COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III
CASE NO. 2014AP1852-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

JOSEPH J. VANMETER,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION IN
EAU CLAIRE COUNTY CIRCUIT COURT
THE HONORABLE PAUL J. LENZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED FOR REVIEW

I. IS A TRAINED POLICE OFFICER'S TESTIMONY REGARDING THE HORIZONTAL GAZE NYSTAGMUS (HGN) TEST ADMISSIBLE UNDER THE DAUBERT STANDARD?

TRIAL COURT ANSWERED: YES.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication of this court's opinion nor oral argument are necessary in this case. The issue presented is adequately addressed in the brief and under the rules of appellate procedure, publication of this decision is not appropriate because this is a one-judge appeal. *See* Rule 809.23 (1) (b) (4) , Wis. Rules of Appellate Procedure, 2011-2012.

STATEMENT OF FACTS

On September 30, 2011, Joseph VanMeter was arrested by Officer Arthur Jaquish on suspicion of Operating While Intoxicated, Third Offense and Disorderly Conduct. R. Doc. 1. After the prosecution commenced, VanMeter filed various pretrial motions, including a Motion to Exclude HGN (Horizontal Gaze Nystagmus) Evidence. R. Doc. 10. In his supporting brief, VanMeter argued that evidence relating to the HGN test (a test wherein officers look for involuntary twitching in a subjects eyes as evidence of possible impairment) should be excluded because the test was not sufficiently reliable and did not meet the Daubert evidentiary standard. R. Doc. 7, 5-8. It its response brief, the State argued that HGN, like all standardized field sobriety tests, is an observational tool rather than a scientific test and therefore, the Daubert standard is not applicable to determining its admissibility. R. Doc. 12, 10. Further, the State argued that even if the trial court determined that HGN was a scientific test necessitating expert testimony, HGN was based on reliable scientific principles and was admissible under Daubert when proffered by a trained law enforcement officer. *Id*. at 14. The trial court, relying at least in part on persuasive case law from other Midwestern states, concluded that the HGN test is an observational tool rather than a scientific test. R. Doc. 43, 4:22-25; 5:1-2. In making this finding, the trial court concluded that HGN testimony was admissible as a lay opinion and denied VanMeter's motion. *Id*.

After denying the motion, the trial court considered VanMeter's Motion to Suppress Based Upon Illegal Stop or Investigation Detention R. Doc. 11. At the hearing, Officer Jaquish testified about the evidentiary basis upon which he arrested VanMeter for Operating While Intoxicated, which included, among other things, observations made during the HGN test. R. Doc. 44, 1-19. Prior to offering testimony regarding his observations during HGN, Officer Jaquish testified that he was trained to administer field sobriety tests, including the HGN test. *Id*. at 5:7-9; 12:19-21. He testified that his training consisted of a 520-hour academy training course, supplemented by continuing yearly in-service trainings which include updates on field sobriety testing. *Id*. 5:1-14. He also testified that he had nearly five years of law enforcement experience and had arrested more than 75 individuals on suspicion of operating while intoxicated. *Id*. 4:16-18; 5:15-18. At the close of testimony, the trial court found that there was probable cause for the arrest and denied VanMeter's motion. *Id*. at 30:1-2.

A jury trial was held on January 2, 2014, at which Officer Jaquish testified again regarding his qualifications to administer the HGN test. R. Doc. 52, 60:7-16. He testified that he has training and experience in administering field sobriety tests, that he was certified in 2007 to administer the tests, and that he does the tests as a regular part of his professional duties. *Id*. He also testified that he had specific training and experience in administering the HGN test. *Id*. at 60:19-22. Officer Jaquish then testified regarding how he administered the HGN test and

the observations he made of VanMeter during the HGN test on the night of the arrest. *Id*. at 60:17-25 - 63:1-6. Officer Jaquish also testified about observations made during other field sobriety tests. *Id*. at 63:8 – 69:17. At the close of evidence, the jury found VanMeter guilty of Operating While Intoxicated, Third Offense, Operating With a Prohibited Alcohol Concentration, Third Offense, and Disorderly Conduct. R. Doc. 32.

