COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP865-CR **Cir. Ct. No. 2014CT177**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ALEJANDRO HERRERA AYALA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

¶1 HRUZ, J.[1] The State of Wisconsin appeals an order granting Alejandro Herrera Ayala's motion to suppress evidence.[2] *See* WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Alejandro Herrera Ayala is also referred to in portions of the record as Herrera-Ayala.

§ 974.05(1)(d)2. The State argues police officers had probable cause to arrest Herrera Ayala for operating a motor vehicle while intoxicated (OWI). In particular, the State contends the circuit court should not have excluded the results of the standardized field sobriety tests (SFSTs) from its probable cause determination, and if any of the SFST results are considered, probable cause to arrest existed as a matter of law. The circuit court's decision to disregard each of the SFST results was based on its findings of fact regarding the "significant communication issues between" Herrera Ayala and the arresting officer throughout the administration of the SFSTs, and the resulting unreliability of the tests as administered. Our standards for reviewing a circuit court's factual findings require us not to disturb those findings unless they are clearly erroneous. Because we are unable to draw that conclusion based on the record in this case, we affirm the order.

BACKGROUND

¶2 Herrera Ayala was charged with OWI, operating with a prohibited alcohol concentration, and operating a motor vehicle while revoked, all as second offenses. He later moved to suppress all evidence obtained by police officers subsequent to his arrest, including the chemical tests of his blood. As grounds for his motion, Herrera Ayala argued: the officers lacked reasonable suspicion to administer SFSTs on him; the officers lacked probable cause to arrest him; and the evidence acquired after his arrest was obtained in violation of his constitutional rights.

¶3 According to testimony at the motion hearing, on November 16, 2013, City of Green Bay police officer Scott Asplund was working an OWI enforcement assignment.[3] Nothing in particular drew Asplund's attention to Herrera Ayala's vehicle; Asplund "was just looking for any kind of violation [he] could so [he] decided to start following the vehicle." After Asplund began following the vehicle, Herrera Ayala immediately turned left onto another street and then turned right into the first driveway, hitting the curb as he did so. Asplund did not know whether Herrera Ayala was trying to avoid him or pulling into his home address, so Asplund decided not to conduct a traffic stop.

¶4 Approximately one to two minutes later, Herrera Ayala turned in front of Asplund and passed by his location. Asplund described the turn as "a sharp turn," in which Herrera Ayala "signaled real quick and veered left." At that point, Asplund did a U-turn to catch up to the vehicle. By the time Asplund reached the vehicle, Herrera Ayala had parked it and walked to the other side of the road.[4] Asplund activated his squad lights and stopped Herrera Ayala. The stop occurred at approximately 12:40 a.m. Herrera Ayala denied driving the vehicle.

[3] Asplund described an OWI enforcement assignment as one in which the department has "a group of officers working the streets of Green Bay looking for possible intoxicated drivers or other violations."

The evidentiary hearing on Herrera Ayala's motion to suppress evidence took place over two days. Herrera Ayala did not testify during the motion hearing.

[4] Herrera Ayala's vehicle was not parked in an inappropriate or unlawful manner, and Asplund did not observe anything to indicate Herrera Ayala was impaired based on how the vehicle was parked.

¶5 Asplund testified he could "smell a strong odor of intoxicants" coming from Herrera Ayala. Asplund further testified,

> Yeah, I asked him if he had been drinking, and at one point he even used the term *cerveza*,[5] and I believe, I can't recall for sure, I believe he acknowledged he had been drinking somewhat, but he wasn't driving so—I'd have to double check the video if it's on there. I'm not 100 percent on that.[6]

Asplund also thought Herrera Ayala's speech "appeared to be somewhat slurred," but he could not tell for sure due to Herrera Ayala's heavy accent. During the stop, Asplund learned Herrera Ayala had a prior OWI conviction.

