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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP0097-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW G. CHITWOOD,

Defendant-Appellant

On Appeal from an Amended Judgment of Conviction Entered in Washington County Circuit Court, the Honorable James K. Muehlbauer, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> The drug recognition evaluation protocol is a standardized and systematic method utilized throughout the United States for examining an individual suspected of driving under the influence of drugs. The protocol consists of a 12-step process to assess a suspect. In this case, the certified drug recognition evaluator was unable to complete all 12 steps of the drug recognition protocol, as Mr. Chitwood was suffering from head and mouth injuries requiring medical treatment. Nonetheless, over the objection of trial counsel, the circuit court allowed the drug recognition evaluator to provide an opinion to the jury based on the incomplete evaluation that Mr. Chitwood was driving under the influence of drugs and was incapable of driving safely. Did the circuit court err in this post-***Daubert*** jury trial case by allowing opinion testimony from a drug recognition evaluator based on an incomplete evaluation?

The circuit court allowed the opinion testimony based on the incomplete drug recognition evaluation, finding that it was not "scientific expert testimony" requiring the application of ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would be welcome if it would be helpful to the court. Publication is not warranted, as this is a fact-specific case.

STATEMENT OF THE CASE AND FACTS

A criminal complaint was filed alleging that on October 28, 2011, Andrew G. Chitwood drove a Buick along Hillside Road and hit a mailbox and two trees. (1:3). Deputy Eric Essigner was dispatched and observed Mr. Chitwood sitting outside the Buick, which had damage to both sides and the rear. (1:2). Mr. Chitwood's face was bleeding and a female was holding a piece of cloth against his forehead to stop the bleeding. (*Id.*). Shortly thereafter, a rescue squad arrived and began tending to Mr. Chitwood's injuries. (*Id.*). According to Essigner, Mr. Chitwood appeared relaxed, had a difficult time keeping his head straight and maintaining focus with his eyes, his speech was slow and at times confused, and based on Essigner's previous contacts with Mr. Chitwood, "this was not normal behavior." (1:3)

While the rescue squad was tending to Mr. Chitwood's injuries, Mr. Chitwood told Essigner that he had swerved to miss a raccoon or squirrel which caused him to go into a ditch and strike a tree. (1:2). Mr. Chitwood said that he was not under the influence and later indicated he had taken oxycodone as prescribed and other medications that he could not remember. (1:3; 39:259-260).

Mr. Chitwood was transported to the hospital and his blood was drawn. Mr. Chitwood's blood contained oxycodone (33 ug/L), citalopram (62 ug/L), carisoprodol (9.6 mg/L), and meprobamate (30 mg/L). (10:3). Mr. Chitwood had four previous convictions for operating while intoxicated, his operating privileges were revoked, he did not have an ignition interlock device as ordered in a previous case, and was out on bond in a misdemeanor case. (1:3-4).

Mr. Chitwood was charged with: (1) operating while under the influence of a combination of intoxicant, controlled

substance, and analog—5th or 6th offense; (2) operating a motor vehicle after revocation; (3) failure to install an ignition interlock device; and (4) misdemeanor bail jumping. (1:1-2).

After several adjournments, a two-day jury trial took place. Outside the presence of the jury, Mr. Chitwood pled guilty to counts three and four—failure to install an ignition interlock device and misdemeanor bail jumping. (39:36-46).

Jury Trial

Mr. Chitwood then proceeded to trial on counts one and two—operating while intoxicated 5th or 6th offense and operating after revocation. Regarding the operating while intoxicated count, Mr. Chitwood stipulated that he had four prior operating while intoxicated convictions. (39:28-32). Regarding the operating after revocation, Mr. Chitwood stipulated that the State could prove that the revocation resulted from "an operating while intoxicated-type of offense." (39:32-35).

The State presented testimony from Randy Eller, Eric Essigner, Hope Demler, Nathan Peskie, and Sara Schrieber. Mr. Chitwood did not testify.

A. Randy Eller

Randy Eller testified that he was driving on Hillside Road around 1:30 p.m. and observed a car in a ditch. (39:111, 189). The headrest on the driver's seat was gone and the passenger side rear window was gone. (39:184, 191). In the driver's seat there was a person that had "blood all over his face." (39:112). Eller identified Mr. Chitwood as the person in the car. (39:182-83).

Mr. Chitwood was unable to get out of the car and ultimately exited out the rear driver's side window. (39:184).

Mr. Chitwood "didn't want him to call the police" because his dad was coming to get him. (39:185-86). Eller insisted on calling 911 due to Mr. Chitwood's injuries. (39:186, 192).

A woman also pulled over to help and she started to wipe off Mr. Chitwood's face with a sock. (39:186). Once the blood was wiped off, Eller saw that Mr. Chitwood had a "bad cut" on his forehead and his chin looked like it needed stitches. (39:187-88). Mr. Chitwood stated that "an animal jumped out in front of him and he had to swerve to miss it." (39:189).

