STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2013AP0065-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

WILLIAM A. JOHNSON,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON FEBRUARY 29, 2012, THE HONORABLE JASON A. ROSSELL, PRESIDING, IN THE KENOSHA COUNTY CIRCUIT COURT. KENOSHA COUNTY CASE NO. 2011CF823

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

Respectfully submitted:

LAW OFFICE OF MATTHEW S. PINIX, LLC
1200 East Capitol Drive, Suite 220
Milwaukee, Wisconsin 53211
T: 414.963.6164
F: 414.967.9169
matthew@pinixlawoffice.com
www.pinixlawoffice.com

By: Matthew S. Pinix
State Bar No. 1064368
Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

I. WHAT STANDARD OF REVIEW SHOULD WISCONSIN'S APPELLATE COURTS EMPLOY WHEN CONSIDERING A CIRCUIT COURT'S DECISION TO ADMIT OR EXCLUDE EXPERT WITNESS TESTIMONY UNDER WIS. STAT. § 907.02?

This question was not presented to the circuit court.

II. WHETHER THE CIRCUIT COURT FAILED IN ITS OBLIGATION TO ACT AS A GATEKEEPER WHEN DECIDING THAT THE STATE'S EXPERT WITNESS COULD OPINE REGARDING THE CAUSE OF AN INJURY TO THE VICTIM'S VAGINA?

This question was not presented to the circuit court.

III. WHETHER EXPERT WITNESS TESTIMONY REGARDING THE CAUSE OF AN INJURY TO THE VICTIM'S VAGINA SHOULD HAVE BEEN EXCLUDED UNDER WIS. STAT. § 907.02 AS UNRELIABLE?

The circuit court allowed the State to elicit this testimony from its expert over the defense's objection.

IV. WHETHER THE SAME TESTIMONY SHOULD HAVE BEEN EXCLUDED BECAUSE IT WAS IRRELEVANT?

The circuit court allowed the State to elicit this testimony from its expert over the defense's objection.

V. WHETHER THE SAME TESTIMONY SHOULD HAVE BEEN EXCLUDED BECAUSE IT WAS LIKELY TO MISLEAD THE JURY OR TO CAUSE CONFUSION OF THE ISSUES?

The circuit court allowed the State to elicit this testimony from its expert over the defense's objection.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Johnson does not believe oral argument will be necessary in the instant appeal, as the briefs should sufficiently explicate the facts and law necessary for this Court to reach a decision. He does not request it. However, Johnson welcomes the opportunity to argue the case if this Court believes oral argument will clarify issues not fully settled in briefing.

Johnson believes the Court's opinion in the instant case will meet the criteria for publication. The issue argued herein concerns the application of Wis. Stat. § 907.02, which was recently changed to conform with Federal Rule of Evidence 702. *See* Daniel D. Blinka, *The* Daubert *Standard in Wisconsin: A Primer*, Wisconsin Lawyer 14, March 2011; *see also* 2011 Wis. Act 2. The change to Wis. Stat. § 907.02 represents a monumental shift away from the way Wisconsin had previously dealt with expert witness testimony. *See, e.g., State v. Jones*, 2010 WI App 133, ¶ 22, 329 Wis. 2d 498, 791 N.W.2d 390. To date, no appellate decisions have considered the merits of a challenge under the amended Wis. Stat. § 907.02. This Court's opinion in the instant case will thus "[e]nunciate[] a new rule of law." Wis. Stat. § (Rule) 809.23(1)(a)1. Publication is therefore appropriate.

STATEMENT OF THE CASE

I. NATURE, PROCEDURAL STATUS, AND DISPOSITION BELOW

William A. Johnson was prosecuted in the instant case for having had sex with a nineteen-year-old woman, Kalena P., while she was intoxicated to the point that she could not legally consent, *contra* Wis. Stat. § 940.225(2)(cm). (R.1.) At trial, Johnson did not deny the sexual intercourse, but said it had been consensual. (R.64:187-88.) He disputed Kalena P.'s level of intoxication and her inability to consent. (R.65:102-03.)

Pretrial, the State gave notice that it intended to call a registered nurse, Terri Cohn, as an expert witness. (R.21; A. Ap. 104.) Cohn was to "offer opinion evidence, based upon her training and experience as to whether there were findings in her exam that [were] consistent or inconsistent with nonconsensual sexual contact or intercourse." (*Id.*) As forecasted, the State sought to elicit Cohn's opinion at trial whether Kalena P.'s injuries were consistent with consensual sex. (R.63:282; A. Ap. 132). Johnson objected to that testimony on qualification and foundation grounds. (R.63:282-83; A. Ap. 132-33). The circuit court ultimately concluded that Cohn was qualified to testify under Wis. Stat. § 907.02 (hereinafter "Section 907.02") and

Daubert[1], and thus allowed her to opine that Kalena P.'s injuries were not incurred during consensual sex. (R.64:25-30; A. Ap. 132-37). The jury returned a guilty verdict. (R.34.)

Johnson was sentenced to twenty years of imprisonment: twelve years of initial confinement and eight years of extended supervision. (R.66:51.) He filed a notice of intent to pursue postconviction relief (R.47), and the instant appeal followed (R.57). Johnson challenges the circuit court's ruling admitting Cohn's testimony. (*Id.*)

II. STATEMENT OF RELEVANT FACTS

Kalena P. was assaulted at the home Johnson shared with his girlfriend and her children. (R.64:186, 219.) On Johnson's birthday in 2011, his girlfriend enlisted Kalena P.'s babysitting services to accommodate a night out. (R.62:148.) Lacking money to pay Kalena P., Johnson's girlfriend offered alcohol instead. (R.62:149.) Kalena P. accepted and brought four friends along with her to "hang out" while she watched the children (R.62:148-49.). Johnson's girlfriend went to the store that night and purchased Kalena P. alcohol. (R.62:149-50.)

Johnson and his girlfriend then went out on the town; Kalena P. and her friends remained with the children.

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

(R.62:151-52.) Kalena P. later could remember having had only "one" drink—"a glass of Everclear and 7-Up"—that night (R.62:152), which made her "drunk" (R.62:155). She explained that she had limited experience with alcohol before that night, having drunk it only infrequently and never to the point of intoxication. (R.62:154.) Her recollection of the night's events was "[b]lurry." (R.62:155.) She remembered at one moment sitting on the floor with her cup of Everclear and 7-Up, and then sometime later waking up behind the couch covered in vomit with her pants off. (R.62:155.)

Kalena P. remembered that Johnson helped her to the bathroom after she awoke behind the couch. (R.62:157.) She explained that he had to assist her to the bathroom because she was unable to walk on her own. (R.62:157.) It was in the bathroom, she said, that Johnson assaulted her. (R.62:157-58.)

Once she got to the bathroom, Kalena P. "[sat] to the side of the toilet trying to calm [herself] down because [she] felt nauseous and [she] was in an out of consciousness." (R.62:157.) The next thing Kalena P. remembered was "[b]eing bent over on [her] hands and knees and wondering what was going on." (R.62:158.) "Someone," she said, "bent [her] over," but she did not know who. (R.62:158.) Her underwear was then pulled

down, and her assailant penetrated her. (R.62:158-60.) Kalena P. continued to go "in and out of consciousness" and she did not "look back to see who it was" behind her. (R.62:160.) She did, however, "remember seeing red shorts . . . behind [her]." (R.62:160.) The next thing Kalena P. remembered was her assailant leaving the bathroom and Johnson's girlfriend entering. (R.62:161.) Kalena P. then told Johnson's girlfriend that Johnson had assaulted her. (R.62:161-62) She believed it to have been Johnson based on her assailant's red shorts (R.62:161-62); Johnson had earlier that night been wearing red shorts (R.64:207).