¶6 Asplund acknowledged that at times he had difficulty communicating with Herrera Ayala. He further explained, "[A]t times it seemed like when I would ask questions in English, he understood and was talking, and at other times, he may not have understood completely." Asplund decided to have Herrera Ayala perform SFSTs and contacted officer Jeff Brann to assist. Asplund believed Brann was fluent or at least "fluent to a certain extent" in Spanish. When Brann arrived, he informed Asplund that he had limited Spanish-speaking ability and was not comfortable administering full SFSTs, but that he could help Herrera Ayala understand some of the instructions and determine whether Herrera Ayala understood the instructions.

¶7 Asplund administered the horizontal gaze nystagmus (HGN) test first. When Asplund was asked if he attempted to explain the SFSTs to Herrera

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[5] *Cerveza* means beer in Spanish. THE AMERICAN HERITAGE SPANISH DICTIONARY 56 (Houghton Mifflin Co., 2d Office ed. 2000).

[6] The stop was recorded on an audio/video recording device in Asplund's squad car.

Ayala, Asplund testified: "Yes, I did or Officer Brann did kind of in Spanish. He was helping out and I would explain it and he would help out, kind of the dual thing, I guess." According to Asplund, Herrera Ayala substantially complied with the instructions to keep his arms at his sides, keep his head straight, and focus on the tip of a pen; although Asplund also mentioned that Herrera Ayala "might have been just a little bit weaving" or have been "just a little bit shaky" despite instructions to remain still. Brann testified that he had administered a quick version of the HGN test before Asplund began his test, and based on this quick version, he believed Herrera Ayala would understand what he was supposed to do to perform the test. Brann also testified that he gave Herrera Ayala the HGN test instructions in Spanish, and he believed Herrera Ayala understood those instructions. Asplund testified he observed six of six possible clues of intoxication during the HGN test.

¶8 Asplund next administered the walk-and-turn test. Asplund stated he demonstrated the test to Herrera Ayala while explaining the instructions. Asplund could not recall to what extent Brann assisted with the walk-and-turn test, but he did not think Herrera Ayala had difficulty understanding the instructions. Brann testified he assisted "here and there" with the walk-and-turn test. Brann also explained that, at times, Herrera Ayala would look back in his direction during the test and that Brann would "just offer as much clarification as [he] could." Brann believed Herrera Ayala understood what he was supposed to do for the test. Asplund testified he observed several clues of intoxication during the walk-and-turn test.

¶9 Last, Asplund administered the one-leg stand test. Asplund stated he explained and demonstrated this test to Herrera Ayala, but he again could not recall to what extent Brann assisted with the test. According to Asplund, Herrera

Ayala lifted his arms into the air, lost his balance, and put his foot down approximately ten seconds into the test. The circuit court found these actions happened immediately after Herrera Ayala heard the officers verbally reacting and laughing once he started counting in lieu of the officer counting for him. Asplund said Herrera Ayala was "pretty unsteady," so Asplund stopped the test. Asplund then placed Herrera Ayala under arrest and transported him to a hospital for a blood draw. While at the hospital, Asplund administered what the parties referred to as a preliminary breath test (PBT) to Herrera Ayala.

¶10 After the motion hearing, the parties provided additional briefing. Specific to his claim that Asplund lacked probable cause to arrest him for OWI, Herrera Ayala asserted: (1) the inability of the officers to effectively communicate with him is "readily observable in the video recording," and that inability to communicate rendered the information gathered during the stop unreliable; (2) the arresting officer failed to take sufficient measures to ensure accurate and meaningful communication with him; and (3) the SFSTs were improperly administered, rendering the results invalid. The circuit court was provided with the audio/video recording of the stop, which the court reviewed at Herrera Ayala's request.[7]

¶11 The circuit court issued a lengthy written decision and order on Herrera Ayala's motion. The court first concluded Asplund had reasonable suspicion to conduct the original stop based upon Asplund's observations of Herrera Ayala's "suspicious" driving and the time of day. The court, however,

[7] During the motion hearing, Asplund confirmed the audio/video recording was an accurate depiction of the stop.

opined it was a "very close case." The court next concluded Asplund had the requisite reasonable suspicion to administer the SFSTs, again describing it as an "incredibly close case." Finally, the court concluded Asplund lacked probable cause to arrest Herrera Ayala for OWI under the totality of circumstances and granted Herrera Ayala's motion to suppress evidence on this basis.