B. Deputy Eric Essigner

Eric Essigner testified that on October 28, 2011, he was working as a deputy sheriff for the Washington County Sheriff's Department. (39:193).

He testified that on that date, he first observed Mr. Chitwood on the ground next to the front passenger side tire of a Buick. (39:197). There was a male and a female standing next to Mr. Chitwood. (39:197-98). Essigner allowed the pair to leave without obtaining any information. (39:198, 256-257). At the request of the State, Essigner later determined that the male was Randy Eller. (39:267, 269).

Mr. Chitwood had "a lot of blood on his face," and Essigner was not able to tell the exact area of injury. (39:200, 260). Emergency workers arrived at the scene to take care of Mr. Chitwood. (*Id.*).

Mr. Chitwood stated that he had swerved to miss a squirrel. (*Id.*). A short time later, Mr. Chitwood stated that it may have been a raccoon. (*Id.*). According to Essigner, Mr. Chitwood appeared "relaxed and lackadaisical," was speaking slowly, and it was difficult to understand his responses.

(39:202). Mr. Chitwood appeared to have a hard time staying awake, his head was bobbing from side to side, and his eyes were "real slow" in opening and closing, and "he would have a hard time finding where I was and I wasn't moving." (39:203, 241). Essigner "felt that Mr. Chitwood may be under the influence of intoxicant or drugs." (*Id.*). When asked if he was under the influence of any prescription drugs, Mr. Chitwood stated no. When asked if he took any medication, Mr. Chitwood said had taken oxycodone and some other prescription medications that he could not recall the name of earlier in the day. (39:204, 259-260). A C-collar was placed around Mr. Chitwood's neck and he was placed on a backboard and taken in an ambulance to the hospital. (39:205). Mr. Chitwood consented to a blood draw. (39:267). Essigner testified that Mr. Chitwood's driver's license was revoked and he was mailed a notice of revocation. (39:213-14).

Essigner also testified that he observed a tire tread for four or five feet that ended at a black mailbox that had papers and mail strewn about. (39:217-18). The mailbox had a dent in the lower right corner and a white paint transfer. (39:218). Based on the tire track, it appeared to Essigner that the vehicle was just drifting off the road. (39:219).

Past the mailbox, Essigner observed black tire marks that "I could follow to the – through the path of travel for the Buick – to the Buick's final rest location – or I'm sorry, where it exited the road and made more tire marks in the gravel – or in the gravel shoulder, the grass ditch and damage to the trees." (39:220). Essigner testified that the tire marks appeared to indicate a "hard left-hand steering maneuver," then a "hard right hand turning maneuver," and then the vehicle was "spinning in a clockwise direction." (39:220). According to Essigner, the driver's side front wheel and tire

assembly and the quarter panel struck the first tree. (39:223). There were "white vehicle parts" on the ground at the base of the tree. (39:223). The Buick had a black paint transfer on the passenger side rear-view mirror. (39:226). There was damage to the front driver side of the vehicle and to the rear passenger side of the vehicle. (*Id.*).

Essigner returned in March 2012 to take pictures of the scene. (39:223-224, 258). When Essigner returned, he saw a hubcap that had the Buick emblem at the base of the first tree, the mailbox was still damaged with a paint transfer, but placed back in its correct position, some of the tire marks were still there, and there was damage to the first tree. (39:225, 270). The March photos were moved into evidence and published to the jury. (39:228-239).

At the hospital, Mr. Chitwood was having a "hard time speaking," his eyes were still opening and closing slowly, and it appeared that he was sleeping or falling asleep. (39:241). Essigner did not ask that Mr. Chitwood perform any of the physical field sobriety tests or the horizontal gaze nystagmus (HGN) test due to the medical treatment Mr. Chitwood was receiving and his position in the room. (39:242, 261-262).

Essigner placed Mr. Chitwood under arrest for operating a motor vehicle under the influence, based on his observations at the scene which appeared to show that the vehicle just drifted off the edge of the road and "did not make any marks that would show like a swerve to avoid the squirrel or a raccoon," his body movements, his reaction to questions, and his admission to having taken oxycodone. (39:243).

Mr. Chitwood's blood was drawn. (39:246, 249, 267). Prior to the blood draw, Essigner read the "Informing the Accused" form to Mr. Chitwood. (39:244). Mr. Chitwood "had several questions and time passed and normally what we

do is give a reasonable amount of time and he was asking the same questions. I was giving the same answers…and so I started putting down the check box no, because it indicates a refusal and as I was writing no…Mr. Chitwood said fine, I'll do it or something to that matter." (39:245).

After approximately four hours at the hospital, Mr. Chitwood was transported to the jail. (39:253). According to Essigner, Mr. Chitwood was "more coherent" on the transport to the jail. (39:254). He had a "much more crisp tone" and he was mobile. (*Id.*).

Although Essigner did not conduct any field sobriety tests or the HGN test and was not trained as a drug recognition expert (39:257, 269), Essigner opined that he did not believe Mr. Chitwood was able to safely operate a motor vehicle. (39:254).

