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CASE NOS 2018AP001553, 2018AP001554

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COUNTY OF MILWAUKEE,

Plaintiff-Respondent,

v

CHRISTANN SPANNRAFT

Defendant-Appellant

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ON NOTICE OF APPEAL TO REVIEW THE JUDGMENT OF CONVICTION  
ENTERED ON JULY 20, 2018, IN THE CIRCUIT COURT FOR MILWAUKEE  
COUNTY, THE HONORABLE KASHOUA KRISTY YANG, PRESIDING,  
FINDING SPANNRAFT GUILTY OF OWI-1<sup>ST</sup> AND OPERATION WITHOUT  
REQUIRED LAMPS LIGHTED

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### ISSUES PRESENTED

1. Did the circuit court err in excluding from testimony, the procedure used to administer the Preliminary Breath Test?

The trial court found that the Preliminary Breath Test was not admissible under Wisconsin Statute § 343.303.

The trial court erred in disallowing evidence that would have been used for a permissible purpose under § 343.303

2. Did the circuit court err in its conclusion the Field Sobriety Tests were administered and graded according to NHTSA standards and the arrest was warranted?

The trial court found that the Field Sobriety Tests were properly conducted and the Deputy Spittlemeister was credible.

The trial court erred in judgement as video evidence is inconsistent with Spittlemeister's report and testimony.

3. Did the circuit court err in its conclusion of all events surrounding the Intoximeter testing?

The trial court found that Officer Prodzinski followed the proper procedure during the Intoximeter testing and found Spannraft's contradicting testimony not credible.

The trial court made its decision based on non-existent testimony that it found to be not credible.

### STANDARD OF REVIEW

This case requires this court to review the findings of fact of the circuit court, which were based primarily upon the credibility of the witnesses presented at trial. "Findings of fact shall not be set aside unless clearly erroneous." Wis. Statute § 805.17(2). "While it is not the function of the appellate court to assess the weight of testimony and credibility of witnesses, it is their function to review and reverse

the decision of the circuit court when findings of fact are based upon caprice, an abuse of discretion, or an error of law.” *Lessor v. Wangelin*, 221 Wis. 2d 668 N.W.2d 1, 4 (Ct. App. 1998).

While the “weight of the evidence and the credibility of the witnesses are matters resting within the province of the trier of fact, it is axiomatic that trial court findings may not be disturbed on appeal **unless they are contrary to the great weight and clear preponderance of the evidence or are conclusions of law mislabeled as findings.**” *See, e.g., In Matter of Estate of Sensenbrenner*, 89 Wis.2d 677, 278 N.W.2d 887 (1979).

This case also requires this court to review the circuit court’s decision to exclude certain evidence. “Appellate courts are to review and reverse a circuit court’s decision to exclude evidence when the circuit court erroneously exercised its discretion.” *Weborg v. Jenny*, 2012 WI 67, ¶ 41, 341 Wis. 2d 668, 816 N.W.2d 191. An exercise of discretion was erroneous if the circuit court applied an improper legal standard or made decisions that were not reasonably supported by the facts on the record. *Id.*

“No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, **unless** in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the **error complained of has affected the substantial rights of the party** seeking to reverse or set aside the judgment.” Wis. Statute § 805.18(2) (emphasis added).

## ARGUMENT

### I. THE COURT COMMITTED CLEAR ERROR IN EXCLUDING FROM TESTIMONY THE PROCEDURE USED ADMINISTERING THE PRELIMINARY BREATH TEST OF SPANNRAFT

Wis. Stat. § 343.303 clearly states the result of the PBT testing is inadmissible. The statute does not mention, and there is neither case law nor any precedent regarding, the actual **procedure used** in administering the PBT, which is what is at question.

The Respondent’s Brief incorrectly assumes the “procedures are only being sought to be introduced to cast doubt on the validity of the results.” Further stating, “The circuit court understood this and determined the procedures were irrelevant.” (Brief of Respondent, p.5). However; the testimony and transcripts reflect no such

understanding, no mention of such, nor the questioning of the procedures being introduced to cast doubt on the validity of the results or for any other reason. Those issues were simply never discussed at trial, therefore there is no evidence on record to support what the Respondent claims as reasoning for the circuit court disallowing the evidence regarding the procedure Spittlemeister used to administer the PBT with Spannraft.

The Respondent is assuming what would or would not have been testified to regarding the Intoximeter readings. Such statements are clear assumptions as there is nothing in record to reflect such assumptions. These assumptions are not fact and are irrelevant to this case.

Spannraft asserts the PBT process made it 100% clear to Spittlemeister that Spannraft was, indeed, inhaler dependent and another method to obtain Spannraft's accurate blood alcohol level should have been used (i.e., a blood draw).

Spannraft argues that the evidence regarding procedures were used for a permissible purpose under § 343.303 because the procedures speak to whether the officer had probable cause to arrest her, which would be a permissible use of those results.

The Respondent claims this assertion is not supported by the record. However, the reason for allowing the evidence to establish probable cause was very clearly stated by Spannraft's then attorney on the record.