VanMeter initially filed a no-merit report. However, this Court rejected the no-merit report, finding that an arguable issue exists with respect to whether the HGN test meets the Daubert standard. VanMeter then submitted a brief, arguing not only that the trial court improperly denied his Motion to Exclude HGN Evidence, but also that the trial court improperly denied his Motion to Dismiss for Lack of Probable Cause to Make Warrantless Arrest (R. Doc. 8). In his brief, VanMeter also argues that "the evidence should be suppressed because Officer Jaquish had no reasonable suspicion to request field sobriety tests", thereby implying that he is also appealing the denial of his Motion to Suppress Based Upon Illegal Stop or Investigation Detention (R. Doc. 11). *See* Brief of Defendant-Appellant, pp. 4. However, because this Court specifically limited the scope of this appeal to whether the HGN test meets the Daubert standard, the State will address only that issue.[1]

[1] The State bases this conclusion on this Court's correspondence from December 30, 2014, which states, in part, "A potential issue for appeal is whether the horizontal gaze nystagmus test meets the ***Daubert*** standard. . .Therefore, we reject the no-merit report and will require a merit brief to

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY REGARDING THE HORIZONTAL GAZE NYSTAGMUS (HGN) TEST BECAUSE IT IS AN OBSERVATIONAL TOOL RATHER THAN A SCIENTIFIC TEST, AND THEREFORE TESTIMONY FROM A POLICE OFFICER REGARDING OBSERVATIONS MADE DURING THE HGN TEST ARE PROPERLY ADMITTED INTO EVIDENCE AS A LAY OPINION UNDER S. 907.01, WIS. STATS.

A circuit court's decision to admit or exclude evidence is reviewed under an erroneous exercise of discretion standard. *State v. Shomberg*, 2006 WI 9, ¶ 10, 288 Wis.2d 1, 709 N.W.2d 370. A circuit court's discretionary decision will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts of the record. *Shomberg*, 288 Wis.2d 1, ¶ 11, 709 N.W.2d 370. In the instant case, the trial court concluded that the HGN test is observational rather than scientific and was therefore admissible as a lay opinion. R. Doc. 43, 4:22-25; 5:1-2. This determination has a rational basis and was made in accordance with accepted legal standards and as such, should not be disturbed.

In early 2011, Wisconsin joined the majority of states and the federal system when it enacted 2011 Wis. Act 2, which codified the evidentiary standard announced in Daubert v. Merrell Dow Phar., Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993). *See* WIS. STAT. §§ 907.02. The newly-adopted Daubert standard provides as follows:

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be filed on that issue." (emphasis supplied). The State is willing to address VanMeter's other appellate arguments if directed by this Court to do so.

> 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. WIS. STAT. § 907.02(1).

It is only where an opinion involves scientific, technical, or specialized knowledge that the three-pronged test mandated by Daubert must be satisfied. When lay opinion testimony is offered, is remains subject to Wisconsin's original relevance standard, unchanged by Daubert. WIS. STAT. § 904.01.

When the trial court considered VanMeter's challenge to HGN testimony on February 20, 2012, Wisconsin appellate courts had not considered whether HGN testimony requires scientific or technical knowledge and thus falls within the ambit of Daubert. Accordingly, the trial court appropriately sought guidance from other states on that issue. *See Berg v. Schultz*, 190 Wis.2d 170, 176, 526 N.W.2d 781 (Ct. App. 1994), R. Doc. 43, 4:22-25. In its brief, the State pointed to cases from several other Midwestern states which had considered the issue and determined that testimony regarding observations made during HGN is not scientific or technical in nature. R. Doc. 12, 11. The State cited State v. Nagel, 30 Ohio App.3d 80, 506 N.E.2d 285 (Ct. App. 1986), in which the Ohio Court of Appeals found that testimony regarding the gaze nystagmus test was admissible based on a trained officer's personal observations without expert interpretation. *Id*. at 80-81. The State also cited State v. Murphy, 451 N.W.2d 154 (Iowa 1990),

in which the Iowa Supreme Court held that testimony by a properly trained police officer with respect to the administration and results of the HGN test is admissible without need for further scientific evidence. *Id*. at 158. The State also cited City of Fargo v. McLaughlin, 512 N.W.2d 700 (N.D. 1994), in which the North Dakota Supreme Court stated that no scientific foundation is required, and that HGN testimony is admissible based on a showing of the officer's training and experience in administering the test and a showing that the test was in fact properly administered. *Id*. at 707-08. In support of his argument, VanMeter cited cases from other states with different holdings. R. Doc. 7, 5. The trial court reviewed the case law submitted by the parties and found the cases from North Dakota, Iowa, and Ohio persuasive in concluding that testimony regarding observations during the HGN test are not scientific in nature. R. Doc 43, 4:22-25; 5:1-2. Implicit in the court's ruling is the conclusion that because the HGN test is not scientific in nature, it is not subject to the Daubert standard and is admissible based on Wisconsin's original relevance standard. Utilizing this reasoning, the trial court properly exercised its discretion in deciding to admit HGN testimony.