Johnson offered a different version of events. (*See* R.64:187-88.) He stated that his night out with his girlfriend had been rocky. (R.64:200-02.) When the couple returned to the apartment, Johnson and his girlfriend went separate ways: he remained in the living room; she went to the couple's bedroom. (R.190.) Johnson then encountered Kalena P. as she awoke from behind the couch. (R.64:246-47.) After exchanging a few words with Kalena P., Johnson went to talk with his girlfriend. (R.64:246-47.) The couple's conversation devolved into an argument, and Johnson returned to the living room where he

again encountered Kalena P. (R.64:246-47.) The two began a flirtation that led to sex. (R.64:187-88.)

Johnson explained that his girlfriend awoke during his tryst with Kalena P., which startled the lovers apart. (R.64:190.) Kalena P. headed to the bathroom, and Johnson followed not knowing whether their fornication was finished. (R.64:190-91, 234-35.) He denied any sex in the bathroom. (R.64:236.)

After Kalena P. told Johnson's girlfriend of her assault, the police were called. (R.62:161-62.) Kalena P. was taken to the hospital where she was examined by a sexual assault nurse examiner (hereinafter referred to as a "SANE nurse"). (R.63:246, 249.) Terri Cohn, the SANE nurse who treated Kalena P., works in that capacity as a supplement to her regular employment. (R.63:247.) Cohn's daily work is "in an operating room;" she performs work as a SANE nurse in "an on-call capacity," "sign[ing] up for hours during the month" during which she is available "if an alleged victim comes into the emergency room." (R.63:247.) Cohn was educated as a nurse—earning "a diploma in Nursing"—after which she "went through a specific course in order to be a [SANE nurse]." (R.63:248.) She holds only one other degree or certification in nursing: "a certification in Psychiatric Nursing." (R.63:248.) She

was a psychiatric nurse for "28 years prior to [her] current job" in the operating room. She had been a SANE nurse for only three years when she examined Kalena P., during which time she had performed over fifty exams. (R.63:248-49.)

When asked to explain "[w]hat kind of specialized training [she] under[went] to become a SANE nurse," Cohn answered as follows: "We had to go to -- for adult and adolescent we had to go to a week training, and then for my child portion I had to go for a week training as well 40 hours for each." (R.63:248-49.) She offered no further explanation of the courses or materials that were covered during her training.

In pretrial filings, the State informed the court and defense of its intent to rely on Cohn's testimony as an expert witness. (R.21; A. Ap. 104.) The State noted that

> Ms. Cohn may offer opinion evidence, based upon her training and experience as to whether there were findings in her exam that are consistent or inconsistent with nonconsensual sexual contact or intercourse. Ms. Cohn will discuss the examination she performed, the findings of the examination, and may testify as to the statements made by Ms. P[.] during the examination.

(*Id.*) Whether the State would be able to ask such questions was addressed, first, on the second day of trial. (*See* R.63:274-75; A. Ap. 121-22.) The discussion originally arose after defense counsel objected to Cohn's testimony about hearsay statements Kalena P. made during the course of her examination.

(R.63:258; A. Ap. 105.) After a lengthy discussion about that issue, the State said:

> The other, I guess, similar issue is this that may come up, and I suppose you might as well take care of it now. There -- in the labia majora the -- there is a small red mark tender to touch on the right side. Just so everyone's aware. I'm not going to show a picture of that. There are pictures. But I was going to have Miss Cohn describe what that is and what that means, which I believe she can as part of her findings. But -- and that -- that would be consistent with the exam hurting as Kalena P[.] in her initial statement to her, which I think is already been admissible under the case cited by the court, she indicates that all I remember saying it hurt. Which would be actually inconsistent with her previous testimony. But I would then ask if that is consistent with the assault possibly hurting or if that mark in her expert opinion could cause pain.

(R.63:269-70; A. Ap. 116-17.) Defense counsel responded, "Well, I think that's the conclusion that I object to, judge. I think that she can note—all it says a small red mark tender to touch right side." (R.63:270; A. Ap. 117.)

When the court prohibited Cohn from opining whether Kalena P.'s injury hurt during the sexual assault, the State further reasoned:

> What I'm having trouble with is if that is to be the case, I fail to see what an expert can provide. Because experts, as I understand it, they're not providing conclusions as [defense counsel] stated. It would be an opinion that such a thing is consistent. She's not saying that this is what caused the pain. She's not saying that the hands and – hands on the shoulders caused the tenderness. It's her opinion as an expert that it is consistent.
>
> My understanding of the expert statute, both old and new, is that the standard is that if it's relevant, which I believe this testimony is relevant, and that if an expert, an expert can give opinions about things that they have in their sphere of knowledge.

> Now, if someone is a SANE nurse, not only that but a SANE-A, which is an upper designation that means she is an expert who's done 50 exams, who's been a nurse for 20-some odd years, I think it is within her expertise to say . . . having a – a -- and it says red mark. I believe the testimony will show it's really more of a kind of an area like an abrasion -- an abrasive area, at least when Miss Cohn and I went through the pictures in -- at the SANE -- SANE room, that such an abrasive area and it's it's a sizable area. It's not a little dot is consistent with a sexual assault causing pain.

(R.63:273-74; A. Ap. 120-21.) The defense again argued against admitting Cohn's testimony:

> Well, I think [the prosecutor] is mixing up two areas here as if they were one; and what I mean by that is this. If we're talking about something is a physical problem, an injury, this is described in the reports as a mark, I think then one has to ask the expert to reasonable degree of medical probability or medical certainty was this injury caused by this conduct. If you're talking about behavior, not physical injuries, such as poor eye contact, such as failure to report timely, or some -- some other thing along that line, that's when you get into the question of is this conduct consistent. Because we're not in that area of objective things like we are with injuries. We're in this much more soft area of the social sciences where one can't testify -- cannot testify to certain things.
>
> And -- and that's why I think the new law, which I understand doesn't necessarily apply, is that you have a pre-trial hearing on expert testimony and you go through this -- this whole scenario, is this kind of testimony really supported by certain a standard of -- in the field of endeavor that we're talking about science, social science, so that the expert really has a basis of opinion which is largely held by the group of experts that he or she comes from. And that was I think the -- the reason why now we have these – or going to have these pre-trials hearings on testimony of experts.
>
> Thus, in this case I don't think you can ask the kind of question is this injury consistent with. The question is was this conduct -- did this conduct cause this injury and does that meet the medical standard of proof, which it doesn't.

(R.63:274-75; A. Ap. 121-22.)

The court then issued its ruling:

> [Defense counsel] now brings up in his -- in his argument is something of foundation. And I'm going to want the -- want the State to lay foundation for the basis of her opinion for whether a mark or what other of her findings -- I didn't read the whole report. I don't know all the findings. So, whatever those findings are, why she believes that it's either consistent or inconsistent. And I'm going to be looking for that sort of foundation for her opinion.
>
> I do believe that she's an expert in the field that she's in. It's now I think *Daubert* actually – doesn't actually go to the qualifications, to be perfectly honest with you. I don't think *Daubert* changed the qualification rules at all. The qualifications of an expert have always been the qualifications of an expert.
>
> The next part of the *Daubert* test really is whether or not the opinion that the expert is about to present is one that is scientifically reliable enough for the court to act as a gatekeeper in which to allow it in or out. And so, the objection that's being raised by -- by counsel at this point is not one of hearsay but one of foundation. The question about whether there's sufficient foundation for that opinion being given to the jury.