¶12 As part of the circuit court's probable cause analysis, it found that "the manner in which [the] SFSTs were administered was fatally flawed" and the results were "unreliable for the purposes of probable cause for arrest." The court explained, "The video of the traffic stop is clear that there were significant communication issues between Officer Asplund and Herrera-Ayala throughout the administration of the SFSTs." The court further stated, "[E]ven with Officer Brann's assistance, it is clear in the video that Herrera-Ayala had issues understanding the SFST instructions given to him by Officer Asplund." Because the court found the results of the SFSTs administered by Asplund were unreliable, it determined "Asplund could have only considered the suspicious driving, and odor of intoxicants, and possibly the statements made by Herrera-Ayala prior to the SFSTs when determining whether Herrera-Ayala had probably committed a crime." According to the circuit court, a reasonable officer would not have found

probable cause to arrest for OWI under those circumstances.[8] The State now appeals.

DISCUSSION

¶13 "Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact, which we review under two different standards." ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. We uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** "[A] finding of fact is clearly erroneous when 'it is against the great weight and clear preponderance of the evidence.'" ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (quoting ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748). However, we apply the law to those factual findings de novo. ***Hughes***, 233 Wis. 2d 280, ¶15. "[W]hen evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are

[8] The circuit court also concluded, "Asplund's failure to administer a PBT to assist in making a probable cause determination prior to arrest further demonstrates ... Asplund's failure to lay the proper foundation based upon reliable building blocks for an OWI arrest in this case." The court explained, "[T]his case presents 'the very kind of situation for which the PBT was intended' because the PBT would have aided ... Asplund in determining whether probable cause to arrest existed." (Quoting ***State v. Begicevic***, 2004 WI App 57, ¶10, 270 Wis. 2d 675, 678 N.W.2d 293.) We agree with the ***Begicevic*** court's general opinion regarding the efficacy of PBT tests in instances where communication issues unrelated to intoxication are involved. *See* ***Begicevic***, 270 Wis. 2d 675, ¶¶9-10. We also agree with the circuit court's specific assessment, here, that, especially given the communication issues present in this case, administration of the PBT pre-arrest could have aided significantly in establishing probable cause to arrest Herrera Ayala.

reviewing the [circuit] court's findings of fact based on that recording."[9] ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898; *see also* ***id.***, ¶14 ("Here, the trial court's ruling involved not simply the review of the video, the court also evaluated the credibility of the officer and weighed all of the evidence.").

¶14 "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Here, the State challenges the circuit court's factual finding that each of the SFST results was unreliable. The State argues the circuit court's finding in this regard "is in stark contrast to the relevant facts contained within the record and is based on misapplication of law."

¶15 The outcome of this appeal is largely dictated by our standards of review. In particular, we uphold the circuit court's factual findings unless they are clearly erroneous. *See* ***Walli***, 334 Wis. 2d 402, ¶¶10, 17. The same standard generally applies to a circuit court's credibility determinations. *See* ***Hughes***, 233 Wis. 2d 280, ¶2 n.1 (stating that appellate courts "will uphold a trial court's determination of credibility unless that determination goes against the great weight and clear preponderance of the evidence").

[9] The State does not address the standard of review that applies when the evidence in the record consists of disputed testimony and an audio/video recording. The State further conflates the clearly erroneous standard for reviewing a circuit court's findings of fact with our standard for reviewing a circuit court's discretionary act. The State appears to view those two standards as one in the same; they are not. *Cf.* ***State v. Smith***, 2016 WI 23, ¶¶24 n.10, 26, 367 Wis. 2d 483, 878 N.W.2d 135 (while doing so in a different legal context, recognizing generally that "clearly erroneous" and "erroneous exercise of discretion" are "two different standards of review," and applying the clearly erroneous standard to a circuit court's factual findings).

¶16 In an eighteen-page, written decision, the circuit court articulated its rationale for finding each of the SFST results to be unreliable, evaluating both the audio/video recording and the officers' testimony. The court observed that despite Brann instructing Herrera Ayala in Spanish to remain completely still during the HGN test and to follow the pen only with his eyes, Herrera Ayala's body and head visibly moved side-to-side throughout the test. The court also noted that Asplund's testimony did not address whether Herrera Ayala's movement during the HGN test could be attributed to a lack of understanding, intoxication, or both.

¶17 The circuit court further explained:

> Even greater communication issues are visible during the walk-and-turn and one-leg stand test. Officer Brann testified that he provided little to no translation during these tests, although they require more detailed instruction than the HGN test. Throughout his instructions for the walk-and-turn test, Officer Asplund instructed Herrera-Ayala in English, but would intermittently include Spanish words such as "nueve"[10] to indicate the number of steps Herrera-Ayala should take. When Officer Asplund asked if Herrera-Ayala had any questions, Herrera-Ayala visibly turned to Officer Brann, who also repeated "nueve." However, Officer Asplund did not ask additional questions to make sure that Herrera-Ayala understood, rephrase his instructions, or have Officer Brann give the instructions entirely in Spanish.
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> Furthermore, Officer Asplund testified that he relied on demonstrating the test to make sure that Herrera-Ayala understood. However, Officer Asplund did not demonstrate the test fully. If Herrera-Ayala was expected to understand what was expected of him based upon the demonstration alone, he would have been unable to do so. *Each of the clues noted by Officer Asplund could have been attributed to Herrera-Ayala's misunderstanding of the*

[10] *Nueve* means nine in Spanish. THE AMERICAN HERITAGE SPANISH DICTIONARY, *supra*, at 200.

> *instructions.*[11] Notably, Officer Asplund did not note that Herrera-Ayala swayed while walking, used his arms to balance, or stepped off of the line.
>
> Similar problems with administering instructions occurred with the one-leg stand test. This is especially true of Officer Asplund's testimony regarding Herrera-Ayala failing to count out loud. While giving Herrera-Ayala the instructions for the one-leg stand test, Officer Asplund instructed him that he should count "one thousand one, one thousand dos." He did not instruct Herrera-Ayala how long he should count. When Officer Asplund asked Herrera-Ayala whether he had questions, he again turned to Officer Brann but did not receive additional instructions. When Herrera-Ayala began the test, Officer Asplund began counting out loud to attempt to get Herrera-Ayala to count out loud. However, when Herrera-Ayala did so, Officer Asplund and the other officers verbally reacted and laughed. It was at that point that Herrera-Ayala lost his balance. *Again, Herrera-Ayala failing to count out loud could reasonably be attributed to not understanding what was expected of him, given the language difficulties and somewhat conflicting instructions by Officer Asplund.*

(Emphasis added.)

¶18 In all, the circuit court found that the results of the SFSTs were unreliable. It did so based on its related, underlying factual findings that Herrera Ayala failed to understand—and thus follow—the instructions for each test due to the significant communication issues between Asplund and Herrera Ayala, and that the officers failed to adequately confirm Herrera Ayala's poor performance on

[11] When Asplund was asked about the clues Herrera Ayala exhibited during the walk-and-turn test, he described Herrera Ayala as keeping a couple of inches between his steps, taking more steps than he was supposed to, starting early on the test, performing an improper turn at the end of the steps, requiring prompting to start walking again, taking too many steps on the walk back, and not counting out loud.

the SFSTs was due to intoxication, rather than other reasons.[12] Indeed, the court characterized its findings regarding the "significant communication issues between Officer Asplund and Herrera-Ayala" and "Herrera-Ayala ha[ving] issues understanding the SFST instructions" as being "clear" from the audio/video recording.[13] Upon our review of the record, including the officers' testimony and the audio/video recording, *cf.* ***Walli***, 334 Wis. 2d 402, ¶¶14, 17, we conclude these findings are not clearly erroneous.

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[12] We acknowledge a different fact finder—or even this court, armed only with the audio/video recording and the transcript pages from the hearing—may have reached a different conclusion. This may be especially so regarding the HGN test results, since, as the State argues, the HGN test is "not as instruction-dependent as the other two tests because it measures nystagmus, i.e., an involuntary physiological response," and "swaying during the test is not a standardized clue." However, this court does not engage in fact finding. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). Moreover, "a factual finding is not clearly erroneous merely because a different fact[]finder could draw different inferences from the record." ***State v. Wenk***, 2001 WI App 268, ¶8, 248 Wis. 2d 714, 637 N.W.2d 417. Rather, a factual finding is clearly erroneous when "it is against the great weight and clear preponderance of the evidence." ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (quoting ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748).

Here, the circuit court observed that, despite Herrera Ayala being instructed to remain still during the test and to follow the pen with only his eyes, Herrera Ayala visibly moved his head and body side to side throughout the test. Asplund did not testify that the results of the HGN test could still be reliable even with this type of movement. To the contrary, during cross-examination Asplund was asked, "If you don't administer, for example, the HGN [test] as it's described in the training manual or [the National Highway Traffic Safety Administration] sets forth, isn't it true that the results then regarding possible impairment are less accurate?" He responded, "Potentially, yes." He later added: "Ideally, every test is done 100 percent accurate by the book every single time. Any variations potentially could skew the results." On this record, we cannot conclude the circuit court's factual finding that the results of the HGN test were unreliable was against the great weight and clear preponderance of the evidence and thus clearly erroneous.

[13] We note that while the circuit court never made an express finding regarding the credibility of the officers' testimony during the motion hearing, the court necessarily weighed that testimony against the content of the video in reaching its conclusions, many of which were contrary to portions of the officers' testimony. *See* ***State v. Walli***, 2011 WI App 86, ¶14, 334 Wis. 2d 402, 799 N.W.2d 898; *see also* ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) ("If a circuit court does not expressly make a finding about the credibility of a witness, we assume it made implicit findings on a witness'[s] credibility when analyzing the evidence.").

¶19 The State does not provide a clearly developed argument as to how the circuit court "misapplied the law." *See supra* ¶14. At one point, the State opaquely discusses two cases, ***State v. Piddington***, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, and ***State v. Begicevic***, 2004 WI App 57, 270 Wis. 2d 675, 678 N.W.2d 293. To be sure, both cases involve OWI defendants with whom law enforcement had communication difficulties due to language barriers. ***Piddington***, 241 Wis. 2d 754, ¶¶2-3; ***Begicevic***, 270 Wis. 2d 675, ¶¶9, 11, 17-18. But those cases principally addressed the objective legal sufficiency of police officers' communication of information to OWI defendants that is statutorily required—namely, implied consent warnings under WIS. STAT. § 343.305(4). ***Piddington***, 241 Wis. 2d 754, ¶¶13-33; ***Begicevic***, 270 Wis. 2d 675, ¶¶11-25. This issue, in turn, presented questions of law, both in terms of interpreting what § 343.305(4) requires of law enforcement and, if the facts in a case are undisputed, how those requirements are applied. ***Piddington***, 241 Wis. 2d 754, ¶13; ***Begicevic***, 270 Wis. 2d 675, ¶11. Generally, implied consent warnings arise only after an OWI arrest has occurred, which, of course, follows a determination of probable cause to arrest. *See* WIS. STAT. § 343.305(3)(a); *see also* ***State v. Krajewski***, 2002 WI 97, ¶¶19-20, 255 Wis. 2d 98, 648 N.W.2d 385.

¶20 We discern two possible arguments from the State based on these cases. First, the State contends the supreme court in ***Piddington*** and the court of appeals in ***Begicevic*** both "analyzed the administration of SFSTs when communication issues are present during an OWI investigation" and "upheld the administration of [the] SFSTs" in those cases. These statements are false. Neither case addressed a challenge to there being probable cause to arrest a suspect for OWI based on issues regarding the administration or reliability of SFSTs. There were no discussions of the legal standards that would apply to such a challenge or

of how to account for language barriers when those tests are administered. In particular, neither of those reviewing courts was asked to determine, as we are here, whether a circuit court's factual findings regarding the unreliability of SFST results were clearly erroneous.[14] In short, neither court "upheld" the administration of the SFSTs.

¶21 Second, if the State is attempting to argue that the methods Asplund used were objectively reasonable in conveying the information required for Herrera Ayala to understand and take the SFSTs and, further, that the circuit court misapplied the law by requiring more, any such arguments are undeveloped. The State makes no argument for either why or how the principles developed and applied in ***Piddington*** and ***Begicevic*** governing an officer's compliance with Wisconsin's implied consent statute apply to its challenge of the circuit court's findings in this case regarding the unreliability of the SFSTs. Some such argument, while perhaps plausible, is not self-evident, and it requires more substance than the State provided here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review inadequately briefed issues).

[14] In ***Begicevic***, one argument the court addressed was whether there was probable cause to request Begicevic to submit to a PBT, based in part on his performance on SFSTs. ***Begicevic***, 270 Wis. 2d 675, ¶¶8-10. The language the State quotes from ***Begicevic*** comes from this portion of the court's analysis. *See* ***id.***, ¶9 ("Although [the driver] had a heavy accent and asked [the officer] if she spoke German, [the officer] believed that she was able to communicate her requests to him in English and began to instruct him on the field sobriety tests she wanted to conduct."). The court was applying the lesser standard for determining if an officer may administer a PBT, under which an "officer may request a PBT if there is 'probable cause to believe' that the person has been violating the OWI laws." ***Id.***, ¶10 (quoting and applying ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310-11, 603 N.W.2d 541 (1999)). In other words, the PBT is performed if the driver's performance on the SFSTs "[does] not produce enough evidence to establish probable cause *for arrest*." ***Id.*** (emphasis added). At no point did Begicevic argue—or the court address—the reliability of the SFSTs as administered so as to support a finding of probable cause to arrest for an OWI violation without the PBT results.

¶22 Finally, although the State briefly notes the correct statement of law that there is no requirement that police officers perform field sobriety tests in order to determine probable cause to arrest for an OWI offense, *see* ***State v. Kennedy***, 2014 WI 132, ¶¶21-22, 359 Wis. 2d 454, 856 N.W.2d 834, the State does not develop any alternative argument that Asplund had probable cause to arrest Herrera Ayala without consideration of any of the SFST results.[15] The State's failure to do so is surprising given that the circuit court's order directly addressed this issue and that Herrera Ayala sets forth a developed argument in his response brief as to why the circuit court properly concluded Asplund's other observations did not rise to the level of probable cause to arrest Herrera Ayala for OWI.[16] Because the State, as the appellant, does not argue the circuit court erred in concluding Asplund did not have probable cause to arrest Herrera Ayala even without the SFST results, we decline to consider the issue further. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (we will not abandon our neutrality to develop arguments for a party); ***Pettit***, 171 Wis. 2d at 646-47.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[15] This includes the State not arguing that Asplund observed other, independent indicators of intoxication during the administration of the SFSTs, aside from the test results or "clues."

[16] The State did not file a reply brief in this appeal.