The trial court's conclusion finds substantial support in Wisconsin law. In City of West Bend v. Wilkens, 2005 WI App 36, 278 Wis.2d 643, 693 N.W.2d 324, the defense attempted to characterize field sobriety tests as scientific in nature. The Wisconsin Court of Appeals rejected this characterization, stating:

> [Field sobriety tests] are not scientific tests. They are merely observational tools that law enforcement officers commonly use to assist them in discerning various

> indicia of intoxication, the perception of which is necessarily subjective. Moreover, it is not beyond the ken of the average person to understand such indicia and to form an opinion about whether an individual is intoxicated.
> *Id*. at ¶ 1.

The Wilkens court couched its opinion as primarily applicable to the Walk and Turn and One Leg Stand Tests. While Wisconsin courts have not made a definitive statement on whether HGN testimony is based on scientific or technical knowledge, the issue has begun to surface in the appellate courts. In unpublished opinions, the Wisconsin Court of Appeals has agreed that HGN and other standardized field sobriety tests are not scientific in nature and are therefore not subject to Daubert analysis.

In City of Mequon v. Haynor, 2010 WI App 145, 330 Wis.2d 99, 791 N.W.2d 406 (unpublished), the Court stated:

> Like many courts, we remain unconvinced that HGN and VGN (Vertical Gaze Nystagmus) are based on science. *See City of West Bend v. Wilkens*, 2005 WI App 36, ¶ 18-21, 278 Wis.2d 643, 693 N.W.2d 324. However, that does not take away from the fact that the HGN and VGN, as well as the other [field sobriety tests] routinely performed, do serve a purpose, as we observed in Wilkens when we cited to a federal district court case, United States v. Horn, 185 F.Supp.2d 530, 558 (D.Md. 2002), which pointed out the tests were "standardized procedures police officers use to enable them to observe a suspect's coordination, balance, concentration, speech, ability to follow instructions, mood and general physical condition – all of which are visual cues that laypersons, using ordinary experience, associate with reaching opinions about whether someone has been drinking." *Haynor*, 330 Wis.2d 99, ¶ 22, 791 N.W.2d 406 (unpublished).

Similarly, in State v. Warren, 2013 WI App 30, 346 Wis.2d 281, 827 N.W.2d 930 (unpublished), the Wisconsin Court of Appeals, relying on Wilkens when considering a Daubert challenge to field sobriety tests including HGN, stated that "an officer testifying that field sobriety tests and other observations led him to

form a subjective opinion that a driver's alcohol level was impermissibly high is not scientific or expert testimony…" *Warren*, 346 Wis.2d 281, ¶ 7, 827 N.W.2d 930 (unpublished).

Based on this background, the State argues that the trial court in this case properly exercised his discretion in conformity with existing legal standards to determine that the HGN test does not implicate scientific or technical knowledge. As such, allowing admission of HGN testimony was not an erroneous exercise of discretion and the judgment of the trial court should be affirmed.

II. EVEN IF HGN TESTIMONY IS SCIENTIFIC OR TECHNICAL IN NATURE, IT IS ADMISSIBLE UNDER THE DAUBERT STANDARD BECAUSE HGN IS BASED ON RELIABLE SCIENTIFIC PRINCIPLES AND TRAINED LAW ENFORCEMENT OFFICERS POSSESS SUFFICIENT QUALIFICATIONS TO TESTIFY AS EXPERT WITNESSES IN THIS AREA AND ACCORDINGLY, THE TRIAL COURT'S ADMISSION OF THE TESTIMONY IS NOT REVERSIBLE ERROR.