"But there is a question in terms of overall probable cause. If probable cause is not established prior to the test, that test might be needed in order to establish probable cause in the first place." (R47:P.45,1-5)

The Respondent continued, stating, "This directly contradicts Spannraft's assertion in her brief that the procedures **and results** of the preliminary breath test were being offered to prove lack of probable cause to arrest. (emphasis added). (Brief of Defendant-Appellant, p. 11-12). Nowhere in Spannraft's brief are "results" (of PBT testing) mentioned. Neither Spannraft, nor her then attorney, ever mentioned the results of the PBT would or would not show probable cause for Spannraft's arrest.

The Respondent's brief goes on stating, "...the **results** of the preliminary breath test were not considered by the court in its findings of fact. (R48:20)." (emphasis added). Seeing as the results are not allowed as evidence the judge did not use such in her determination. Spannraft has not made any claim to the contrary.

As stated previously, had the Court held a pretrial conference, this issue would have been raised. At trial, the Court erred in disallowing the procedural evidence.

Had this evidence been allowed, it would show Spittlemeister had clear knowledge of Spannraft being inhaler dependent and the video shows Spannraft having had great difficulty getting enough air to properly perform the test which *should* have led to Spittlemeister to obtain BAC numbers through a blood test which would have been 100% accurate. This brings Spittlemeister's judgement into question.

The process and procedure Spittlemeister used to administer the PBT was not probable cause for Spannraft's arrest and the admission of evidence should have been allowed per § 343.303.

The PBT procedures in question are absolutely "of consequence to the determination of the action," as required for evidence to be relevant under Wis. Stat. § 904.01, therefore, the circuit court erroneously rejected the admission of the evidence in question.

**II. THE COURT ERRED IN CONCLUDING THE FIELD SOBRIETY TESTS WERE ADMINISTERED AND GRADED ACCORDING TO NTSHA STANDARDS AND WARRANTED THE ARREST**

Spittlemeister testified he believed Spannraft was under the influence of alcohol because her eyes were bloodshot, red and glassy, and her speech was slurred. Spannraft testified consumed two and a half glasses of wine. The arrest video does not demonstrate Spannraft's speech sounding slurred at any point.

Spannraft's admission of drinking early in the evening does not mean she was intoxicated at the time of driving.

Spannraft is not asking for the FSTs to not be allowed. Spannraft maintains the court did not give any explanation as to reasoning for the determination of Spittlemeister's testimony being credible. There is video evidence clearly showing Spannraft's performance on the FSTs is inconsistent with Spittlemeister's report and testimony.

This certainly lends itself to this Court reviewing and overturning the trial court's ruling.

### III. THE COURT CLEARLY COMMITTED ERROR IN ITS CONCLUSIONS OF THE INTOXIMETER TESTING AND EVENTS SURROUNDING SUCH

Spannraft is not alleging any testimony was not credible, nor asking this court to review Spannraft's credibility as a witness. What is at question is, **was there any testimony from Spannraft that could be found not credible regarding the events occurring during a twenty-minute observation period at the CJF?**

The circuit court alleges in their finding of facts and determination that Spannraft's testimony regarding the twenty-minute observation period was not credible as well as stating Spannraft's testimony regarding the Intoximeter machine's workings was not credible.

These findings are clearly erroneous and this Court should overturn the determination.

As the transcripts of record show, Spannraft never testified to any events occurring during the twenty-minute observation period. Please see transcript of record of Spannraft's entire testimony. (R.47: P. 92–R.48: P. 4-12). There is clearly no testimony regarding the twenty-minute observation period, nor Spannraft stating she used an inhaler during the twenty-minute period. There is also no testimony by Spannraft as to the workings of the Intoxilyzer machine.

In their brief, the Respondent states:

“The circuit court weighed the testimony of Officers Prodzinski and Spannraft and made two determinations: (1) That **Spannraft's testimony was not credible as to what occurred during the twenty minute Intoximeter testing**, and (2) that Officer Prodzinski's testimony was credible. (R.48:21-22).” (emphasis added). (Respondent Brief P. 8).

In her findings of fact and decision, Yang stated:

“Prodzinski observed Spannraft for twenty-minutes at the CJF and Spannraft was not allowed to put anything into her mouth.” Yang went on to say, “I don't find Ms. Spannraft's testimony to be credible as to what occurred during those twenty minutes.” (R.48:24-25)

Again, the transcripts of record show, Spannraft did not testify regarding any events occurring during the twenty-minute observation period nor the workings of or report output of the Intoximeter machine.



Spannraft did testify the inhaler was used between the first and second attempts at the Intoxilyzer (R.47: P.102-104), which, according to Officer Prodzinski's own testimony, is AFTER the conclusion of the twenty-minute observation period.

[Spannraft] "I used it at Potawatomi, and I used it in the Intoximeter room between the first and second tests." (R.47: P. 101;18-19)

And:

[Spannraft] "There was a time period in between the two tests that we had to wait. And then for the second test, I got up there and was trying to again catch a breath large enough to exhale, and it did not work." (R.47: P. 102; 22-23)

"The gentleman performing the test at the Intoximeter said go ahead and use your inhaler. I went to my purse, and I opened my inhaler. I used it as prescribed, took two puffs, and immediately blew into the Intoximeter again."