C. Detective Hope Demler

Hope Demler testified she was a detective with the Washington County Sheriff's Department. (39:274-75). Delmer testified that she was involved in the transmittal of the blood kit evidence to and from the State Crime Laboratory. (39:275-78).

D. Deputy Sheriff Nathan Peskie (Drug Recognition Evaluator)

Nathan Peskie testified that he was a deputy sheriff with the Washington County Sheriff's Department and was certified as a drug recognition evaluator. (44:5, 9; App. 102, 106). Peskie explained that the average law enforcement officer is trained to detect people operating under the influence using three standard field tests. However, when people are under the influence of drugs additional testing is

required to determine whether impairment is caused by alcohol or drugs. (44:10; App. 107). Peskie testified that there is a "standardized and systematic 12-step procedure" that is followed throughout the United States to evaluate whether a person is under the influence of drugs. (44:12; App. 109).

Peskie testified that the 12 steps of the drug recognition evaluation protocol are: (1) check for breath alcohol; (2) interview the arresting officer; (3) check pulse, horizontal gaze nystagmus (HGN), and pupil size; (4) conduct the "full battery of HGN checks," which includes "smooth pursuit, nystagmus at maximum deviation, prior to 45 degrees, vertical nystagmus (VGN), and lack of convergence of the pupils;" (5) conduct divided attention tests, which include the Rhomberg test, "where I ask the person to stand with their feet together, eyes closed, tilt their head back slightly and estimate the passage of 30 seconds," the walk-and-turn test, the one-leg stand, finger-to-nose test; (6) check vital signs; (7) check pupils in different lighting conditions and then check nasal and oral cavities for signs of drug use; (8) check muscle tone; (9) check for injection sites; (10) confront the individual with observations and ask questions; (11) record his opinion; and (12) review toxicology reports. (44:14-18; App. 111-115).

In this case, Peskie testified that he only conducted a "partial" drug recognition evaluation on Mr. Chitwood. (44:21, 42; App. 118, 139). Peskie stated that when he arrived, Mr. Chitwood was "C-collared and backboarded in the trauma room of the emergency room. I don't interfere with medical attention." (44:23; App. 120).

The State inquired whether Peskie could render an opinion as to the presence of any drugs. (44:23-24; App. 120-

121). Defense counsel objected based on lack of foundation and speculation. (44:24; App. 121).

Outside of the presence of the jury, a lengthy discussion was held and some testimony was taken from Peskie. The following exchange occurred:

> THE COURT:…I could have easily just sustained the objection and wait to see what foundation is laid but I'm kind of concerned. I anticipate they'll be more than one objection so I thought we'd get to the bottom of what is going on here and whether our witness can offer an opinion based on a partial examination or not. So I thought we'd just excuse the jury. It would be easier.
>
> So anything further you want to say about your objection? Again, I could easily sustain it based on lack of foundation right now but I don't know that that solves the whole thing of what we're going to do next…
>
> DEFENSE COUNSEL: Well, not specifically, Judge. I think you have pretty much what I'm getting at, is the whole partial evaluation, not all of the steps being either followed or not able to be followed. That's sort of – that is what I'm getting at, I guess. So not too much to add other than what you've already mentioned.
>
> THE COURT: And [State], I don't know if you want to just talk about it or if you want to do an offer of proof and have the witness answer some questions about what his training allows. You know, if they can render an opinion based on a partial exam or not.
>
> I haven't run into this in terms of a case where a partial exam was done and not a full one. I've had other DRE cases, and I know that there are 12 steps. I know what the case law says about that. But what's the State's position on this?

> STATE: I can certainly – well, first of all, based on the time of this particular offense, ***Daubert*** or the change in the evidence is not actually – it took affect after this case, so it's not applicable to this case.
>
> Secondly, as far as the foundation, I can certainly ask the officer, are you able to render an opinion with a partial examination? My intention was not to have him list off what his ultimate opinion was but to have him answer the question that I asked him, which would be a yes or no question I think.

(44:24-26; App.121-123).

The State proceeded to question Peskie, who testified that he is able and trained to render an opinion when there is a partial evaluation, and that in this case he had an opinion. (44:26-29; App. 123-126). The circuit court interrupted the State's questioning stating that:

> None of this is helping me with the question I've got. It's fascinating and I get the fact that Investigator Peskie made some observations and has some opinions based on it.
>
> What I was trying to figure out and I haven't heard yet is whether, based on the partial exam he has an opinion as to impairment or not. All I've got is yes, he's got an opinion. And yes, there's drugs. Well, we know that because we're going to have an analyst testify that drugs were found in his system but we know that he admitted he had drugs.
>
> So again, all of this is interesting. It's fascinating but it ain't telling me anything that I was concerned about. <u>What I was concerned about is whether he's got an opinion and whether he can legitimately render an opinion as to whether somebody has impairment based on a partial test</u>. And I ain't heard anything about that yet. That's what I'm curious about.

