025.

Signed:

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