(R.63:278-79; A. Ap. 125-26.) The State sought clarification: "If I can ask a similar question? If I choose to lay the proper foundation [can I ask whether] the injury in the vagina is consistent or inconsistent with non-consensual sex[?]" (R.63:282; A. Ap. 129.) The court reiterated that the State could get into that testimony if the proper foundation was laid. (*Id.*) But the defense continued to have problems with allowing the State to question Cohn regarding the cause of Kalena P.'s injury. (R.63:282-83; A. Ap. 129-30.) The court adjourned the proceedings to "do[] all the *Daubert* reading" and then further address the issue. (R.63:283-84; A. Ap. 130-31.) However, when the proceedings reconvened, the State told the court that it was

"not going to be asking those questions, if that can short-circuit this. I'm not going to be asking [Cohn] for any opinions, . . . [a]t least [not] the two . . . about . . . consistent with non-consensual sex." (R.63:284; A. Ap. 131.) The court did not address the matter further. (*Id.*)

Contrary to those representations, however, the State sought to elicit from Cohn a response the following question: "Now, [defense counsel] asked you if it could be caused by -- the injury [to Kalena P.'s vagina] could be caused by consensual sex. Is it likely to be caused by consensual sex?" (R.64:25; A. Ap. 32.) The defense immediately objected: "Objection. There's no foundation laid for the answer. Speculation." (*Id.*) The court "sustain[ed] [the objection] as to foundation at th[at] time." (*Id.*) The State then sought to establish the necessary foundation.

The following exchange occurred:

> Q. How many SANE exams have you done?
> A. Over 50.
> Q. And have you gotten training on injuries that could be caused by consensual sex?
> A. Yes.
> Q. Have you gotten -- do you have experience and training on what injuries could be cause [*sic.*] by non-consensual sex?
> A. Yes.
> Q. Are you able to give opinions because of this training about whether an injury is consistent with consensual or non-consensual sex?
> A. Yes.
> Q. And you answered [defense counsel]'s question about it being possible to be caused by consensual sex.
> A. Correct.

> Q. And what was your answer to that question?
>
> [Defense counsel]: Objection, it's repetitious. The record speaks for itself.
>
> THE COURT: Sustained. It's been previously gone into.
>
> [By the State]:
>
> Q. So, is this injury, the follow-up to [defense counsel]'s question, likely to be caused by consensual sex?
>
> [Defense counsel]: Objection. Doesn't meet the necessary standard of to a reasonable degree of medical probability. She's not qualified to render a medical – it's an [sic.] medical opinion as to the cause of injury.
>
> THE COURT: Okay. [Prosecutor].
>
> [Proscutor]: This is well within her area as an expert. [Defense counsel] asked essentially the same question but slightly different. I'm asking the flip side of that same question. She has done a number of exams. She's an expert in this area. She has the SANE-A qualification, which was discussed. This is not a conclusion. It may not be to a medical degree of certainty. I'm not aware if if that can be given. And that can certainly be gone into by Mr. Rose at other times. And it's proper for cross-examination. Proper for argument.
>
> But as far as this question, I believe it's proper; and she has established that as an expert, especially as a SANE-A given her experience that she can give opinions as to whether or not it is likely -- it is likely to be caused by consensual sex and given that [defense counsel] has already asked a very similar if not essentially the same question.

(R.64:26-27; A. Ap. 133-34.) The jury was present for that argument.

The circuit court issued the following ruling: "I think the door got opened, and I believe he can have an answer to that question. So, the objection is overruled. You may have the answer." (R.64:27; A. Ap. 134). The State the questioned Cohn as follows:

> Q. Is that injury, the red mark on the labia majora, likely to be caused by consensual sex?
> A. No.
> Q. Why not?

A. Because with consensual sex there would be probably more lubrication, and this is a friction injury.
Q. What do you mean by lubrication?
A. Lubrication by the patient for arousal.
Q. And is there a relationship between lubrication and consensual and non-consensual sex?
A. Yes.

[Defense counsel]: Objection, speculation.

THE COURT: Sustained.

BY [the prosecutor]:
Q. Through your training and experience have you learned anything about lubrication in regards to consensual and non-consensual sex?

[Defense counsel]: Objection, insufficient foundation. Immaterial.

[The prosecutor]: I'm in the process of laying foundation.

THE COURT: It is a foundational question. So, I'll allow the answer to it.

[Cohn]: Can you repeat it?

BY [the prosecutor]:
Q. You have had training and experience as a SANE nurse?
A. Correct.
Q. You have additional training to be a SANE-A?
A. Correct.
Q. Did you receive training in how a female lubricates herself?
A. Yes.
Q. And did you receive training regarding how a female lubricates herself in consensual versus non-consensual encounters?
A. Yes.

[Defense counsel]: Objection, insufficient foundation.

THE COURT: It's a foundational question. Overruled. You may have the answer.

A. Yes.
BY [the prosecutor]:
Q. And do you have experience seeing injuries in non-consensual and consensual sex?
A. Yes.

[Defense counsel]: Judge, I'm going to object to this line of questioning. We didn't get into all of this.

[The prosecutor]: It's a follow-up to his question.

[Defense counsel]: First of all, my question was not objected to. But secondly, we didn't get into all of that.

(R.64:27-29; A. Ap. 134-36.) After the circuit court called for a sidebar, the State resumed its questioning. (R.64:30; A. Ap. 137.)

> Q. Nurse Cohn, you indicated this injury was unlikely to be caused by consensual sex. Correct?
> A. Correct.
> [Defense counsel]: Objection, repetitious.
> THE COURT: Based on the -- on the ruling I'll overrule. You may have it.
> BY [the prosecutor]:
> Q. Why do you believe that?
> [Defense counsel]: Objection, repetitious.
> THE COURT: Based on the side bar, overruled.
> A. I believe it because this type of injury is a friction injury. Most abrasions are caused by friction usually when -- in an unlubricated patient.

(*Id.*)

In closing arguments, the State returned to Cohn's conclusions. The State argued that the injury Kalena P. suffered showed that the sex between her and Johnson "was unlikely to [have] be[en] consensual sex because of the lubrication issue. . . . [I]n nonconsensual sex where there's no lubrication, there's more friction; and [the injury to Kalena P.'s vagina] was described as a friction injury." (R.65:82-83.) The State directed the jury to Cohn's testimony when making that point. (R.65:82-83.)

Johnson argues that it was improper for Cohn to testify as an expert regarding whether Kalena P.'s injury was caused by consensual or nonconsensual sex. He offers the following in support.

ARGUMENT

This is a case about expert witness testimony and the circuit court's role in admitting it. The United States Supreme Court issued its seminal case on the issue in 1993. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* concluded that Federal Rule of Evidence 702—the evidentiary provision governing expert witness testimony in the federal system—required federal district court judges to play a significant gatekeeping role in deciding whether to admit purported expert testimony. 509 U.S. at 592-93. In the twenty years since *Daubert*, numerous jurisdictions—both state and federal—have considered *Daubert*'s application to different expert witness scenarios. *See, e.g., State v. Porter*, 698 A.2d 739 (Conn. 1997), *Gayton v. McCoy*, 593 F.3d 610 (7th Cir. 2010).