Even if this Court disagrees with the trial court's determination that the HGN test does not implicate scientific or otherwise technical knowledge, the State argues that the officer's testimony regarding HGN is admissible under the Daubert standard because HGN is based on reliable scientific principles and trained law enforcement officers possess sufficient qualifications to testify as expert witnesses in this area. Thus, the trial court's admission of HGN evidence should not be reversed because the testimony is admissible, albeit not on the grounds cited by the trial court. *See State v. Holt*, 128 Wis.2d 110, 283 N.W.2d 679 (Ct. App. 1985) ("It is well-established that if a trial court reaches a proper result for the

wrong reason, it will be affirmed.), *superseded by statute on other grounds, as recognized in* State v. Grunke, *2007 WI App 198, 305 Wis.2d 312, 738 N.W.2d 137*.

As previously stated, Wis. Stat. § 907.02(1), which codified Daubert, sets for a three-part test for an when expert can provide testimony regarding scientific or otherwise technical information: (1) the witness's testimony is derived from sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness applied these principles and methods to the facts of this case. If the proffered testimony meets all three prongs of this test, it is admissible under Daubert.

The first prong of the Daubert test requires analysis of whether the witness's testimony is derived from sufficient facts or data. Federal Rule of Evidence 702, which is effectively the same rule as Wis. Stat. § 907.02, includes comments which provide guidance for determining whether testimony is derived from sufficient facts or data. Comments from FRE 702 indicate that such a determination calls for quantitative rather than qualitative analysis. In determining whether Officer Jaquish's testimony is derived from sufficient facts or data, the entire factual record in this case must be reviewed. *See State v. LaCount*, 2008 WI 59, ¶ 15, 310 Wis.2d 85, 750 N.W.2d 780 ("A reviewing court may search the record for reasons to sustain the circuit court's exercise of discretion.").

Officer Jaquish testified at the suppression hearing that he had nearly five years of law enforcement experience. R. Doc 43, 4:6-8. In order to become a police officer, Officer Jaquish earned a Bachelor's degree and completed a 520-hour academy training course, which included training on the administration of HGN and other field sobriety tests. *Id*. at 4:23-25; 5:1-9. Officer Jaquish testified that he received continuing training as a police officer in the form of yearly in-service trainings which included updates on field sobriety testing. *Id*. at 5:10-14. Officer Jaquish also testified that he had been involved with more than 75 cases involving arrests for operating while intoxicated. *Id.* at 5:15-18. Finally, he testified that there have been cases wherein he administered field sobriety tests and decided not to arrest the subject for operating while intoxicated. *Id*. at 5:21-24. At the jury trial, Officer Jaquish reiterated that he was trained to administer field sobriety tests and that he is certified to administer the tests. R. Doc. 52, 60:10-12. He also testified that he administers field sobriety tests, including the HGN test, as a regular part of his job duties. *Id.* at 60, 14-21.

With respect to his actual administration of the test in the instant case, Officer Jaquish's testimony makes clear that he personally administered and observed the HGN test. Officer Jaquish was in very close physical proximity to VanMeter during administration of the tests, testifying that they were standing in front of VanMeter's vehicle. *Id.* at 62:8-10.

On this record, it is clear that Officer Jaquish's testimony was derived from sufficient facts or data. Officer Jaquish was merely feet away from VanMeter and was in a position to personally and accurately observed VanMeter's performance on the HGN test. Moreover, Officer Jaquish's observations would have been measured against his years of experience, where he had administered the HGN test dozens of times. Officer Jaquish was not a third party who peripherally observed VanMeter's performance. Rather, his testimony was based on his personal observations and substantial experience, and is thus derived from sufficient facts or data, satisfying the first prong of the Daubert test.

The second prong of the Daubert test – whether HGN testimony is the product of reliable principles and methods – finds legal support in Wisconsin. In State v. Zivcic, 229 Wis.2d 119, 598 N.W.2d 565 (Ct. App. 1999), the Wisconsin Court of Appeals admitted HGN testimony, concluding that "as long as the HGN test results are accompanied by the testimony of a law enforcement officer who is properly trained to administer and evaluate the test," it is admissible. *Id*. at 128. In arriving at this conclusion, the Zivcic court cited as persuasive several cases from other states. *Id*. at 128-29. These cases included State v. Bresson, 51 Ohio St.3d 123, 128, 554 N.E.2d 1330 (Ohio 1990) (finding that the HGN test is reliable and admissible with proper foundation as to the officer's training and administration of the test); People v. Berger, 217 Mich.App. 213, 217, 551 N.W.2d 421 (Mich.App. 1996) (agreeing that the HGN test is scientific evidence