> I mean the rest of it's interesting. Again, number one, ***Daubert*** wasn't in Wisconsin when this case happened. I get that.
>
> Number two, even if ***Daubert*** was in effect at the time, DRE results are not ***Daubert*** expert testimony anyways. They are physical observations. So I'm not worried about ***Daubert***. But I'm worried about what his opinion is and what's the basis of his opinion and I ain't really heard it yet, at least as I think it would be relevant to the jury.

(44:29-30; App. 126-127) (emphasis added). The court then began to question Peskie:

> THE COURT: So if nobody's going to ask it, I'm going to ask it. Are you able to render an opinion based on a partial DRE exam as to whether or not you believe a subject is impaired or not?
>
> PESKIE: I am, Your Honor.
>
> THE COURT: Okay and how are you able to do that? Based on what?
>
> PESKIE: Based off his slow response, his diminished –
>
> THE COURT: No, no, I don't mean the facts of this case. Based on what training or – you know, does your training, this, you know, 120 hours teach you that you can, based on a partial exam, render an opinion?
>
> PESKIE: Based off the HGN it's consistent with somebody who's under the influence of drugs and impaired. Based off my observations, the slow response, the diminished muscle, gross and fine motor skills, it is my opinion that he was impaired and could not operate a motor vehicle safely.
>
> THE COURT: I got it. That's your opinion, but does all that training teach you that – in other words, why are

> there 12 steps to this protocol if you can render an opinion based on, I don't know, six of them or something?
>
> PESKIE: There's 12 steps because that's the ideal process. It's common for me in situations where people are involved in motor vehicle accidents that I'm unable to conduct all steps. It's also common that sometimes I conduct an evaluation and I determine the person's not impaired based off a partial evaluation.
>
> THE COURT: All right and does your training include those types of scenarios where you don't do all 12 steps of the protocol?
>
> PESKIE: Yes, it does.

(44:30-32; App. 127-128).

The court then gave defense counsel an opportunity to cross-examine Peskie:

> DEFENSE COUNSEL: Investigator Peskie, as part of your training were any of the subjects that you evaluated as part of your training match Mr. Chitwood's case in terms of which parts of the evaluation you were able to do and which parts you were not?
>
> PESKIE: No.
>
> DEFENSE COUNSEL: Okay, so no part of your training in terms of conducting evaluations to get your certification were consistent with Mr. Chitwood's case?
>
> PESKIE: <u>Correct. We never conducted any evaluations on anybody that was injured</u>.
>
> DEFENSE COUNSEL: Okay. So you indicated that part of your training included partial evaluations, but none of those partial evaluations were consistent to the type of

evaluation you had to perform on Mr. Chitwood, correct?

PESKIE: Let me clarify. We never conducted evaluations on anybody that was injured or a partial. We were given circumstances, face sheets partially completed and had to form opinions off those.

DEFENSE COUNSEL: Okay, so none of your training involved individuals with injuries?

PESKIE: None of the field certification, correct.

DEFENSE COUNSEL: And none of your training involved cases consistent with Mr. Chitwood's case in terms of injuries and which tests were able to be performed, correct?

PESKIE: Again, the field certification portion, no, but the information on a face sheet and rendering an opinion, I would say we did things similar to Mr. Chitwood's.

DEFENSE COUNSEL: As part of your training were you – was part of your training – let me strike that. I've got to ask this a better way. It's going to be confusing otherwise.

Was consideration of possible medical conditions, and specifically head injuries, part of your training in that respect?

PESKIE: Yes.

DEFENSE COUNSEL: And were the --- the injuries in your training in regards to head injuries medically consistent with the injuries that Mr. Chitwood sustained or are you not able to say that?

PESKIE: I'm not sure I follow.

> DEFENSE COUNSEL: Okay. Do you know what Mr. Chitwood's medical diagnoses were in this case?
>
> PESKIE: No.
>
> DEFENSE COUNSEL: Okay, so you would not be able to say whether his medical condition is consistent with the type of training you received in regards to medical conditions, correct?
>
> PESKIE: I would say that I did not observe any signs of a head injury, which I had been trained in, that would have prevented me from conducting HGN for example.
>
> DEFENSE COUNSEL: Okay. But you indicated that you received some training with how certain medical conditions can affect an evaluation, correct?
>
> PESKIE: Correct.
>
> DEFENSE COUNSEL: <u>But you don't know what medical conditions Mr. Chitwood was diagnosed with, correct</u>?
>
> PESKIE: <u>Correct</u>.

(44:33-35; App. 130-132) (emphasis added).

The State asked one follow-up question:

> STATE: You said the field training you didn't have partial examinations or partial information? What part of your training involved the partial examination?
>
> PESKIE: Classroom and the recertification.

(44:35-36; App. 132-133).

The circuit court then stated that it misspoke and ***Daubert*** is in fact the law in this case. However, the circuit court stated that "drug recognition evaluations are not

scientific testing and in that sense ***Daubert*** doesn't apply." (44:36-37; App. 133-134). The circuit court then cited ***United States v. Everett***, 972 F. Supp. 1313 (D.Nev. 1997) and ***New Mexico v. Aleman***, 194 P. 3d 110 (New Mex. 2008) for the proposition that "this sort of testimony is not scientific and is not subject to a ***Daubert*** analysis." (44:37; App. 134). The circuit court also referred to ***United States v. Horn***, 185 F. Supp. 530 (D.Maryland 2002) which involves standardized field sobriety tests (SFSTs). The circuit court again stated that "[i]t is similar, not identical, but similar, to the standardized field sobriety tests and those are not subject to ***Daubert*** either." (*Id.*). The court then again stated that this is not "expert scientific testimony," and "it's training and it's physical observations of things that if you've got the right training, you can observe them. But it's not scientific." (44:37-38; App. 134-135).

The circuit court inquired whether defense counsel continued to have an objection. (44:38; App 135). Defense counsel stated:

> Well, for the record I'd like the objection noted, yes, Judge. And I'd also add that there probably needs to also be an analysis of given all the limitations and the differences between this case and a partial evaluation and things of that nature, I think we'd also object on grounds to – let me just make clear.
>
> The objection that I have would be Investigator Peskie rendering an opinion as to whether Mr. Chitwood was impaired due to drugs. That's the objection. And in addition to the analysis the Court just conducted, I also think there's an analysis of prejudicial effects substantially outweighing probative value. At least that's another potential grounds that we would make the objection on. So just so that's noted for the record, that's the objection.

(44:38-39; App. 135-136).

The court responded in relevant part that “the proper foundation still has to be laid in front of the jury,” but “if we get to that point, you can reiterate your objection but it’s preserved for the record.” (44:39; App. 136). The court then again stated “[i]t is not an expert opinion. It is an opinion similar, of course not identical, but of the type we allow where an officer offers an opinion, arresting officer, that someone’s under the influence based on standardized field sobriety tests. So I’m going to allow the opinion in. Certainly you can cross examine on the lack of training or experience under identical circumstances. My view is that that would go to the weight of the testimony. The jury would be entitled to hear the opinion and then they’d have to decide whether they think it makes any sense or not but that’s their job in evaluating the weight of the testimony.” (44:40; App. 137).

Subsequently, Peskie testified that he was able to render an opinion with respect to an individual’s ability to safely operate a motor vehicle based on a particular drug category. (44:41-42; App. 138-139). According to Peskie, the training he received allowed for opinions with partial information and he had conducted partial evaluations in the past. (44:43-44; App. 140-141).

Over the objection of defense counsel, Peskie opined that Mr. Chitwood was under the influence of a “narcotic analgesic” and a “central nervous system depressant” rendering him incapable of operating a motor vehicle safely. (44:46-49, 53-54; App. 143-146, 150-151). Peskie testified that in his opinion Mr. Chitwood was under the influence of a narcotic analgesic based on his observation that Mr. Chitwood was relaxed and had delayed verbal response, slow speech, a slurred, thick, low raspy voice, constricted pupils,

did not whimper or complain about medical treatments, which included staples, not stitches, and lacked an elevated pulse or blood pressure. (44:47-48; App. 144-145). Peskie testified that his opinion that Mr. Chitwood was under the influence of a central nervous system depressant was based on the "lack of smooth pursuit in his left and right pupil," "distinct and sustained nystagmus at maximum deviation in his left and right pupil," vertical nystagmus, relaxed demeanor, delayed response, and lethargic movements. (44:48-49; App. 146-147).

Peskie testified that Mr. Chitwood told him that he had a Mountain Dew to drink that day, was unable to say what time it was, or when he had last slept. (44:55; App. 152). Mr. Chitwood stated that he was injured. Mr. Chitwood also told Peskie that he had taken prescribed medications at roughly 3:00 a.m. and again sometime that morning. (*Id.*).

On cross-examination, Peskie testified that he did not administer the first of the 12 steps of the drug recognition evaluation protocol, the blood alcohol test, due to the fact that Mr. Chitwood had blood in his mouth. (44:60-61, 70; App. 157-158, 167). Peskie also did not conduct the Rhomberg test, the walk-and-turn test, the one-leg stand test, or the finger-to-nose test. (44:71; App. 168). In addition, Peskie did not test the reaction of Mr. Chitwood's pupils to light. (44:74-76; App. 171-173).

E. Toxicologist Sara Schrieber

Sara Schrieber testified that she is a technical forensic director at the Milwaukee County Medical Examiner's Office. (44:86). Previously, she worked as a forensic toxicologist at the Wisconsin State Crime Laboratory. (*Id.*).

Schrieber testified that Mr. Chitwood's blood contained a prescription drug for pain management, Oxycodone, an antidepressant Citalopram, a sedative/muscle relaxer, Carisoprodol, and a metabolite of Carisoprodol, Meprobamate. (44:107-120, 137). According to Schrieber, depending on the concentration and how it affects a person, Oxycodone can constrict a person's pupils, cause droopiness in the eyes, drowsiness, lack of muscle coordination, slowing of speech, slurring, constipation, and urinary retention. (44:112-114). Carisoprodol and Meprobamate can result in dizziness, confusion, or drowsiness. (44:117, 120, 138).

Schrieber testified that she would expect the drugs to have been present at the time Mr. Chitwood was driving. (44:121). Schrieber opined that in a "normal person," "…I would expect, but I wouldn't be surprised of an inability to safely operate a motor vehicle given this combination. The level of drugs are high. They indicate a semi-recent ingestion of the drug or certainly a large volume of drug that was administered some time ago. That combination certainly – each of them individually has an adverse effect on the ability to drive a vehicle and the combination together certainly would – would compound that opinion in my mind." (44:131, 138).

On cross-examination, Schrieber testified that there is a "high probability" that an individual would not be able to safely drive with the concentrations in this case, but there could be an individual that has a "very good tolerance to these drugs and can handle those levels." (44:134).

In addition, Schrieber testified that she had never met Mr. Chitwood, had no idea what his medication tolerance was, never reviewed any of his medical records, and did not evaluate his driving. (44:135-136, 139, 144). Schrieber

testified that there is a “possibility” the concentrations of drugs in this case might not impair Mr. Chitwood’s ability to drive. (44:136).

On re-direct, Schrieber confirmed that “I don’t specifically know how this drug combination would have affected Mr. Chitwood. I didn’t observe his driving. I don’t know his medical history. I have not observed him under the influence of these drugs, so he may or may not have some tolerance associated with – especially if he had chronic use and chronic prescription use of these – his drug combination or each of them individually. So he may have some tolerance associated with those.” (44:140). Schrieber then noted that “tolerance doesn’t necessarily, though, mask all the effects of the drugs…Some people are able to perform through some of the symptoms associated to adverse drugs…but it doesn’t necessarily mean everything is totally good and fine and that they wouldn’t suffer any of the side effects at all.” (44:141, 143-144).

F. Jury Instructions

Regarding witness testimony, the circuit court instructed the jury in relevant part as follows:

> Ordinarily a witness may testify only about facts, however, a witness with expertise in a particular field may give an opinion in that field. In determining the weight to give to this opinion, you should consider the qualifications and credibility of the witness, the facts upon which the opinion is based and the reasons given for the opinion. Opinion evidence was received to help you reach a conclusion, however, you are not bound by any expert’s opinion.
>
> Ordinarily a witness may testify only about facts, however, in this case former deputy sheriff Eric Essigner

> was allowed to give an opinion that Defendant Andrew Chitwood was not able to operate a motor vehicle in a safe manner and Investigator Nathan Peskie was allowed to give an opinion that Defendant Andrew Chitwood, was under the influence of a narcotic analgesic and a central nervous system depressant and was incapable of operating a motor vehicle safely.
>
> In determining the weight you give to these opinions, you should consider the witness' opportunities to observe what happened and the extent to which the opinions are based upon those observations. Opinion evidence was received to help you reach a conclusion, however, you are not bound by the opinion of any witness.
>
> During the trial an expert witness was told to assume certain facts and then was asked for an opinion based on that assumption. This is called a hypothetical question. The opinion does not establish the truth of the facts upon which it is based.

(44:168); *see* Wis. JI-Criminal 200, titled "Expert Opinion Testimony: General," Wis. JI-Criminal 201, titled "Opinion of a Nonexpert Witness," and Wis. JI-Criminal 205, titled "Expert Testimony: Hypothetical Question."

G. Verdict

The jury found Mr. Chitwood guilty of counts one and two. (44:213).

H. Sentence

The Honorable James K. Muehlbauer imposed a 5-year prison sentence (2 years initial confinement and 3 years extended supervision) on the operating while intoxicated count, 1 year in prison on the operating while revoked count, 6 months in jail on the ignition interlock count, and 6 months

in jail on the misdemeanor bail jumping count, all to run concurrent. (55).

Additional relevant facts are referenced below.

ARGUMENT

I. The Certified Drug Recognition Evaluator's Opinion Based on an Incomplete Drug Recognition Protocol Evaluation Was Inadmissible under ***Daubert***.

A. Introduction.

The test for the admissibility of expert testimony is commonly referred to as the "***Daubert*** test" and was derived from three United States Supreme Court cases: ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993), ***General Electric Co. v. Joiner***, 522 U.S. 136 (1997), and ***Kumho Tire v. Carmichael***, 526 U.S. 137 (1999). The reliability standard in these cases was incorporated into Federal Rules of Evidence 701 and 702, which govern the admission of lay and expert testimony in the federal courts.

In 2011, the legislature revised the Wisconsin statutes relating to lay testimony and expert testimony, Wis. Stat. §§ 907.01 and 907.02, to conform to Federal Rules of Evidence 701 and 702. *See* 2011 Wis. Act 2, §§ 33-38, 45. The new rules in Wisconsin apply to all actions commenced on or after February 1, 2011, which includes this case. 2011 Wis. Act 2, § 45.

The new rules separate testimony into two spheres: (1) lay testimony, which involves "common sense" and "common experience," and cannot be predicated upon "specialized knowledge," governed by Wis. Stat. § 907.01,

and (2) expert testimony governed by Wis. Stat. § 907.02. The amended rules are as follows:

> **907.01. Opinion testimony by lay witnesses.**
>
> (1) Rationally based on the perception of the witness.
>
> (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).
>
> **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.
>
> (2) Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.

Wis. Stat. §§ 907.01 and 907.02.

The effect of this change was to adopt the "***Daubert*** test" for the admission of expert testimony. ***In re Commitment of Knipfer***, 2014 WI App 9, ¶ 3, 352 Wis. 2d 563, 842 N.W.2d 526; *see also* ***Daubert***, 509 U.S. 579 (1993).

The circuit court's gate-keeping function under the ***Daubert*** test is to ensure that the expert's testimony is based on a reliable foundation and is relevant to the material issues. ***State v. Giese***, 2014 WI App 92, ¶ 18, 356 Wis. 2d 796, 854 N.W.2d 687.

When determining whether expert testimony is admissible under ***Daubert***, the question is whether the scientific principles and methods that the expert relies upon have a reliable foundation "in the knowledge and experience of [the expert's discipline]." ***Id***. (citation omitted). Relevant factors include whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community. ***Id***. "The standard is flexible but has teeth. The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***Id.***, ¶ 19.

Although the original ***Daubert*** case involved scientific experts, the United States Supreme Court has also applied the ***Daubert*** standard with equal force to nonscientific expert witnesses. *See* ***Kumho Tire Co.***, 526 U.S. 137, 147 (1999). This is consistent with the text of Federal Rule of Evidence 702 and Wis. Stat. § 907.02 which expressly contemplate that an expert may be qualified on the basis of training and experience alone.

The admissibility of evidence is within the circuit court's discretion. ***State v. Peters***, 192 Wis. 2d 674, 685, 534 N.W.2d 867 (Ct. App. 1995). A circuit court's discretionary determination is sustained if it "examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶ 89, 245 Wis. 2d 772, 629 N.W.2d 727.

In this case, at trial, certified drug recognition evaluator Nathan Peskie testified that he only completed a "partial" or incomplete drug recognition evaluation due to Mr. Chitwood's injuries and his decision not to interfere with ongoing medical treatment. (44:21, 23, 42; App. 118, 120, 142).

Nonetheless, over the objections of the defense (44:23-24, 46-49, 53-54; App. 120-121, 143-146, 150-151), the circuit court allowed Peskie to opine that Mr. Chitwood was under the influence of a "narcotic analgesic" and a "central nervous system depressant" rendering him incapable of operating a motor vehicle safely. (*Id.*). The circuit court concluded that Peskie's testimony was not "expert scientific testimony," and thus not subject to the ***Daubert*** test. (44:36-40; App. 133-137).

However, as discussed below, contrary to the circuit court's determination, Peskie's opinion was clearly expert testimony and inadmissible under ***Daubert***.

B. Certified Drug Recognition Evaluator Peskie's opinion was expert testimony and inadmissible under ***Daubert***.

1. Peskie's opinion was expert testimony because it was based on "scientific knowledge."

The drug recognition evaluation protocol is a standardized and systematic method utilized throughout the United States for examining an individual suspected of driving under the influence of drugs. (44:12; App. 109). The test consists of a 12-step process to assess a suspect. (44:13; App. 110).

The drug recognition evaluation protocol is *systematic* because it is based on a "complete set" of observable signs and symptoms that are known to be reliable indicators of drug impairment. "The DRE Protocol," www.decp.org/experts.12steps.htm (last viewed May 20, 2015). The protocol is *standardized* because "it is conducted the same way, by every drug recognition expert, for every suspect whenever possible." ***Id.***; for a detailed discussion of the history of the development of the drug recognition protocol *see,* ***U.S. v. Everett***, 972 F. Supp. 1313, 1316 (D.Nev. 1997).

Several courts outside of Wisconsin have considered whether drug recognition evidence must satisfy the reliability requirements under ***Daubert*** and ***Frye***, which pre-dated ***Daubert***. *See* ***Frye v. United States***, 293 F. 1013 (1923) (in order for scientific testimony to be admissible, the expert's methodology had to be sufficiently established to have gained general acceptance in the field in which it belongs).

Some jurisdictions have concluded that drug recognition evaluation evidence is scientific. ***State v. Baity***, 991 P.2d 1151 (Wash. 2000) (finding drug recognition evidence has a "scientific aspect, which tends to cast a scientific aura" requiring assessment under ***Frye***); ***People v. Quinn***, 580 N.Y.S2d 818 (New York Dist. Ct. 1991), judgment *rev'd* on other grounds, 607 N.Y.S2d 534 (App. Term 1993) (finding drug recognition evidence is scientific and subject to a refined ***Frye*** test); ***State v. Sampson***, 6 P.3d 543 (Or. App. 2000) (finding drug recognition evidence is a scientific test subject to state test).

Other jurisdictions have concluded that only part of the drug recognition evaluation is scientific. *See, e.g.,* ***State v. Klawitter***, 518 N.W.2d 577, 584-86 (Minn. 1994) (concluding

that the HGN, VGN, and examination of muscle rigidity is scientific and subject to ***Frye***, but the protocol as a whole is not scientific); ***Williams v. State***, 710 So. 2d 24 (Fl. Dist. Ct. App. 3d Dist. 1998) (concluding that the "general portion" of the drug recognition evaluation protocol is not scientific, but the HGN, VGN, and LOC tests are scientific though do not require the application ***Frye*** as none of the tests are new or novel); ***State v. Aleman***, 194 P.3d 110 (New Mex. 2008) (finding that the 12 step protocol as a whole was not scientific and not subject to ***Daubert***, but the HGN test was scientific and subject to ***Daubert***).

This Court should find that the drug recognition evaluation evidence is scientific. "Normally scientific evidence involves highly technical or specialized information beyond the ken of the average person's general knowledge." ***City of West Bend v. Wilken***, 2005 WI App 36, ¶ 21, 278 Wis. 2d 643, 693 N.W.2d 324. The drug recognition evaluation protocol is technical and involves specialized information beyond an average person's, and even an average police officer's, intelligence. (44:10-12; App. 107-109). The drug recognition protocol has a highly specialized certification procedure and requires a battery of tests administered involving medical science. (44:14-19; App. 111-116). The blood alcohol test, the HGN test, the VGN test, the LOC test, the vital signs exam, and the toxicologist analysis are all based on medical science. ***Sampson***, 6 P.3d 543, 549-551. While portions of the protocol are not based on medical science (e.g. parts of the physical examination and interview of the arresting officer), the officer's final analysis is heavily informed by data derived from the scientific portions of the protocol. ***Id.*** In addition, the protocol was developed in conjunction with scientists and relies on published field and laboratory studies. ***Id.***

2. Alternatively, Peskie's opinion was expert testimony because it was based on "specialized knowledge."

Assuming for the sake of argument, but not conceding, that drug recognition evidence is not scientific, it is based on "specialized knowledge," which also requires the application of ***Daubert***. According to Peskie, the "average" law enforcement officer is only trained to detect people operating under the influence. (44:10; App. 107). Conversely, a drug recognition evaluator is given "advanced training" to determine whether individuals are under the influence of drugs or alcohol. (***Id.***). Peskie testified that in order to be a drug recognition evaluator, he attended specific training programs, including a 2005 "drugs that impair training," a 2007 "recognition, evaluation, and classification program," an annual "drugs or alcohol that impair" training, and several "impaired driving conferences" and drug recognition evaluation recertification. (44:7-8, 10-12; App. 104-105, 107-109). Peskie's training included both classroom and field certification and he is recertified every year. (44:9, 11; App. 106, 108). The State introduced an 8-page curriculum vitae for Peskie. (44:8; App. 105). Thus, contrary to the circuit court's decision, because he had "specialized knowledge," Peskie's opinion was expert testimony requiring the application of ***Daubert***.

3. Peskie's expert testimony was inadmissible under ***Daubert***.

Applying ***Daubert*** to this case, Peskie's expert testimony based on the *incomplete* drug recognition evaluation was inadmissible. While Peskie testified that his classroom training and recertification included instances where *all* 12 steps were not completed (44:35-36; App. 133-

134), the State presented no evidence that an incomplete drug recognition protocol is reliable. The State presented no evidence of general acceptance of an incomplete drug recognition protocol, no operational safeguards, no evidence about the error rate of an incomplete protocol, no specialized literature mentioning an incomplete protocol nor any evidence that an incomplete protocol has been submitted to peer review, or any laboratory corroboration. *See generally*, ***State v. Aman***, 95 P.3d 244 (Or. App. 2004) (finding that a trial court erred in omitting evidence of the 12-step drug recognition protocol missing confirmation by urinalysis); ***State v. Baity***, 991 P.2d 1151, 1160-1161 (2000) (finding drug recognition evidence admissible only where all 12 steps of the protocol are completed). Consequently, Peskie's testimony was inadmissible under ***Daubert*** and prejudiced Mr. Chitwood.

At trial, Peskie testified at length about his training, his experience, and the details of the 12-step protocol. (*See, e.g.,* 44:5-23; App. 101-120). This invited the jury to incorrectly believe that Peskie's testimony was based on a reliable, possibly scientific, principles or method, when in fact no such evidence of reliability was provided.

Therefore, contrary to the circuit court's determination, Peskie's opinion was expert testimony and inadmissible under ***Daubert***.

CONCLUSION

For the reasons stated, Mr. Chitwood respectfully requests that this Court enter an order directing the circuit court to vacate Mr. Chitwood's conviction and grant a new trial.

Dated this 20th day of May, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 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 2 points and maximum of 60 characters per line of body text. The length of the brief is 7313 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 20th day of May, 2015.

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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.

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Dated this 20th day of May, 2015.

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APPENDIX

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