Wisconsin, though, was not among those courts adopting *Daubert*. As recently as 2010, the Wisconsin Supreme Court rejected calls to conform Wisconsin's evidentiary rules to *Daubert* and its progeny. *State v. Fischer*, 2010 WI 6, ¶ 7, 322 Wis. 2d 265, 778 N.W.2d 629 ("We, therefore, decline to adopt a *Daubert*-like approach to expert testimony that would make the judge the gatekeeper."). The language of Wisconsin's evidentiary code did not then conform with Rule 702, and Wisconsin had

long maintained an evidentiary standard for experts dissimilar to *Daubert*. *See id.* Wisconsin courts therefore saw no cause to apply *Daubert*'s principles to the state's evidentiary code. *Id.* However, "[i]n late January 2011, the Wisconsin Legislature amended Wis. Stat. section 907.02 to adopt the reliability standard found in Federal Rule of Evidence 702 and embraced by a majority of states." Daniel D. Blinka, *The* Daubert *Standard in Wisconsin: A Primer*, Wisconsin Lawyer 14, March 2011; *see also* 2011 Wis. Act 2.

The playing field has thus shifted, and the time has come for Wisconsin's appellate courts to recognize that *Daubert* has become the law of the land.

Some Wisconsin appellate courts have already noted the changes to Section 907.02, *see, e.g., State v. Gloria C.*, 2012AP1693, ¶ 11 n.3 (Wis. Ct. App. Feb. 5, 2013) (new rules inapplicable because case originated prior to enactment), but—as of the date of this brief—no appellate court has yet published a decision regarding the scope and application of the new evidentiary standards, *see, e.g., State v. Warren*, 2012AP1727-CR, ¶ 1 n.2, ¶ 9 (Wis. Ct. App. Jan. 16, 2013) (electing not to address expert witness issues and deciding case on other grounds). Johnson asks this Court to fill that gap. He herein addresses

what should be the applicable standard of review and what duties the circuit court should incur under the new Section 907.02.

He asserts that Cohn's testimony should have been excluded under *Daubert* and the amended Section 907.02. He contends that the circuit court failed in its gatekeeping duties insofar as it did not make any findings regarding the reliability or relevance of Cohn's testimony. Additionally, he asserts that, even if the court had acted as a gatekeeper, Cohn's testimony should have been excluded because she was not qualified and her testimony was both unreliable and irrelevant. Lastly, he argues that the circuit court abused its discretion by allowing Cohn to offer expert testimony on a matter which the jury was capable of understanding and deciding without her help. The admission of Cohn's testimony was both erroneous and prejudicial to Johnson; he is therefore entitled to a new trial.

I. WISCONSIN'S APPELLATE COURTS SHOULD USE A MIXED STANDARD OF REVIEW WHEN CONSIDERING A CIRCUIT COURT'S RULING ON THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY UNDER THE NEW WIS. STAT. § 907.02.

As mentioned above, no Wisconsin appellate court has yet addressed the merits of a challenge to expert testimony under the new Section 907.02. As such, no court has yet

determined what standard should apply when reviewing whether the circuit court erred.

Previous Wisconsin cases dealing with expert witness testimony have stated, "The admissibility of expert opinion testimony lies in the discretion of the circuit court. We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." *State v. Shomberg*, 2006 WI 9, ¶ 10, 288 Wis. 2d 1, 709 N.W.2d 370 (quotation marks and quoted authority omitted). That standard is "highly deferential," asking not whether the reviewing court, "ruling initially on the admissibility of the evidence, would have permitted it to come in but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *Id.* ¶ 11 (quotation marks and quoted authority omitted).

However, that standard of review is tied to the old rule governing expert witness testimony. *See Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698. Prior to the 2011 amendment of Section 907.02, it read:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Wis. Stat. § 907.02 (2010). Wisconsin courts interpreted the former Section 907.02 as giving "to the trial judge a more-limited role" than exists under the "federal system, where the judge is a powerful gatekeeper with respect to the receipt of proffered expert evidence." *State v. Jones*, 2010 WI App 133, ¶ 22, 329 Wis. 2d 498, 791 N.W.2d 390 (citing, *inter alia*, *Daubert*, 509 U.S. 579). The circuit court's obligation when deciding the admissibility of expert testimony under Section 907.02 was "'merely [to] require[] the evidence to be 'an aid to the jury' or 'reliable enough to be probative.'" *Id.* (quoting *State v. Walstad*, 119 Wis.2d 483, 519, 351 N.W.2d 469, 487 (1984)).

As amended, Section 907.02 now reads in relevant part:

> **907.02 Testimony by experts.**
> **(1)** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

It is thus identical to Federal Rule of Evidence 702:

> **Rule 702. Testimony by Experts**
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Insofar as the language of Section 907.02 now mirrors that in Rule 702, the rules that govern its application should similarly mirror those adopted by the United States Supreme Court for the implementation of Rule 702. *Daubert* was the Supreme Court's foundational case interpreting Rule 702's application, and thus its holding and the holdings of those cases that have followed it should guide the development of Wisconsin law in this area, including the applicable standard of reiew. *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (recognizing application of *Daubert*'s principles to non-scientific expert testimony).

The Seventh Circuit employs a mixed standard of review in *Daubert* cases: "We review de novo whether the court correctly applied *Daubert*'s framework, and we review the court's decision to admit or exclude expert testimony for abuse of discretion." *Gayton*, 593 F.3d at 616. That standard is sensibly compartmentalized to first independently review the circuit court's application of the legal test for reliability and relevance under *Daubert*, and second to review the court's exercise of its discretion when weighing the admissibility of evidence that satisfies *Daubert*. *Id.*

The first question—whether a trial court satisfied its duty under *Daubert*—presents a question of law because a trial court has no discretion whether to apply the *Daubert* test. *See Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring) ("[T]rial-court discretion in choosing the manner of testing expert reliability . . . is not discretion to abandon the gatekeeping function."). Thus, whether the court properly vetted the reliability of expert testimony cannot be reviewed for an abuse of discretion; either it acted according to law or it did not. *Gayton*, 593 F.3d at 616. "[A] district court, when faced with a party's objection, must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." *United States v. Roach*, 582 F.3d 1192, 1206 (10th Cir. 2009) (quotation marks and quoted authority omitted). Proper execution of "the gatekeeping function requires a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law." *United States v. Avitia-Guillen*, 680 F.3d 1253, 1258 (10th Cir. 2012) (quotation marks and quoted authority omitted). Federal appellate courts like the Seventh Circuit thus review "de novo the question of whether the district court applied the proper standard and

actually performed its gatekeeper role in the first instance." *Roach*, 582 F.3d at 1206.

A more deferential standard applies after it is determined that the court satisfied its gatekeeping obligations. *United States v. Pansier*, 576 F.3d 726, 737-38 (7th Cir. 2009). Once a reviewing court is satisfied that the lower court properly acted as a gatekeeper, "abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence." *General Electric, Co. v. Joiner*, 522 U.S. 136, 146 (1997). "When the district court's analysis satisfies the requirements of *Daubert*, [appellate courts] affirm its decision to preclude expert scientific evidence unless the decision constitutes an abuse of the court's discretion." *United States v. Hall*, 165 F.3d 1095, 1103 (7th Cir. 1999).

The standard of review should be the same in Wisconsin. The new Section 907.02 is not the same animal as its predecessor, and thus the standard of review should change to accommodate it. As is argued later in this brief, Wisconsin's circuit courts like their federal counterparts are now tasked with being gatekeepers responsible for deciding, in the first instance, whether an expert witness is qualified and whether his or her testimony is reliable and relevant, and then whether it is

admissible. Before the circuit court can decide whether to admit an expert's testimony, the court must first undertake the analysis set forth in *Daubert* and its progeny. Wisconsin's appellate courts should therefore first review de novo whether the circuit court performed its gatekeeping function. Then, if the circuit court satisfied its obligation under *Daubert*, review should ask whether the circuit court abused its discretion by admitting or excluding expert testimony.

Johnson turns now to an application of that standard to the facts of his case. He argues in the first instance that Wisconsin's trial court judges, like their federal counterparts, should act as gatekeepers, and he explains how the judge in the instant case failed in that regard. He follows with an explanation of how, even if the court had performed its gatekeeping function, the evidence should not have been admitted because it was unreliable and irrelevant to the task at hand. Finally, he contends that, even if reliable and relevant, the evidence should have been excluded on the grounds of prejudice to the defendant by confusion of the issues submitted to the jury.

II. THE CIRCUIT COURT ABANDONED ITS GATE-KEEPING FUNCTION BY FAILING TO MAKE ANY FINDINGS REGARDING THE RELIABILITY OF THE DATA OR METHOD USED BY THE STATE'S EXPERT—TERRY COHN—TO CONCLUDE THAT AN INJURY TO

THE VICTIM'S VAGINA WAS NOT THE RESULT OF CONSENSUAL SEX.

The legislature's changes to Section 907.02 should likewise change the role Wisconsin's trial judges play when deciding the admissibility of expert witness testimony. *See Jones*, 2010 WI App 133, ¶ 22 (distinguishing circuit court's role under the old Section 907.02 from federal gatekeepers). Wisconsin judges should now be made to bear the same gatekeeping responsibilities as their federal counterparts. *See Kumho Tire*, 526 U.S. at 147 (explaining judge's obligation under *Daubert*).

A. Wisconsin's Trial Judges Should be Required to Serve as Gatekeepers when Deciding the Admissibility of Purported Expert Witness Testimony.

As noted above, Rule 702 makes federal district court judges responsible for vetting expert testimony before deeming it admissible. *Daubert*, 509 U.S. at 592-93. The Supreme Court has explained the judge's role as follows:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.

Id. (footnotes omitted). A trial court's responsibility under Rule 702 is "a special obligation" purposed on "'ensur[ing] that any and all scientific testimony is not only relevant, but reliable.'" *Kumho Tire*, 526 U.S. at 147 (quoting *Daubert*, 509 U.S. at 589).

The *Daubert* rule requires trial judges to "engage in a difficult, two-part analysis." *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (*Daubert II*), 43 F.3d 1311 (9th Cir. 1995) (on remand after *Daubert*). Courts must "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. To decide whether testimony is reliable, courts "must determine nothing less than whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science.'" *Daubert II*, 43 F.3d at 1315 (quoting *Daubert*, 509 U.S. at 597). Proof of relevancy requires the proponent be able to demonstrate that the expert's testimony "fit[s]" the reasons for which it is adduced; that is to say, the evidence must "logically advance[] a material aspect of the proposing party's case." *Id.*

The rule should be the same under Section 907.02. When faced with purported expert testimony, Wisconsin's trial judges should be required to determine whether the proposed

evidence is: (1) reliable and (2) relevant to the issue at hand. Failure on either prong should result in exclusion. *See Daubert II*, 43 F.3d at 1322 (testimony excluded because cannot meet relevancy requirement alone).

1. Reliability demands that the expert's conclusion be reached by application of the scientific method, even when that conclusion is the result of experience or training.

"To decide whether an expert's analysis is reliable, the court must rigorously examine the data on which the expert relies, the method by which his or her opinion is drawn from applicable studies and data, and the application of the data and methods to the case at hand." *EEOC v. Beauty Enterp., Inc.*, 361 F. Supp. 2d 11, 14 (D. Conn. 2005). The Supreme Court has suggested four factors relevant to the reliability determination:

> Whether a "theory or technique can be (and has been) tested";
>
> Whether it "has been subjected to peer review and publication";
>
> Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and
>
> Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community."

Kumho Tire, 526 U.S. at 149-50 (quoting *Daubert*, 509 U.S. at 592, 594). The Court's list of reliability considerations is "helpful, not definitive," *Kumho Tire*, 526 U.S. at 151, and in certain situations

courts may have to look beyond the *Daubert* factors to ascertain the reliability of expert testimony, *see* Fed. R. Evid. 702 Advisory Committee Notes (2000 amendment) ("No attempt has been made to 'codify' these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive.").

"[T]he reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, et alia." *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999). "[A] district court is required to rule out subjective belief or unsupported speculation by considering whether the testimony has been subjected to the scientific method. An expert must substantiate his [or her] opinion; providing only an ultimate conclusion with no analysis is meaningless." *Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999) (quotation marks and quoted authority omitted). "[T]he *Daubert* factors are applicable [even] in cases where an expert eschews reliance on any rigorous methodology and instead purports to base his [or her] opinion merely on 'experience' or 'training.'" *Id.* at 758. Indeed, *Daubert*'s interpretation of Rule 702 applies not only to expert testimony developed from scientific study, but also to experience-based expert testimony. The Court has

> conclude[d] that *Daubert*'s general principles apply to the expert matters described in Rule 702. The Rule, *in respect to all such matters*, "establishes a standard of evidentiary reliability." 509 U.S., at 590. It "requires a valid connection to the pertinent inquiry as a precondition to admissibility." *Id.*, at 592. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." 509 U.S., at 592.

Kumho Tire, 526 U.S. at 149 (emphasis added).

Thus, regardless of whether an expert's conclusions are developed from scientific study or from experience, the court's role is the same: "Under the *Daubert* framework, the district court is tasked with determining whether a given expert is qualified to testify in the case in question and whether his [or her] testimony is scientifically reliable." *Gayton*, 593 F.3d at 616.

When questioning an expert's qualifications, "[t]he question [to] ask is not whether an expert witness is qualified in general, but whether [the expert's] 'qualifications provide a foundation . . . to answer a specific question.'" *Id.* at 617 (quoting *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994)). "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990).

And while expert testimony derived from experience is permissible, an expert's bald assertion of opinion, purportedly derived from experience, is insufficient to satisfy *Daubert*'s reliability standard. *Joiner*, 522 U.S. at 146. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *Id.* at 146. "[P]ersonal observation [is] not sufficient to establish a methodology based in scientific fact." *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 345 (7th Cir. 1994). Even an expert who reaches a conclusion based on experience must be able to demonstrate that the conclusion is the result of applying the scientific method to the data. *Clark*, 192 F.3d at 757.

2. To be relevant, the evidence must logically advance a material aspect of the proposing party's case.

"The second part of the *Daubert* analysis requires the district court to determine 'whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue.' In other words, 'the suggested scientific testimony must "fit" the issue to which the expert is testifying.'" *Chapman v. Maytag Corp.*, 297 F.3d 682, 687 (7th Cir.