with general acceptance and proven reliability); and State v. Murphy, 451 N.W.2d 154, 158 (Iowa 1990) (finding that based on the record, there was no reason to question the reliability of the HGN test). Thus, the Zivcic court inherently recognized that HGN testimony is based on reliable principles and is admissible as long as it comes from a trained law enforcement officer. Although Zivcic was decided before the adoption of the Daubert standard in Wisconsin, the case has not been overturned, 2011 Wis. Act 2 has not rejected its holding, and it remains binding precedent. As such, Wisconsin law has long-recognized the reliability and use of HGN evidence to establish impairment.

Although Zivcic referenced only three foreign cases in determining that HGN evidence is reliable and generally accepted, there is an abundance of case law from courts across the country which have examined the HGN test and found that it is based on reliable, scientifically valid principles. This is especially compelling given recent precedent in this state involving Wisconsin appellate courts relying on foreign jurisprudence when deciding whether scientific testimony passes Daubert scrutiny. For example, in State v. Giese, 2014 WI App 92, 356 Wis.2d 796, 854 N.W.2d 687 (2014), the Wisconsin Court of Appeals relied on cases from Arizona, Vermont, and Massachusetts in reaching the conclusion that retrograde extrapolation is a reliable, generally accepted scientific method and is accordingly admissible under Daubert. *Giese* 356 Wis.2d 796, ¶ 22. Accepting that examination of foreign jurisprudence may inform Daubert

decisions in Wisconsin, the State points out a limited sampling of foreign decisions concluding that HGN is based on reliable, scientifically valid principles, including State v. Taylor, 694 A.2d 907, 911-12 (Me. 1997) (taking judicial notice of the reliability of the HGN test to detect impaired drivers); State v. Ruthardt, 680 A.2d 349, 359-360 (Del. Super. 1996) (finding that HGN evidence offered by a properly trained officer is a reasonably reliable indicator of alcohol impairment); Hawkins v. State, 476 S.E.2d 803, 808 (Ga. Ct. App. 1996) (finding that the HGN test has reached a "state of verifiable certainty in the scientific community"); Schultz v. State, 664 A.2d 60, 69-70, 74 (Md. Ct. Spec. App. 1995) (taking judicial notice of the reliability and acceptance of the HGN test); State v. O'Key, 321 Or. 285, 319, 899 P.2d 663 (Or. 1995) (finding that the HGN evidence is scientifically valid and relevant in impaired driving trials); and Emerson v. State, 880 S.W.2d 759, 769 (Tex. Crim. App. 1994) (taking judicial notice of the reliability of the theory underlying the HGN test and its technique). This list represents but a small selection of states in which HGN evidence has been examined and found scientifically reliable.

Given Wisconsin's Zivcic decision and the widespread acceptance of HGN evidence across the country, it is the State's position that HGN testimony is the product of reliable principles and methods. Thus, the second prong of the Daubert test is satisfied.

The third prong of the Daubert test – whether the officer applied the principles and methods to the facts of the case – requires an examination of the entire factual record in this case. *See State v. LaCount*, 2008 WI 59, ¶ 15, 310 Wis.2d 85, 750 N.W.2d 780 ("A reviewing court may search the record for reasons to sustain the circuit court's exercise of discretion.").

There were two occasions on which Officer Jaquish testified regarding his qualifications to administer the HGN test. At the suppression hearing, he testified regarding his training to administer field sobriety tests, including the HGN test. R. Doc. 44, 5:7-9; 12:19-21. He testified that his training consisted of a 520-hour academy training course, supplemented by continuing yearly in-service trainings which included updates on field sobriety testing. *Id*. 5:1-14. He also testified that he had nearly five years of law enforcement experience and had arrested more than 75 individuals on suspicion of operating while intoxicated. *Id*. 4:16-18; 5:15-18. At the jury trial, Officer Jaquish testified that he was certified in 2007 to administer the tests, specifically including the HGN test, and that he does the tests as a regular part of his professional duties. R. Doc. 52, 60:7-22.