[Atty] Q. "And would that have been just prior to the second test result, if you will?"

[Spannraft] A. "Correct." (R.47: P.103;3-15)

When asked what the process is at the CJF to begin processing a subject, Prodzinski testified:

[Prodzinski] "...For the most part, I mean, wait for them to come. We offer to let the subject use the bathroom. Then I will ask them to open their mouth, make sure there's nothing in it. Then I perform a twenty-minute observation."

[ADA] Q. "And what is the purpose of this twenty-minute observation?"

[Prodzinski] A. "To make sure the subject doesn't vomit, regurgitate, put anything in their mouth..."

Prodzinski read statements made on the Intox Report (Exhibit 4 at trial):

"I observed the subject identified above and certify that she/he did not smoke, regurgitate, vomit, or drink alcohol beverages **for twenty minutes prior to my breath specimen taken...**" (R.47: P.77;1-8) (emphasis added).

When asked what happens next, Prodzinski stated: "(I) Waited for the twenty-minute observation to be complete. And then I go up, I hit the space bar, that will start the test."

Prodzinski further testified there is nowhere on the report generated by the Intoxilyzer, to indicate if a subject would make use of an inhaler for breathing purposes. Prodzinski went on, when questioned about Spannraft using her inhaler

in the Intox room saying, "We don't let them put anything in their mouth for the twenty-minute observation period." Prodzinski went on to emphasize a second time, "during my twenty minutes' observation" Spannraft would not have been allowed to put anything in her mouth.

This corroborates Spannraft's testimony that the use of the inhaler was AFTER the twenty-minute observation. Prodzinski's testimony may be credible, but there is no evidence showing Spannraft's testimony is not credible. There is actually a complete LACK of evidence regarding Spannraft's testimony on these subjects. Therefore; Yang was erroneous making statements, on which she based her decision, accusing Spannraft of not being credible.

In the findings of fact and decision, Yang further stated;

"The Intoximeter results for Ms. Spannraft indicates by the machine each time the subject was subjected to the Intoximeter test, in other words when the subject blew into the Intoximeter and also when the twenty minute observation started. It's noted on there, and it contradicts Ms. Spannraft's testimony. Also, she knew that she wasn't allowed to put anything in her mouth." (R.48: P.22)

This directly contradicts Prodzinski's testimony that the Intoxilizer does not record how many attempts a subject may make. (R.47: P. 82-83).

The court's findings of fact again accuse Spannraft of having contradictory testimony, this time regarding the Intoxilyzer machine's workings. Spannraft never testified as to how the Intoxilizer machine works or how it records information. Once again, Judge Yang erroneously made a decision to convict based on words never spoken by Spannraft.

Seeing as there is no testimony from Spannraft regarding both the twenty-minute observation period and the manner in which the Intoxilyzer machine records information; it is clear Judge Yang's findings of fact are erroneous and an abuse of discretion for not taking correct facts/evidence, or; in this case lack thereof, into consideration.

It is unclear how and why Yang believed Spannraft's non-existent testimony is not credible. Yang based her decision on non-existent testimony while contradicting Officer Prodzinski's testimony in her findings.

Yang's findings are capricious as it is completely illogical to make a determination based upon imaginary testimony. This alone is reason enough for this Court to overturn the circuit court decision.

Had the court accurately reviewed the evidence and testimony given at trial, the outcome would have been completely different as Spannraft would have to be found Not Guilty on OWI 1<sup>st</sup>.

The Respondent claims "this court should not disturb the circuit court's credibility determination because such a holding would erase the stout precedent that findings of fact will not be **overturned unless they are clearly erroneous.**" (Respondent Brief P.12) (emphasis added).

Yang's statements in her findings of fact and determination regarding the non-existent testimony, and the influence of such on her decision, is most certainly capricious and clearly erroneous and warrants this Court's review and reversal.

### CONCLUSION

For all reasons stated above, Ms. Spannraft respectfully requests this Court reverse the ruling of the circuit court on the OWI (1<sup>st</sup>). Given Spannraft's perfectly clean driving record, Ms. Spannraft requests this Court issue a warning for a non-moving violation (Defective Equipment) rather than the Operation W/O Required Lamps Lighted.

Respectfully submitted this 6<sup>th</sup> day of January, 2020.



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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for brief and appendix produced with a proportional serif font. The length of this brief is twelve pages and 2918 words.

Respectfully submitted this 6<sup>th</sup> day of January, 2020



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

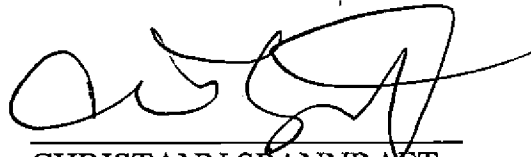
I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content to the printed for 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.

Respectfully submitted this 6<sup>th</sup> day of January, 2020



CHRISTANN SPANNRAFT  
Defendant-Appellant