2002) (quoting *Porter v. Whitehall Labs. Inc.*, 9 F.3d 607, 614 (7th Cir. 1993)).

The Ninth Circuit has explained the "fit" requirement as mandating that an expert's opinion testimony "logically advance[] a material aspect of the proposing party's case." *Daubert II*, 43 F.3d at 1315. "In elucidating the second requirement of Rule 702, *Daubert* stressed the importance of the 'fit' between the testimony and an issue in the case: 'Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.'" *Id.* at 1320 (quoting 509 U.S. at 591-92.) Thus, relevance under *Daubert* demands not only that the expert's testimony assist the jury, but also that it be scientifically connected to the issue at hand. *See id.*

Applying that standard, the Ninth Circuit held that the experts' testimony in *Daubert II* was "inadmissible under the [relevance] prong of Fed. R. Evid. 702" because it did not fit the reason for which it was proffered. 43 F.3d at 1322. The plaintiffs had sought to introduce expert testimony that the defendant's product caused their injuries. *Id.* The court explained, "California tort law requires plaintiffs to show not merely that [the defendant's product] increased the likelihood of

injury, but that it more likely than not caused their injuries." *Id.* at 1320. However, because the experts' testimony could not establish that the defendant's product was more likely than not to have caused the plaintiffs' injuries, it was not fitted to proof of causation under California tort law. *Id.* at 1320-21. Thus, it did not pass the relevance component of the Supreme Court's *Daubert* test. *Id.* at 1322.

B. The Circuit Court Failed to act as a Gatekeeper in the Instant Case Insofar as it did not Inquire Into the Reliability of the Expert's Methodology, the Facts Underlying the her Opinion, or the Link Between the Facts and her Conclusion.

"It is axiomatic that proffered expert testimony must be 'derived by the scientific method[.]'" *Clark*, 192 F.3d at 756 (quoting *Wintz v. Northrop Corp.*, 110 F.3d 508, 512 (7th Cir. 1997)). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146. Along with *Daubert*'s aforementioned reliability factors, "[t]he court should also consider the proposed expert's full range of experience and training in the subject area, as well the methodology used to arrive at a particular conclusion." *Gayton*, 593 F.3d at 616.

In the instant case, the only thing that Cohn explained about her qualifications was that she was a trained SANE nurse, that she had experience treating sexual assault victims, and that she had training on what injuries could be caused by consensual and nonconsensual sex. The State did not inquire any further about what Cohn's training entailed, how it related to the ultimate conclusion that she was making, or even how her training qualified her to reach the conclusion that she asserted. What is more, the circuit court did not require such questions be asked. Instead, the court accepted Cohn as a qualified witness based on the simple fact that she has experience dealing with sexual assault victims, that she has some kind of training on sexual assault examinations and the cause of vaginal injuries, and that she has performed a number of sexual assault exams in the recent past. By failing to determine how or why Cohn was qualified to offer an expert opinion regarding the cause of Kalena P.'s injury, the circuit court failed to comply with its gatekeeping obligation.

"Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Id.* Appellate courts

"give the [trial] court great latitude in determining not only how to measure the reliability of the proposed expert testimony but also whether the testimony is, in fact, reliable, *but the court must provide more than just conclusory statements of admissibility to show that it adequately performed the* Daubert *analysis*." *Pansier*, 576 F.3d at 737-38 (emphasis added). The circuit court in the instant case failed to express more than a conclusory statement that Cohn was qualified. In that, it erred.

In addition to not satisfying the qualification component of the *Daubert* inquiry, the circuit court also failed to test the reliability of Cohn's data and methods, as well as whether Cohn's conclusions were reliably derived therefrom. Cohn was never asked how many times she had seen an injury like the one Kalena P. suffered. She was not asked to and did not detail the method by which she ascertained that Kalena P.'s injury was not caused by consensual sex. She did not offer any details about the number of Kalena P.-type injuries that she has seen that were the result of consensual sex, nonconsensual sex, or something other than sex. She mentioned no tests or studies that she had performed or on which she relied to reach her conclusion. Cohn said that the injury was not caused by consensual sex because it likely occurred in the absence of

lubrication, but she did not explain how that related to Kalena P. She did not explain that Kalena P.'s lubrication levels were within normal or abnormal parameters. She offered no tests performed on Kalena P. to ascertain whether, even during consensual sex, Kalena P. was susceptible to injury. And, similarly, she had no tests to show that Kalena P.'s level of lubrication would have been different during nonconsensual sex. The absence of inquiry into those areas by the court constitutes an abandonment of the circuit court's responsibility under Section 907.02.

A district court "abandon[s] its gate-keeping function by failing to make any findings regarding the reliability of [an expert's] testimony." *Mike's Train House, Inc. v. Lionel, LLC*, 472 F.3d 398, 406 (6th Cir. 2006). Proper execution of "the gatekeeping function requires 'a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law.'" *Avitia-Guillen*, 680 F.3d at 1258 (quoted authority and quotation marks omitted). The court's failure to act as a gatekeeper makes erroneous its decision to admit Cohn's testimony.

III. THE CIRCUIT COURT ERRED IN ADMITTING COHN'S TESTIMONY BECAUSE IT WAS UNRELIABLE.

Cohn's ultimate conclusion as an expert was that Kalena P.'s injury was not caused by consensual sex. *Daubert* requires that Cohn, as an expert, be both qualified and able to demonstrate the reliability of the data and methods on which she relied to reach that conclusion. If Cohn is not qualified, she should not be allowed to testify. If she cannot adduce sufficient evidence to demonstrate the reliability of her data and methods, then the court cannot assess the admissibility of that testimony. If Cohn's conclusion is not supported by reliable data and methods, then it is not admissible.

First, Cohn should not have been allowed to testify as an expert because she was not qualified to testify regarding the cause of Kalena P.'s injury. Cohn's testimony is bereft of studies or tests that she had performed to isolate the causes of patients' injuries. Cohn was simply a SANE nurse whose job it was to treat patients who claimed to have suffered nonconsensual sex. Her role was not to deduce the cause of her patients' injuries. Cohn otherwise worked as an operating room nurse, a position that likewise did not require her to conduct inquiries into the cause of injuries suffered. Likewise absent was the assertion of any studies or tests performed by others to support the

conclusion she reached or the method by which she reached that conclusion. Cohn was therefore not qualified to offer testimony regarding the cause of Kalena P.'s injury. Unless Cohn was a gynecological examiner with experience analyzing injuries to female genitalia caused by consensual, nonconsensual, and no sex, then she was in no position to offer expert testimony regarding the cause of a single injury based solely on her experience as an examiner of women who claim to have been sexually assaulted.

Second, Cohn should not have been allowed to offer an expert opinion regarding the cause of Kalena P.'s injury because her data and methodology were unreliable. Cohn's data is unreliable for two reasons: (1) the validity of the individual members of her data set cannot be tested and (2) her data set omits a key source of information necessary to reach a scientifically valid conclusion about the injury Kalena P. suffered.

The first flaw with Cohn's data is that it is dependent upon the representations made by those women who come to the hospital and allege sexual assault. Cohn's role is to treat those persons, not to make factual determinations as to whether a nonconsensual sex act actually occurred. Thus, Cohn has no

way to confirm the veracity of the factual premises on which she bases her ultimate conclusions other than to accept as true the statements her patients make. The validity of Cohn's data set is therefore untested and unreliable.

Setting aside the problem that Cohn can only assume the validity of her data sample, the reliability of her data has other fatal flaws. Assuming what Cohn's patients tell her is true, the population of Cohn's test group necessarily excludes persons who have had consensual sex. As a SANE nurse, Cohn's only experience is dealing with individuals who allege to be the victims of sexual assaults, that is to say persons who have been engaged in nonconsensual sex. By leaving out of her test group women who may have suffered Kalena P.-type injuries as the result of consensual sex or no sex, Cohn's data is not scientific. To accurately test the hypothesis that injuries of the sort that Kalena P. suffered are not caused by consensual sex, one must question whether persons who had consensual sex can incur such injuries. To answer that question, one must examine for such injuries women who have had consensual sex. However, Cohn's test group omits that key group; she is—by the nature of her work—always dealing with women who were sexually assaulted, and thus not examining those who consented to sex.

The data on which she relies is thus fundamentally flawed and unreliable.

Cohn's method is likewise unreliable because she has no control group. A control group is a group separated from the rest of the experiment where the independent variable being tested cannot influence the results. This isolates the independent variable's effects on the experiment and can help rule out alternate explanations of the experimental results. Creation of a control group in the instant case would require elimination of the consensual sex variable, insofar as that is the variable for which the tests are being run. In other words, the control group should be composed of women who have had nonconsensual sex and women who have not had sex at all. Examination of the members of the control group would show whether there is any incident of Kalena P.-type injuries in the absence of consensual sex. If such injuries occur, then it disproves the hypothesis that Kalena P.'s injury could not have been caused by consensual sex.

The absence from Cohn's data set of women who have abstained from sex at all leaves her with an unreliable control group. She has no group of women who she knows abstained from sex that she can rely on to determine the likelihood of

suffering Kalena P.-type injuries as a result of something other than consensual sex. The absence of a control group guts the reliability of Cohn's methods. Her ultimate conclusion likewise suffers.

Cohn is concluding that Kalena P.'s injury was not the result of consensual sex by comparing her injury to the unreliable pool of data that she has developed over the course of her service as a SANE nurse. If Cohn is constantly seeing women who have been or claim to have been the victim of nonconsensual sex and who have injuries consistent to those suffered by Kalena P., and then she is deriving from that experience the conclusion that every time she sees that kind of injury is not the result of consensual sex, her conclusion is not scientific.

Cohn has no way by which to measure the number of times that women suffer those same types of injuries as the result of something other than sex, and thus she has no way to affirmatively state that Kalena P.-type injuries cannot also occur during consensual sex. Reliance on data collected solely from persons who engaged in nonconsensual sex cannot lead to a scientifically valid conclusion regarding the injuries caused during consensual sex; for, one cannot even test for the variable

that is sought to be proven: that injuries of this sort are not caused by consensual sex. Simply because every injured vagina that Cohn has ever seen was injured during nonconsensual sex does not mean that all such injuries are necessarily caused by nonconsensual sex.

It may be the case that every time that I do not take an umbrella to work it rains. But I cannot scientifically say that because it rained one day, I must not have taken my umbrella to work. There is no justifiable causal connection that can be developed from the manner of my proof; proof of the consequent tells one nothing about the antecedent. Such is the manner of Cohn's proof.

In sum, Cohn's conclusion was derived from the I-know-it-when-I-see-it method. Her testimony is effectively that she knows Kalena P.'s injury was not caused by consensual sex because she can tell just by looking at it. That method is the same as the one deemed unreliable by the Seventh Circuit in *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1106-07 (7th Cir. 1994). O'Conner sued for "damages for personal injuries allegedly caused by unsafe dosages of radiation." *Id.* at 1093. Amongst his injuries were cataracts that his doctor opined "were caused by radiation because radiation–induced cataracts

are so unique that they can be identified merely by observation." *Id.* Analyzing the doctor's proposed testimony under *Daubert*, the court explained, "We do not believe that [the doctor's] testimony can meet at least the first requirement"—reliability. *Id.* at 1106.

The court found the doctor's testimony that he could unmistakably identify radiation induced cataracts on sight an unreliable method. *Id.* at 1107. The doctor's assertion of authorities allegedly supporting his methodology was insufficient to make his method scientific, especially in light of the fact that "none of th[o]se sources indicate[d] that radiation-induced cataracts can be identified by mere observation." *Id.* at 1106. Further undercutting the scientific validity of the doctor's claim was his inability to produce "any personal study or experiments that otherwise would justify his conclusions that Mr. O'Conner's cataracts [we]re radiation-induced." *Id.* at 1107. Given those problems, the court concluded that the doctor's "opinion ha[d] no scientific basis and, consequently, the district court correctly ruled that [the doctor's] testimony [was] inadmissible." *Id.*

The result should be the same in the instant case. Cohn's conclusion regarding the cause of Kalena P.'s injury is nothing

more than her subjective opinion unsupported by any reliable data or method. *See Chapman*, 297 F.3d at 688 (ordering new trial because expert did not conduct any tests or experiments and never produced any studies, tests or experiments to justify or verify his conclusions; holding "the absence of any testing indicates that [the expert's] proffered opinions cannot fairly be characterized as scientific knowledge"). Like the doctor in *O'Conner*, Cohn offered no sources supporting the method by which she deduced the cause of Kalena P.'s injury. *See* 13 F.3d at 1106. Nor did she adduce any personal study or experiments that otherwise would justify her conclusion that Kalena P.'s injury was the result of nonconsensual sex. *See id.* at 1107. Her conclusion is thus unreliable. *See id.*

Expert testimony must be the result of the scientific method. *Clark*, 192 F.3d at 756. Nothing in *Daubert* or the rules of evidence requires admission of Cohn's opinion simply because she believes it to be correct. *Joiner*, 522 U.S. at 146. To admit her opinion, Cohn must be able to show that her conclusion is reliably deduced from equally reliable data and methods. *Clark*, 192 F.3d at 756. Insofar as Cohn was unable to demonstrate the reliability of her data, method, or how either of those reliably led to her conclusion, the circuit court,

functioning as a gatekeeper, should have prevented her from testifying as an expert regarding the cause of Kalena P.'s injury. That it did not was error.

Nonetheless, even if Cohn's testimony was reliable, it should have been excluded because it was irrelevant and likely confused the issues and misled the jury.

IV. THE CIRCUIT COURT ERRED IN ADMITTING COHN'S TESTIMONY BECAUSE IT DID NOT LOGICALLY ADVANCE A MATERIAL ASPECT OF THE STATE'S CASE.

To prove its case against Johnson, the State had to satisfy the following five elements:

> 1. The defendant had sexual intercourse with Kalena P[.]
>
> 2. Kalena P[.] was under the influence of an intoxicant at the time of the sexual intercourse.
>
> > "Intoxicant" means any alcohol beverage, controlled, substance, controlled substance analog or other drug, any combination thereof.
>
> 3. Kalena P[.] was under the influence of an intoxicant to a degree which rendered her incapable of giving consent.
>
> > This requires that Kalena P[.] was incapable of giving freely given agreement to engage in sexual intercourse.
>
> 4. The defendant had actual knowledge that Kalena P[.] was incapable of giving consent.
>
> 5. The defendant had the purpose to have sexual intercourse while Kalena P[.] was incapable of giving consent.

(R.30:9; A. Ap. 38.) Not one of those elements necessitates proof that Kalena P. did not consent to her sexual encounter

with Johnson. (*See id.*) In fact, whether Kalena P. consented is irrelevant to the crime for which Johnson was prosecuted. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Johnson could be guilty of the crime with which he charged if, at the time that they had sex, Kalena P. either agreed to have sex with him or vehemently protested against it. Thus, proof of whether Kalena P. consented to the sexual encounter does not make more or less probable the existence of any fact of consequence to the determination of the crime with which Johnson was charged. *See id.*

The relevant inquiry in the instant case is whether Kalena P. was intoxicated to a point that she was legally incapable of consenting to sex with Johnson. And yet, Cohn's testimony about the cause Kalena P.'s injury was specifically addressed to whether Kalena P. had consented to sex with Johnson. She offered no testimony regarding whether Kalena P.'s injury demonstrated that she was intoxicated or that her level of intoxication was such that it rendered her incapable of giving consent. Cohn's expert opinion thus did not fit the

State's case—it did not logically advance a material aspect of the State's case against Johnson. It was therefore irrelevant and should have been excluded as such.

V. THE CIRCUIT COURT ERRED IN ADMITTING COHN'S TESTIMONY INSOFAR AS HER OPINION WAS DIRECTED SOLELY TO LAY MATTERS WHICH THE JURY WAS CAPABLE OF UNDERSTANDING AND DECIDING WITHOUT HER HELP.

Even if Cohn's testimony was reliable and relevant, it nonetheless should have been excluded because it was likely to confuse the issues and mislead the jury. *See* Wis. Stat. § 904.03 (exclusion of otherwise relevant evidence).

In prior *Daubert* cases, federal courts have concluded that expert testimony that may pass the *Daubert* test is nonetheless susceptible to exclusion. "As with any other relevant evidence, the court should exclude expert testimony if its prejudicial effect substantially outweighs its relevance. In addition, the district court should not admit testimony that is directed solely to lay matters which a jury is capable of understanding and deciding without the expert's help." *United States v. Mulder*, 273 F.3d 91, 101 (2d Cir. 2001) (quotation marks & quoted authority omitted). Although "the district court is not compelled to exclude all expert testimony that may in some way overlap with matters within the jury's experience . . . [i]f the proffered

testimony duplicates the jury's knowledge, [then] Rule 403 might counsel exclusion . . . to avoid the risk of unduly influencing the jury." H*all*, 93 F.3d at 1343.

Federal Rule of Evidence 403 reads: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." It is thus substantially similar to Wisconsin's evidentiary rule governing the exclusion of otherwise relevant evidence: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Wis. Stat. § 904.03. The similarity between Rule 403 and Section 904.03 counsels that Wisconsin courts should analyze the exclusion of relevant Section 907.02 evidence consistently with federal courts' exclusion of relevant Rule 702 evidence.

In the instant case, Cohn's testimony should have been excluded because it was "directed solely to lay matters which [the] jury [was] capable of understanding and deciding without

the expert's help." *Mulder*, 273 F.3d at 101. The manner of sex is fully within the common knowledge and experience of Wisconsin adults. Even those jurors personally inexperienced with sex have likely been through sexual education classes, given the ubiquity of those programs in schools throughout the state. Furthermore, the prevalence of sexual themes and sexuality in television, movies, and print media means that sexual intercourse is a matter of common knowledge. The jurors were thus capable of understanding without the assistance of an expert that the natural biological function of sex involves female lubrication. Furthermore, the jury was capable of understanding from their common knowledge and experience how injuries can occur during sex; the jurors did not need an expert to tell them those things.

Cohn's testimony therefore "duplicate[d] the jury's knowledge" and was likely to have "unduly influenc[ed] the jury." *Hall*, 93 F.3d at 1343. The danger of undue influence is exaggerated when, as in the instant case, the proponent of the evidence touts the credibility and believability of the expert's conclusions when arguing in front of the jury that the expert's testimony should be allowed. (*See* R.64:26-27; A. Ap. 133-34.) As a result, there is a reasonable likelihood that Cohn's

testimony regarding the cause Kalena P.'s injury usurped the jurors' common knowledge and experience and eliminated something that the jurors could and should have debated in the jury room. Her testimony is thus likely to have improperly influenced the jury's deliberations. *See Mulder*, 273 F.3d at 101. It should have been excluded. Wis. Stat. § 904.03.

The danger of confusing the issues before the jury likewise counseled exclusion. As discussed above, whether Kalena P. consented to her sexual encounter with Johnson has no bearing on the crime with which Johnson was charged. The ultimate question before the jury was whether Kalena P. was intoxicated to a point that she could not legally consent at the time that she had sex with Johnson. The jurors were called upon not to decide whether Johnson forced Kalena P. to have sex with him, but rather whether their sexual encounter was legally nonconsensual by virtue of Kalena P.'s intoxication.

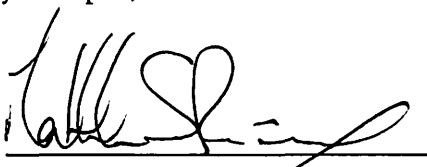
Cohn's testimony that Kalena P.'s injury was not the result of consensual sex muddies the waters and confuses the issue, especially in light of Cohn's failure to connect Kalena P.'s injury to her level of intoxication, the true issue of relevance to Kalena P.'s consent. Thus, Cohn's testimony was likely to cause confusion of the issues: the jury may have believed that it could

convict Johnson of the crime with which he was charged simply because it believed that Kalena P. did not consent to sex. But, again, that is not an element of the offense. The jury had to decide whether Kalena P. was so intoxicated that she could not legally consent, and Cohn's testimony likely confused those issues. If reliable and relevant, Cohn's testimony should have been excluded under Wis. Stat. § 904.03.

CONCLUSION

For the aforementioned reasons, Johnson asks this Court to hold that the circuit court erroneously admitted Cohn's testimony and that Johnson is therefore entitled to a new trial. He asks this Court to remand his case to the circuit court for proceedings consistent with so holding.

Dated this 1st day of April, 2013.



Matthew S. Pinix
Attorney for Defendant-Appellant

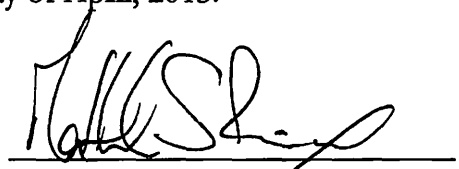
CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,883 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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 1st day of April, 2013.



Matthew S. Pinix
Attorney for Defendant-Appellant

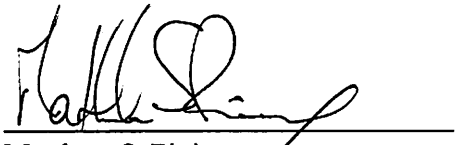
CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 first names and last initials 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.

Dated this 1st day of April, 2013.

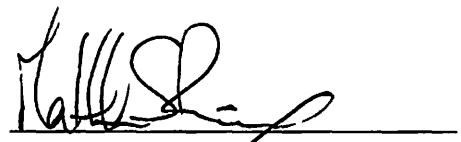


Matthew S. Pinix
Attorney for Defendant-Appellant

CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on April 1, 2013. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated this 1st day of April, 2013.



Matthew S. Pinix
Attorney for Defendant-Appellant