Officer Jaquish then described, in detail, the proper administration of the HGN test. He testified that when administering the test, he first confirmed that the subject's pupils are of equal size and that the subject's eyes track together. *Id*. at 61:10-12. Next, Officer Jaquish testified that using his finger as a stimulus, he looked for the lack of smooth pursuit in each of the subject's eyes, specifying that

if the person was intoxicated, his or her eyes "jump from one spot to the next…like a marble rolling over a rough surface." *Id*. at 61:7, 16-19. Next, Officer Jaquish testified that he checked for nystagmus at maximum deviation, which meant "twitching of the eye…when it's at its maximum deviation out to the sides." *Id*. at 61:20-24. Finally, Officer Jaquish testified that he looked for the onset of nystagmus, "that same jerky motion," prior to 45 degrees. *Id*. at 61:25; 62:1.

Following this description of proper HGN procedure, Officer Jaquish described how he administered the test in this case. Officer Jaquish testified that first instructed VanMeter on how to do perform the test. *Id*. at 4-16. After this instruction, Officer Jaquish administered the test, checking first for equal pupil size and tracking, and then looking for (and observing) a lack of smooth pursuit in both VanMeter's eyes, nystagmus at maximum deviation in both VanMeter's eyes, and the onset of nystagmus prior to 45 degrees in each of VanMeter's eyes. *Id*. at 62:22-25; 63:1-3. Thus, Officer Jaquish administered the HGN test in conformity with his training and experience and observed that VanMeter exhibited every possible indication of impairment which the HGN test is designed to detect. *Id*. at 63:2-6.

After Officer Jaquish had laid out his training and qualifications to administer the HGN test, VanMeter did not object to testimony regarding Officer Jaquish's observations during the test. R. Doc. 43, 12:19-21; R. Doc. 52, 60:7-16.

Nor did VanMeter object to Officer Jaquish's characterization of the proper procedure for administration of the HGN test. R. Doc. 43, 13:9-23; 14:8-25; 15:1-10, R. Doc. 52, 61:3-25; 62:1-14. The trial court made no findings that Officer Jaquish did not follow the proper procedure and made no findings that Officer Jaquish did not properly administer the test. On this record, there is no basis to question whether Officer Jaquish appropriately applied his training and experience to the facts of this case. He provided a detailed description of the proper administration of the HGN test, and then administered the test in conformity with that training protocol, thus satisfying the third prong of the Daubert test.

Based on the foregoing analysis, the HGN evidence offered in this case satisfies all three prongs of the Daubert test and is therefore admissible. As such, it was not reversible error for the trial court to admit the testimony, even if the testimony was admitted on a different basis. Accordingly, the judgment of the trial court should be affirmed.

III. ANY OTHER ISSUES RAISED BY VANMETER'S BRIEF ARE OUTSIDE THE SCOPE OF THIS APPEAL.

As a final point, the State notes that VanMeter's brief includes arguments ancillary to the examination of whether the HGN testimony offer in this case was admissible under Daubert. These argument include a contention that the evidence in this case should have been suppressed because Officer Jaquish lacked reasonable suspicion to request field sobriety tests. *See* Brief of Defendant-

Appellant, pp. 4. In its rejection of VanMeter's no-merit report, this Court specifically delineated the scope of this appeal, stating that the merit brief should be filed the issue of "whether the horizontal gaze nystagmus test meets the ***Daubert*** standard." Because the State believes VanMeter's ancillary arguments are outside the scope of this appeal, it does not address them here. The State will certainly do so if this Court believes it necessary.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court **AFFIRM** the order of the trial court denying VanMeter's Motion to Exclude HGN Testimony and **AFFIRM** VanMeter's Judgment of Conviction.

Dated this 10th day of July, 2015 at Eau Claire, Wisconsin.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

I hereby certify this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 18 pages, 4,325 words.

Dated this 10th day of July, 2015 at Eau Claire, Wisconsin.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief with the court and served on all opposing parties.

Dated this 10th day of July, 2015 at Eau Claire, Wisconsin.

Respectfully submitted,

_____

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CERTIFICATION OF MAILING

I hereby certify, pursuant to s. 809.80 (4), Wis. Stats., that this brief was deposited in the United States mail for delivery to the Clerk of Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on **July 10, 2015**. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 10th day of July, 2015 at Eau Claire, Wisconsin.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX