STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP0097-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW G. CHITWOOD,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE JAMES K. MUEHLBAUER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

Page

Other Authorities

STATE OF WISCONSIN

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication of the court's opinion. The parties' arguments can be presented fully in their briefs, and the appeal can be resolved by the application of well-established precedent.

ARGUMENT

The only issue that Andrew Chitwood raises in this appeal is whether the trial court erred when it permitted Nathan Peskie, a drug recognition expert, to testify to his opinion as a certified drug recognition evaluator based on a drug evaluation protocol that 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). Chitwood claims that Wis. Stat. § 907.02 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), should have barred Peskie's expert testimony.

Appellate courts review a circuit court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard. *State v. Giese*, 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 854 N.W.2d 687 (applying erroneous exercise of discretion standard to a *Daubert* ruling); s*ee also General Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997). 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 in the record. *Giese*, 356 Wis. 2d 796, ¶ 16. When determining whether the trial court properly exercised its discretion, an appellate court may consider the entire record. *See White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978). If the record supports the trial court's evidentiary

decision, an appellate court "will not reverse even if the trial court gave the wrong reason or no reason at all." *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citation omitted).

In the State's view, the circuit court did not erroneously exercise its discretion in admitting Peskie's expert testimony. Alternatively, if the circuit court erred in admitting Peskie's expert testimony, that error was harmless.

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED PESKIE'S EXPERT TESTIMONY.

Wisconsin Stat. § 907.02 governs the admission of expert testimony. *See Giese*, 356 Wis. 2d 796, ¶ 17. Prior to 2011, that statute made expert testimony admissible "'if the witness [was] qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue.'" *Id.* (quoting *State v. Kandutsch*, 2011 WI 78, ¶ 26, 336 Wis. 2d 478, 799 N.W.2d 865). In January 2011, the legislature amended Wis. Stat. § 907.02 to make Wisconsin law on the admission of expert testimony consistent with "'the *Daubert* reliability standard embodied in Federal Rule of Evidence 702.'" *Id.* (quoting *Kandutsch*, 336 Wis. 2d 478, ¶ 26 n.7). Federal Rule 702 codified the trilogy of United States Supreme Court cases *Daubert*,

General Elec. Co., and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999).

The amended rule provides as follows:

> 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).

Under the new § 907.02, the circuit court performs a "gate-keeper function … to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Giese*, 356 Wis. 2d 796, ¶ 18. The court must focus on the principles and methodology the expert relies upon, not on the conclusion generated. *Id.*; *see also Daubert*, 509 U.S. at 595. The standard envisions a "flexible" inquiry "to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Giese*, 356 Wis. 2d 796, ¶ 19. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. Fed. R. Evid. 702 advisory committee note (2000 amendment) (Rule 702 committee note).

At trial, the State called Nathan Peskie, a Washington County deputy sheriff with the multi-jurisdictional drug enforcement group (44:5). Peskie began his testimony before the jury but when the prosecutor asked his opinion on whether Chitwood's could safely drive, the circuit court sent the jury out and conducted a hearing out of their presence (44:24).

A. The expert's testimony.

Before the jury, Peskie testified to his specialized training in detecting individuals under the influence of alcohol, controlled substances and other drugs (44:7). He received certification in the standard field sobriety tests (SFST) in 2003, received training in 2005 on drugs that impair and in 2007 attended the drug recognition, evaluation and classification program (44:7). He is certified as a drug recognition expert (DRE)[1] by the International Association of Chiefs of Police (IACP) (44:9; 47:Exhibit 13). The court admitted without objection his eight page curriculum vitae (44:8; 47:Exhibit 12).

Peskie explained that the average law enforcement officer is trained to detect alcohol; while the SFST are

[1] Although Peskie referred to himself as a drug recognition evaluator (44:9), case law refers to the acronym "DRE" as drug recognition expert. *See, e.g., Williams v. State*, 710 So. 2d 24, 26 (Fla. Dist. Ct. App. 1998); *State v. Baity*, 991 P.2d 1151, 1153 (Wash. 2000). The State will use "DRE" to denote drug recognition expert in this brief.

applicable to drugs, addition tests are required to determine whether any impairment stems from drugs (44:10). DREs have additional training to determine whether one of seven drug categories impair a person's ability to safely operate a motor vehicle (44:10-11).

Peskie's training consisted of 80 hours of classroom training and 40 hours of field certification training (44:7). The classroom training covered the seven drug categories and proficiency in the SFST (44:11). The field training occurred at the Maricopa County Jail in Phoenix, Arizona (44:11). For twelve hours each day, Peskie practiced identifying persons impaired by drugs and attempted to identify which drug category caused any impairment (44:11). To be certified, he had to correctly identify at least 80 percent of the test subjects (44:11). Peskie scored 100 percent (44:12). Annually he attends eight hours of training on drugs and alcohol impairment in order to be re-certified as a DRE (44:7). He has been certified continuously since 2007 (44:10).

The drug recognition protocol (the protocol) is a standard and systematic twelve step procedure (44:12).[2] The twelve steps are:

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[2] The Los Angeles Police Department developed the protocol in the 1970s. The National Highway Traffic Safety Administration developed a standardized curriculum for training police officers as DREs in the mid-1980s. *See Baity*, 991 P.2d at 1153-54.

1. Breath Alcohol Test. A breath alcohol test is administered to rule out alcohol intoxication. The drug influence evaluation will not be conducted if the breath test result is consistent with the degree or type of impairment.

2. Interview With Arresting Officer. The arresting officer interviews the defendant to ascertain whether the defendant gave any statement and to ascertain whether any drugs or drug paraphernalia were found in the defendant's possession.

3. Preliminary Examination. The defendant is questioned about his or her medical history and examined for signs of illness or injury. The defendant's eyes and pupils are checked for serious trauma and to see if the eyes are bloodshot or retracted. At this time, the first of three pulse rates is taken.

4. Eye Examination. The following tests are administered: the Horizontal Gaze Nystagmus test ("HGN") (rapid involuntary horizontal oscillation of the eyes when attempting to follow a target moved from side to side); the Vertical Gaze Nystagmus test ("VGN") (inability to smoothly track the up-and-down progress of a stimulus); and the Lack of Convergence test ("LOC") (inability to cross eyes to focus on a target directly before the eyes).

5. Field Sobriety Test. A second field sobriety test is conducted which includes the Romberg Balance Test, walk and turn test, one leg stand, the finger to nose test, and the HGN test.

6. Vital Signs. Blood pressure, temperature, and a second pulse rate are taken using the standard sphygmomanometer, stethoscope, and thermometer.

7. Darkroom Examination. The defendant's pupil size is measured in four different lighting conditions using a pupilometer. Oral and nasal cavities are also examined for signs of ingestion.

8. Physical Examination. The defendant's muscle tone is examined for signs of flaccidity or rigidity which could indicate use of alcohol or certain drugs.

9. Injection Sites Check. Arms, wrists, ankles, etc... are checked for signs of injection indicating possible drug abuse. A third pulse rate is also taken at this stage.

10. Post *Miranda* Interrogation. Once the evaluator reaches this stage and determines that the defendant is under the influence, the defendant is questioned about any history of surgery or other medical condition.

11. DRE Opinion. The evaluator forms an opinion as to whether the defendant is under the influence of a certain category of drugs.

12. Toxicological Examination. A toxicological examination is administered to confirm the presence of the drug.

Williams v. State, 710 So. 2d 24, 26 n.4 (Fla. Dist. Ct. App. 1998). Peskie described these twelve steps of the protocol (44:14-19).

Peskie listed the seven drug categories the protocol identifies: (1) central nervous system (CNS) stimulants; (2) CNS depressants; (3) hallucinogens; (4) dissociative analgesics; (5) narcotic analgesics; (6) cannabis; and (7) inhalants (44:12). Peskie testified three of the drug categories: CNS depressants, inhalants and dissociative anesthetics,[3] cause nystagmus (44:15). Peskie described the pupil (darkroom) check as putting the subject in the dark for 90 seconds, then checking the pupil size using a penlight, then shining light directly in the eye and observing the change in pupil size (44:17). DREs use a matrix card which

[3] Peskie described dissociative anesthetics as primarily PCP which, he said was rare in Wisconsin (44:15).

contains a Pupillometer for measuring the size of eye pupils (44:13; 47:Exhibit 14). He explained that narcotic analgesics and CNS depressants cause flaccid muscle tone while stimulants cause rigidity in muscle tone (44:17-18).

Peskie testified that DREs must keep a rolling log of all evaluations including the subjects, the date, the location, the officers present, his opinion and the toxicological result; the circuit court admitted Peskie's log as Exhibit 15 (44:19; 47:Exhibit 15). He had done forty-four evaluations since 2007 (44:20). All of his face sheets, his rolling log, and his CV are sent to his regional instructor every six months (44:45). His regional instructor reviews them and forwards them to the IACP which also reviews them and uses them in the recertification process (44:45).

Peskie did a partial evaluation on Chitwood (44:21). He testified he followed the protocol procedure for those steps he was able to administer (44:22). The circuit court admitted the face sheet and his narrative report as Exhibit 16 without objection (44:19; 47:Exhibit 16).[4]

As noted above, the circuit court sent the jury out when Chitwood's counsel objected to the above foundation for Peskie's opinion (44:24). Peskie then testified he was able

[4] According to Peskie's narrative report and face sheet, he could not perform the breath alcohol test (47:Exhibit 16:page 2) and the SFST (47:Exhibit 16:page 3).

to form an opinion based on a partial evaluation (44:26). The protocol allows for evaluations on partial information and such evaluations formed part of his training (44:26, 31). He described the twelve steps as the ideal process (44:31). It is common that all steps cannot be performed, especially when the subject is involved in an accident (44:31). During his training, he had to perform evaluations from partially completed face sheets in the classroom, some of which were similar to Chitwood's circumstances (44:34, 36).

He described the observations allowing him to make an evaluation as:

- Chitwood was extremely relaxed given the circumstances; he was so relaxed his eyes closed. He appeared to be asleep or nod until asked a question at which point he came alert. This state is associated with narcotic analgesics.
- Chitwood's eyes were watery, his eyelids droopy, his pupils constricted to two millimeters. The normal range of pupil constriction is between 2.5 and 5 millimeters with an average of 4 millimeters.
- Chitwood gave a delayed response to questions. His voice was thick, low, raspy, and his speech slurred. This is consistent with narcotic analgesics.
- Chitwood's pulse and blood pressure were all within the normal range. Because he was injured and in law

enforcement's presence, Peskie expected an elevated pulse and blood pressure.

- Chitwood remained silent with his eyes closed while medical staff scrubbed a forehead laceration and stapled it. Peskie believed this behavior to be abnormal.

(44:26-28). All of these observations were consistent with narcotic analgesics (44:28).

Peskie testified he performed the horizontal gaze nystagmus test (HGN) after Chitwood's x-ray and CAT scan (44:28). He described that both of Chitwood's pupils were equal, he was able to properly track but had a lack of smooth pursuit and distinct and sustained nystagmus in both eyes after 45 degrees (44:28). Chitwood also exhibited vertical nystagmus (44:28). Vertical nystagmus indicated to Peskie a high level of impairment (44:29).

Based on all of Peskie's observations and the HGN, he reached the opinion that Chitwood to so impaired that he could not safely operate a motor vehicle (44:31).

Before the jury, Peskie testified he could not do a complete protocol but in this case he was able to form an opinion based the partial information he observed from the tests he can conduct, from the arresting officer's statements and observations (44:42-43). Peskie testified:

THE WITNESS: I noted two drug categories.

. . . .

Q. And what observations did you make and would you base your opinion that these two drug categories were present?

A. Again, when I observed Mr. Chitwood, he was extremely relaxed given the circumstances. Mr. Chitwood, again, appeared on the nod or a term that we use to describe somebody that appears to be sleeping, when in fact, they're conscious and alert. Their body's just so relaxed that their eyes are closed. If you were sitting up, typically the chin would be resting on their chest because their body's so relaxed.

I noted that he had delayed verbal response when I asked him a question. It took him an unusual time to respond. When he did respond, his voice and speech was slow. It was slurred, thick, low, raspy voice. I noted that his pupils were constricted at 2 millimeters with the average pupil being 4 millimeters in normal room light.

I noted that as Mr. Chitwood was being attended to medically, as they were scrubbing his lacerations, he made no sounds. He made no groans. He received staples in his forehead. He didn't complain. He didn't whimper. He didn't make any movements during that time where I've experienced that. It's painful. I would have expected his pulse to be elevated. I would have expected his blood pressure to be elevated. They were all normal.

Based off my observations, based off the constricted pupils, low, raspy voice, the relaxed, based off Deputy Essinger's observations at the scene and the crash, I noted that I believe it is my opinion that Mr. Chitwood was under the influence of narcotic analgesic.

. . . .

Q. And you indicated that there was a second drug category that you determined to be present?

A. Yes.

Q. And what observations did you make with respect to basing your opinion that a second drug category was present with Mr. Chitwood?

A. When I conducted the HGN check, I noted that he had lack of smooth pursuit in his left and right pupil. I noted that he had distinct and sustained nystagmus at maximum deviation in his left and right pupil and I noted that he had vertical distinct and sustained nystagmus. In addition, again to the relaxed demeanor of Mr. Chitwood, his delayed response, his lethargic movements, I noted that it was my opinion that he was under the influence of a central nervous system depressant.

(44:46-49). Peskie concluded that the two drugs rendered Chitwood "incapable of operating a motor vehicle safely" (44:54).

B. The circuit court's ruling.

The circuit court concluded that *Daubert* applied only to scientific evidence and did not apply to Peskie's expert opinion (44:36). Chitwood argues that Peskie's expert testimony did encompass scientific evidence. Chitwood's brief at 24-26. In the alternative, he argues Peskie's testimony is based on specialized knowledge. Chitwood's brief at 26. The State agrees with Chitwood's alternative argument.

When the Legislature amended § 907.02, it also adopted a change to Wis. Stat. § 907.01, lay opinion, by adding a new subsection (3). Lay opinions before 2011 had to be "rationally" based on the witness's perception and helpful

to a clear understanding of the witness's testimony or to the determination of a factual issue. Wis. Stat. § 907.01 (2009-10); *Town of Fifield v. State Farm Mut. Auto. Ins. Co.*, 119 Wis. 2d 220, 233-34, 349 N.W.2d 684 (1984). New subsection (3) mirrors Fed. R. Evid. 701(c) (2000). The rule embodies a substantive change in the relationship between Wisconsin lay and expert opinions. Lay opinions *cannot* be based on "scientific, technical, or other specialized knowledge." Wis. Stat. § 907.01(3) (2013-14). Opinions based on "scientific, technical, or other specialized knowledge" must meet § 907.02's reliability requirements. *See* 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence*, § 701.1 at 94 (3d ed. Supp. May 2013).

According to the Federal Advisory Committee, the language added to federal rule 701 subsection (c) in 2000, "eliminate[s] the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 advisory committee note (2000 amendment). The Federal Advisory Committee notes inform this Court's interpretation of the Wisconsin Rules of Evidence. *See State v. Hollingsworth*, 160 Wis. 2d 883, 896, 467 N.W.2d 555 (Ct. App. 1991) (using Rule 702 committee note).

United States v. Everett, 972 F. Supp. 1313 (D. Nev. 1997), one of the cases upon which the circuit court relied,

was correct when it was decided. *Daubert* did concern only scientific evidence and some courts, including the *Everett* Court, limited its holding to scientific evidence. In 1999, however, the Supreme Court held that the standard *Daubert* announced applied to all expert opinion evidence. *Kumho Tire*, 526 U.S. at 147-49. The language of § 907.01 reflects this holding.

The other case upon which the circuit court relied, *State v. Aleman*, 2008-NMCA-137, 194 P.3d 110, is inapposite here because New Mexico did not adopt *Kumho Tire* in interpreting its rules of evidence. "Our Supreme Court has explained that the 'application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training' and not scientific knowledge." *Id.*, ¶ 6 (quoting *State v. Torres*, 1999-NMSC-010, ¶ 43, 976 P.2d 20).[5] It is noteworthy that the *Aleman* Court found that the witness there was an expert based on specialized knowledge. *Aleman*, 194 P.3d 110, ¶ 18. That finding, if this Court follows it, brings DREs squarely within § 907.01(3)'s prohibition on lay opinion.

The circuit court's reason for overruling Chitwood's objection was, therefore, wrong. But if the circuit court makes the correct ruling for the wrong reason, this Court

[5] Nevertheless, as the State will later explain, *Aleman* supports the circuit court's admission of Peskie's testimony.

should affirm. *State v. Agosto*, 2008 WI App 149, ¶ 10, 314 Wis. 2d 385, 760 N.W.2d 415 (citing *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985)). Since Peskie's expert opinion was admissible under § 907.02, this Court should affirm Chitwood's conviction.

C. Peskie's expert testimony is admissible under new Wis. Stat. § 907.02 and *Daubert/Kumho Tire*.

In a short argument, Chitwood claims the State presented no evidence that a partially completed drug recognition protocol is sufficiently reliable to pass muster under § 907.02 and *Daubert/Kumho Tire*. In his view, the circuit court should have held Peskie's expert testimony inadmissible. Chitwood's brief at 27-28. He is wrong. Peskie's testimony provided evidence of the reliability of his opinion and reported case law establishes that DREs' opinions are "the product of reliable principles and methods." Peskie's testimony, which the circuit court credited, established he applied the "principles and methods reliably" and his opinion was based on "sufficient facts." Wis. Stat. § 907.02(1). The circuit court correctly admitted Peskie's opinion.

The State first notes that this Court reviews the circuit court's procedure for determining whether an expert witness meets § 907.02(1)'s standard under an erroneous exercise of discretion just like its ultimate decision to admit

the evidence. *See Kumho Tire*, 526 U.S. at 152 ("[The *Joiner* abuse of discretion] standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion."); Rule 702 committee note (citing *Kumho Tire*, 526 U.S. at 153, and noting "the trial judge has the discretion 'both to avoid unnecessary reliability proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises'"). The circuit court correctly admitted Peskie's opinion.

Generally, § 907.02 requires the proponent of expert testimony to establish the opinion is the product of reliable principles and methods. *See Giese*, 356 Wis. 2d 796, ¶ 18. Chitwood does not appear to dispute that the principles and methods underlying the protocol are reliable. Rather, he claims the use of a *partially completed protocol* has not been demonstrated to be reliable. Chitwood's brief at 28. Nevertheless, the State will demonstrate through cases from other jurisdictions, that the principles and methods underlying the protocol have been tested, published, subjected to peer review, and accepted by courts as reliable.

The State begins with a word of caution. Many of the reported cases come from states using the test for admissibility announced in *Frye v. United States*, 293 F.

1013 (D.C. Cir. 1923). Under *Frye*, a proponent of expert scientific evidence must show that the scientific principle or test is sufficiently established to have gained general acceptance in the particular field in which it belongs.

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. at 1014. Note that *Frye* applied its test to scientific evidence and distinguished between experimental and "demonstrable" principles. *Id.* These circumstances lead *Frye* courts to analyze expert opinion only where the opinion is based on scientific principles and also where those principles are "novel." *See, e.g., State v. Baity*, 991 P.2d 1151, 1156-57 (Wash. 2000); *Williams v. State*, 710 So. 2d 24, 26 (Fla. Distr. Ct. App. 1998). Moreover, several of the *Frye* state cases have addressed some of the steps of the protocol separately from the protocol as a whole. *See Baity*, 991 P.2d at 1159 (analyzing *Everett*, *Williams*); *Williams*, 710 So. 2d at 32; *State v. Klawitter*, 518 N.W.2d 577, 584 (Minn. 1994). The *Frye* cases do inform this Court's decision because they cite a number of studies and publications involving the protocol that establish its reliability in the field.

1. The protocol has been the subject a several published studies and peer reviews.

The *Daubert* Court noted that whether the principles and techniques had been published and peer reviewed was a "pertinent consideration" in determining reliability. *Daubert*, 509 U.S. at 593. The Los Angeles Police Department developed the protocol in the 1970's. *Baity*, 991 P.2d at 1153. An early study in Los Angeles to validate the LAPD developed program was published. Richard P. Compton, *Field Evaluation of the Los Angeles Police Department Drug Detection Program,* U.S. D.O.T. H.S. 807 012 (1986). *See Williams,* 710 So. 2d at 27 n.6; *Klawitter*, 518 N.W.2d at 587 n.1 (Wahl, J., dissenting) (referring to "The Los Angeles Study (1986)"); *Everett*, 972 F. Supp. at 1316 (referring to a "subsequent field study in Los Angeles"); *State v. Daly*, 775 N.W.2d 47, 58 (Neb. 2009) (referring to a "field study conducted by the Los Angeles Police Department and the National Highway Traffic Safety Administration").[6]

In 1984, the National Highway Traffic Safety Administration and the National Institute on Drug Abuse sponsored a controlled laboratory evaluation of the DRE program, conducted by researchers at the Johns Hopkins University. U.S. Dep't of Transp. Nat'l Highway Traffic

[6] Chitwood cannot creditably maintain that the Compton study has not been published but it is true that its publication was not in a peer review publication.

Safety Admin., *Drug Evaluation and Classification Program, Briefing Paper* (July 1992). *See Baity,* 991 P.2d at 1154; *Everett*, 972 F. Supp. at 1316; *Klawitter*, 518 N.W.2d at 587 n.1 (Wahl, J., dissenting) (referring to "Johns Hopkins Study (1984)"); *Daly*, 775 N.W.2d at 58 (referring to a "1984 study, conducted by the Johns Hopkins University School of Medicine in conjunction with the National Highway Traffic Safety Administration").

The *Williams* Court also cited two studies: D.F. Preusser, et. al., *Evaluation of the Impact of the Drug Evaluation and Classification Program on Enforcement and Adjudication,* National Highway Traffic Safety Administration, U.S. D.O.T. H.S. 808 058 (1992); and E.V. Adler and M. Burns, *Drug Recognition Expert (DRE) Validation Study,* Final Report to Governor's Office of Highway Safety, State of Arizona (1994). *Williams,* 710 So. 2d at 27 n.6. *See also Klawitter*, 518 N.W.2d at 587 n.1 (Wahl, J., dissenting) (referring to the "Arizona Study (1990)"); *Daly*, 775 N.W.2d at 58 (referring to a "1994 study performed by the State of Arizona").

Klawitter also referred to a Minnesota study. *Klawitter*, 518 N.W.2d at 587 n.1 (Wahl, J., dissenting) (referring to "the Minnesota Study (1993)"). *See also Daly*, 775 N.W.2d at 58 (referring to a "study performed by the State of Minnesota from 1991 to 1993"). And *Aleman*

referred to a Hlastala study. *Aleman*, 194 P.3d at 118. Chitwood cannot deny the existence of these studies.

Chitwood is also wrong to suggest that no study has used an incomplete protocol. The *Williams* Court referred to Stephen J. Heishman, et al., *Laboratory Validation Study of Drug evaluation and Classification Program: Ethanol, Cocaine and Marijuana,* 20 Journal of Analytical Toxicology 468 (1996), which the court criticized because the study used "'an abbreviated DEC evaluation … that was different from the [actual] standardized test used in the field.'" *Williams,* 710 So. 2d at 33 n.14 (quoting Heishman at 480). *See also Daly*, 775 N.W.2d at 60 n.18 (citing two articles Heishman published).

It is clear the protocol has been the subject of published articles addressing its ability to determine drug impairment and identify the drug categories involved. Although some of the studies appeared in non-peer review publications, the Heishman and Hlastala articles demonstrate the protocol has been peer reviewed and criticized.

2. The protocol's error rate.

Cases in other jurisdictions have also addressed the accuracy of DRE's opinions. This has taken the form of an error rate comparing the toxicological result to DRE's impairment decision (the presence of at least one drug) and

the correct identification of one or more of the drug categories.

The Compton study found the DRE's were 94% accurate in making the call of impairment and had an overall accuracy rate of 87% in identifying at least one drug where multiple drugs were used. *Williams,* 710 So. 2d at 27 n.6. *See also Everett*, 972 F. Supp at 1316; *Daly*, 775 N.W.2d at 58. The Pruesser study found an overall confirmation rate comparing the DRE's conclusion with laboratory test results of 84.1%. *Williams,* 710 So. 2d at 27 n.6. In the Arizona study the DRE's findings were consistent with laboratory findings in 91% of the cases studied. *Williams,* 710 So. 2d at 33 n.14. *Baity* states the Arizona study "confirm[s] the reliability of the DRE protocol in a forensic setting." *Baity,* 991 P.2d at 1160. And *Daly* stated that the Arizona study "found that DRE decisions were 'highly accurate' …." *Daly*, 775 N.W.2d at 58. The *Williams* Court concluded that "most studies indicate a reliability factor of between 80% to 90%." *Williams*, 710 So. 2d at 34.

The Heishman study found "at best a 51-percent success rate for DRE accuracy and indicated a success rate of only 44 percent when alcohol-only decisions were excluded." *Daly*, 775 N.W.2d at 60. But as the *Daly* Court noted,

> the 1998 Heishman study concluded that the DRE protocol "is a valid test to identify recent drug use." That study also found that when DRE evaluations were

> inconsistent with toxicological testing, false negatives were substantially more likely than false positives, including with respect to marijuana use. ***And even using an incomplete protocol, "DREs are able to detect drug-induced impairment in general,"*** even when they have difficulty discriminating between various drugs.

Id. at 60-61 (footnotes omitted) (emphasis added).

The State notes that, "proponents 'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable....'" Rule 702 committee note (quoting *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994). The dissent in *Williams* based on the Heischman study concluded: "In other words, the [DREs] were wrong half the time. Obviously, where there is a fifty-percent error rate, the proposed scientific evidence is too unreliable to be introduced at trial." *Williams*, 710 So. 2d at 43 (Cope, J., concurring in part and dissenting in part) (footnote omitted). Florida is a *Frye* state so perhaps this statement is sound where *Frye* controls. But in a *Duaubert* state such as Wisconsin, the statement conflicts with *Paoli* and the advisory committee note. The *Kumho Tire* Court cautioned that the enumerated factors, error rate being one, "neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire*, 526 U.S. at 141. To reject Peskie's testimony on the error rate in one study (which

might even meet a preponderance burden) belies the flexibility of *Daubert/Kumho* Tire.

Where, as here, reliable principles underlie an expert's opinion, but the opponent of the opinion claims some error in the application, such as an incomplete test or invalid assumptions, *Daubert* favors leaving such matters to cross-examination and a determination by the jury. *Giese*, 356 Wis. 2d 796, ¶ 28; *see also Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003) ("It is not the role of the trial court to evaluate the correctness of facts underlying one expert's testimony.").

3. Peskie's training and expertise also sufficiently satisfied Wis. Stat. § 907.02(1).

"Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise." Rule 702 committee note. The text of Federal Rule 702 and Wis. Stat. § 907.02 expressly contemplates that an expert may be qualified on the basis of experience and training alone. *Kumho Tire*, 526 U.S. at 156 ("[N]o one denies that an expert might draw a conclusion from a set of observations based on

extensive and specialized experience."); *United States v. Markum*, 4 F.3d 891, 896 (10th Cir. 1993) ("Experience alone can qualify a witness to give expert testimony.").

In certain fields, experience is the predominant, if not the sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones*, 107 F.3d 1147, 1161 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail). The practice of medicine and nursing are such fields. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 247-48 (5th Cir. 2002) (reversing the exclusion of an opinion based on experience and personal observations by a physician specializing in infectious diseases); *McCullock v. H.B. Fuller Co.,* 61 F.3d 1038, 1043-44 (2d Cir. 1995) (the district court, in the sound exercise of its discretion, properly admitted physician's opinion testimony based on his clinical experience); *Rodriguez v. State*, 635 S.E.2d 402, 404-05 (Ga. Ct. App. 2006) (SANE nurse qualified to give an opinion that reddened vaginal area and small abrasions at the entry to the vaginal vault observed during examination were consistent with injuries that might occur from the penetration of an adult finger). The same is true for the expierence of police officers in the field. *United States v. Schwarck,* 719 F.3d 921, 924 (8th Cir. 2013) (police officer testimony permissibly explained the significance of evidence

that would not be familiar to average jurors with no previous exposure to the drug trafficking business to rebut claim that defendant was a user, not a distributor).

Courts in other *Daubert* jurisdictions have admitted DRE testimony to establish the OWI element of impaired driving. Recall that New Mexico is a *Daubert* state, albeit without applying it to experts based on specialized knowledge. *Aleman*, 194 P.3d 110, ¶ 6. In *Aleman*, the New Mexico Court of Appeals stated: "Even if we were to agree with the trial court's evaluation of the Protocol as scientific in nature, we would still affirm because our review of the evidence presented during the hearing supports the trial court's conclusion that the evidence was admissible." *Id.*, ¶ 21. The court then analyzed the DRE protocol. It found: the theory behind the protocol can be tested, *id.*,¶ 22; the protocol had received adequate scrutiny in the scientific community., *id.*, ¶ 24; the rigorous training and certification program overseen by IACP provided strict standards, *id.*, ¶ 25; the error rate for determining "some sort of drug impairment" was "remarkably low," *id.*, ¶ 28; and the protocol was generally accepted, *id.*, ¶ 29.

The Oregon Court of Appeals also found testimony from the DRE protocol admissible under its law. *State v. Sampson*, 6 P.3d 543 (Or. Ct. App. 2000). The court found: "the DRE protocol has achieved a significant degree of acceptance within the relevant scientific community," *id.* at

553; "DRE certification suffices to qualify a DRE officer to testify about the administration and results of the protocol," *id.* at 554; and "the field studies … that measured the actual corroboration rate achieved by DRE officers using the full protocol show that DRE evidence meets the requirement of reasonable certainty and reliability," *id.* at 556. Finally, the court relied on the toxicological test result to verify the "subjective" aspects of the protocol. *Id.* at 557.

Chitwood cites the Oregon Court of Appeals decision in *State v. Aman*, 95 P.3d 244 (Or. Ct. App. 2004), noting that that the *Aman* Court held inadmissible, an incompletely administered DRE protocol. *Id.* at 244-45. Oregon places particular emphasis on the "'high degree of persuasive power'" of scientific evidence. *Id.* at 248 (quoting *State v. O'Key*, 899 P.2d 663, 672 (Or. 1995)). The *Aman* Court reasoned:

> there was no evidence the methodology employed—an 11-step DRE test without toxicological confirmation—generally has been accepted in the relevant field, has been used in a reported judicial decision, has a known rate of error, is mentioned in specialized literature, or is not a novel, even singular, employment in this state. To the contrary, the omission of the corroborating toxicology report deprives the test of a major element of its scientific basis, and there is no evidence that an examiner's reputation for accuracy constitutes an adequate substitute.

Aman, 95 P.3d at 249.

This reasoning is flawed because the toxicological confirmation plays no part in the officer's opinion as it

cannot be known at the time the officer forms an opinion. Thus, the error rates reflected in the studies cited by the various courts and to which the State refers above are, in fact, error rates of the officer's unconfirmed opinion. It is true the toxicological result is necessary to determine whether the officer's opinion is correct and thus the results are necessary to calculate an error rate. But is mistaken to think that the error rate reflected in the studies is somehow inaccurate because no sample could be obtained to verify a particular opinion. As noted above, such a challenge is best left to cross-examination. In any event, *Aman* can be distinguished here because toxicological tests confirmed Peskie's opinion (44:107).

Chitwood's citation of *Baity* is also unavailing. The *Baity* Court did not "find[the] drug recognition evidence admissible only where all 12-steps of the protocol are completed." Chitwood's brief at 28. The court "emphasize[d] … that our opinion today is confined to situations where all 12-steps of the protocol have been undertaken." *Baity*, 991 P.2d at 1160. The court did not express an opinion about what result would flow from an incomplete protocol. Perhaps the answer would depend on which of the twelve steps was not completed. Or perhaps the term "undertaken" would not exclude an opinion in the *Aman* circumstance where police undertook to collect a urine sample but were unable to do so. The expert in *Aman* testified Aman's inability to give a

sample was consistent with the drug he had taken. *Aman*, 95 P.3d at 246. Finally, perhaps the *Baily* court merely wanted to narrowly confine the precedential force of its opinion, leaving opinions based on an incomplete protocol for another day.

The State notes that the DRE protocol has been in use since the 1980's on a nation-wide basis. *See Baity*, 991 P.2d at 1154 (setting out the historical development of the protocol and training curriculum, and expansion of the program). The program is established in the District of Columbia and all 50 states. *See* The International Drug Evaluation and Classification Program, Participating States in the DECP, http://www.decp.org/experts/states.htm (last visited August 24, 2015).

In *Daly*, the Nebraska Supreme Court admitted testimony based on the DRE protocol under *Daubert*. *Daly*, 775 N.W.2d at 58-59. The *Daly* court noted the particular area of expertise: "[T]he DRE protocol, while based in scientific principles, is a program designed to meet the specific needs of law enforcement." *Id.* at 61. *Daubert*'s flexible standard should be adapted to law enforcement needs which must, of necessity, take into account that certain situations in the field prevent completion of all twelve steps.

This Court noted in *Seifert v. Balink*, No. 2014AP0195, ¶ 19 (Ct. App. July 30, 2015) (Higginbotham, J.) (recommended for publication) (R-Ap. 109): "In cases involving expert testimony provided by physicians, several courts have focused on the knowledge and experience of the testifying expert as an indicator of reliability under *Daubert*." That is true here. The history and use of the DRE protocol in law enforcement circumstances, the rigorous training Peskie had to undergo in order to obtain and remain certified, his personal experience in determining drug impairment in 44 cases from 2007, his certification year, to 2013, the date of trial, his 0% error rate during training, and the general acceptance and use of the DRE protocol in all 50 states, provided ample assurances that Peskie's "testimony [was] the product of reliable principles and methods, and [he] applied the principles and methods reliably to the facts of [Chitwood's] case." Wis. Stat. § 907.02(1).

Peskie's personal observations which included Chitwood's extremely relaxed state, his delayed verbal response, his slurred speech, his thick, low, raspy voice, his lack of response to pain, his constricted pupils, his lack of elevated blood pressure, his lack of smooth pursuit and distinct and sustained nystagmus at maximum deviation in the HGN test, and his nystagmus in the VGN test (44:46-

49), all established that Peskie's testimony rested on sufficient facts and data. Wis. Stat. § 907.02(1).

II. ANY ERROR IN ADMITTING PESKIE'S OPINION WAS HARMLESS BEYOND A REASONABLE DOUBT.

An error is harmless if "it [is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999); *State v. Harvey*, 2002 WI 93, ¶ 46, 254 Wis. 2d 442, 647 N.W.2d 189; *State v. Eison*, 2011 WI App 52, ¶ 11, 332 Wis. 2d 331, 797 N.W.2d 890. If the circuit court erred in admitting Peskie's opinion, the error meets this harmless error standard.

Randy Eller testified he came upon a car in the ditch on October 28, 2011, at 1:30 p.m. (39:180). He approached the car and observed Chitwood seated in the driver's seat, bleeding in the face area (39:181-83). Chitwood claimed a raccoon jumped out in front of him and he served to miss it (39:189). Eller described Chitwood as "kind of out of it" (39:183). At first, Chitwood did not want Eller to call the police (39:185). When Eller told Chitwood he need stitches for his laceration, Chitwood appeared to decline medical treatment saying he would be fine (39:187).

Deputy Essinger responded to Chitwood's accident (39:196). Essinger was a member of the traffic crash reconstruction team as a traffic crash reconstructionist

(39:206). He had received 200 hours of training in addition to police academy training in investigating traffic accidents (39:206). He had investigated or assisted in the investigation of 800-1000 accidents (39:207).

As he walked up to the scene, Essinger observed that Chitwood's car had spun significantly and hit two trees in a relatively short distance (39:201). Chitwood's car was perpendicular to the roadway with its front tires on the roadway and back tires off the road (39:205). The right rear passenger-side tire was lodged against a tree (39:205).

Hillside Road, where this accident occurred, is an asphalt roadway with a three foot gravel shoulder and a grass covered shoulder with a ditch beyond the grass shoulder (39:216-17). Chitwood told Essinger he (Chitwood) swerved to miss a squirrel, then corrected himself to say the animal was a raccoon (39:200). He lost control of his car and crashed into a tree (39:200).

Essinger observed fresh tire marks in the gravel part of the shoulder near a mailbox (39:217-18). The mailbox was knocked over; mail and papers were strewn around the shoulder at the mailbox's location (39:217-18). Essinger observed a dent and white paint transfer on the damaged mailbox (39:217-18). The tire marks contained visible tread pattern (39:217). The tread pattern indicated to Essinger that the car's wheel was free-rolling (39:219). A free-rolling

wheel evidenced that the car was neither accelerating nor heavily breaking (39:219). The track of the tire on the shoulder indicated that the car had drifted off the roadway as it approached the mailbox (39:219). These tire marks ended at the damaged mailbox (39:219).

Essinger also observed black tire marks on the asphalt roadway after the car struck the mailbox (39:217, 220). These tire marks indicated the driver had made a hard left-hand turn sending the car into the lane for oncoming traffic (39:220). The marks did not appear to be from pumping the brakes (39:221). Then the driver quickly compensated with a hard right-hand turn (39:220). The right-hand turn threw the car into a clockwise spin (39:222). Essinger could trace these tire marks to where the car left the roadway, hit and damaged a tree (39:222). The driver's side front wheel and quarter panel struck the tree (39:223). The car continued to spin clockwise after striking the tree and cut a path on the grass part of the shoulder to the location where Chitwood's car came to rest against a second tree (39: 222).

Essinger found white vehicle parts on the ground at the base of the first tree (39:223). He observed a black paint transfer on the passenger-side rear-view mirror (39:225-26), and damage to the driver's-side of Chitwood's car (39:223, 226). The car also had damage on the passenger-side (39:226).

Chitwood appeared very relaxed almost lackadaisical not as if he had just been involved in an accident (39:202). He spoke very slowly and Essinger had a hard time understanding his responses to questions (39:202). Chitwood appeared to have a hard time staying awake (39:203). His eyes opened and closed slowly with a methodical blinking and his head bobbed from side to side (39:203). After closing his eyes, he had a hard time locating Essinger after opening his eyes again despite Essinger having not moved (39:203). Chitwood initially denied being under the influence of alcohol or drugs but eventually admitted to taking oxycodone and other prescription medications earlier in the day (39:203-04).

Essinger followed Chitwood to the hospital (39:226-27, 239). He observed that Chitwood did not respond to questions put to him by medical personnel (39:239). Essinger again observed that Chitwood had trouble speaking and exhibited lethargic behavior; these signs had not changed from the scene of the accident to the hospital (39:241). Chitwood had a C-collar on and was on a backboard, so Essinger did not attempt to perform the SFST (39:241-42).

Because the physical evidence at the scene contradicted Chitwood's version of serving to avoid an animal, and because of his lethargic behavior, and his admission to taking oxycodone, Essinger arrested Chitwood for OWI (39:243). He testified that in his opinion Chitwood

was not able to operate a motor vehicle in a safe manner (39:243, 254).[7] His opinion that Chitwood could not safely drive did not change over the almost four hours he witnessed Chitwood's behavior (39:253). His condition did improve over that time (39:253-54).

Chitwood eventually consented to a blood draw (39:245). A medical lab technician performed the blood draw (39:248).

Sara Schreiber, a forensic toxicologist and technical forensic director of the Milwaukee Medical Examiner's Office (44:86), testified to her qualifications as a forensic toxicologist (44:87-90). She also received training in the physiological effects of drugs on the human body (44:90-92).

Schreiber described the lab procedure for receiving blood draw evidence (44:95-97). She testified that the lab received a Styrofoam box containing a blood tube drawn from Chitwood (44:97-98). The lab first analyzed the sample for alcohol (44:97-98). The lab then screened the sample using "ELISA-base" technique and gas chromatography-mass spectrometry to determine a category of drugs present (44:98-100).

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[7] The prosecutor elicited Essinger's opinion about Chitwood's ability to drive safely twice (39:243, 254). The first time Chitwood's attorney did not object (39:243); the second time he did (39:254). Chitwood does not challenge Essinger's opinion on appeal.

The screening tests identified caffeine, cotinine, liappleocaine, amitriptyline, citalopram, carisoprodol, meprobamate and oxycodone (44:102). The lab does not quantify caffeine, cotinine, and amitriptyline unless the submitting agency requests it because they are common and not usually pertinent to cases (44:102-03).

Schreiber explained the testing process which the lab used for the identification and quantification of oxycodone, citalopram, carisoprodol and meprobamate (44:103-06). The testing identified four drugs and quantified them as follows: oxycodone, 33 micrograms per liter; citalopram, 62 micrograms per liter; carisoprodol, 9.6 milligrams per liter; meprobamate, 30 milligrams per liter (44:107).

Oxycodone is an opiate used in pain management. The result of 33 micrograms per liter would represent a peek therapeutic level for about two hours after a ten milligram dose. But that level could also be the result of a greater dose taken more than two hours ago that had already peeked at a higher concentration and dropped to 33 micrograms or a greater dose taken less than two hours ago that had not yet peeked at a higher concentration. (44:109-13). That level of oxycodone would likely produce constricted pupils, drowsiness, flaccid muscle tone and possible speech issues including slurring (44:109-13).

Carisoprodol is a sedative and muscle relaxant (44:114). The quantitative result is three times the therapeutic dose for a 700 milligram single oral dose (44:115). Carisoprodol has a half-life of about two hours (44:115-16).[8] Therefore, a level of 9.6 milligrams would indicate a very high dose given the time between the accident and the blood draw. A high dose of carisoprodol would likely produce dizziness and confusion along with drowsiness reflected in difficulty keeping the eyes open (44:117). Meprobamate is an active metabolite of carisoprodol (44:117).[9] Citalopram is an antidepressant prescription drug (44:108). The quantitative result indicated a therapeutic dose (44:109).

Schreiber testified at length about the effects of the drugs found, and how they combined to compound the signs and symptoms Chitwood exhibited to Essigner and Peskie (44:122-30). She held the opinion that Chitwood could probably not safely operate his car (44:130-32).[10]

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[8] The half-life of a drug is the time the body takes to metabolize one-half of a given quantity of the drug (44:115-16).

[9] A metabolite is a product of the body's metabolic breakdown of a drug. So here as the body metabolizes carisoprodol, the metabolism produces meprobamate. Active means the meprobamate itself has an effect on the body (44:117-20).

[10] Chitwood's attorney objected to Schreiber's opinion on numerous occasions (44:122, 124-25, 130-31). Chitwood does not challenge Schreiber's opinion on appeal.

The State also notes that Peskie's testimony about his personal observations of Chitwood were not erroneously admitted and Chitwood does not contend to the contrary.

Based on the level of the drug test result, Schreiber held the opinion that all of these drugs were present at the time Chitwood drove his car, hit the mailbox and two trees (44:121). She also held the opinion that Chitwood could probably not safely operate his car (44:130-32).[11]

The above evidence strongly demonstrates that Chitwood drove while under the influence of several drugs to the degree that rendered him incapable of safely driving (44:159). Both Essinger and Peskie observed Chitwood's lethargic behavior which included closing his eyes, difficulty locating Essinger upon opening his eyes, and trouble staying awake. They both observed slurred speech, and slow response or non-response to questions from both police and medical staff. Peskie observed Chitwood's lack of reaction to pain, his constricted pupils and his nystagmus. (As the State reads Chitwood's brief, he does not challenge the HGN, VGN, the tests involving Chitwood's pupils or the testimony about their significance to have been erroneously admitted as separate expert testimony in their own right.) Both

[11] Chitwood's attorney objected to Schreiber's opinion on numerous occasions (44:122, 124-25, 130-31). Chitwood does not challenge Schreiber's opinion on appeal.

Essinger and Schreiber opined that Chitwood could not safely operate his car.

The toxicological result confirmed Chitwood's admission of taking oxycodone and identified the other drugs in his system. This alone rendered Peskie's identification of the drug groups cumulative. Schreiber also described the effects those drugs had on Chitwood's behavior in great detail. She described the effects both as individual drugs and in combination.

Lastly, the physical evidence at the accident scene demonstrated that Chitwood's car drifted off the traveled portion of the road hitting a mailbox on the shoulder. The obvious inference is that the drifting resulted from his drug induced state. Upon striking the mailbox, Chitwood yanked his steering wheel causing a sharp left turn across the centerline of the road for which he sharply overcompensated with a sharp right turn. The right turn threw his car into a spin striking two trees. This scenario contradicts Chitwood's version of swerving to miss an animal.

In view of all of this evidence, Peskie's opinion as a DRE was largely cumulative. A rational jury would have convicted Chitwood without his opinion.

CONCLUSION

For the reasons given above, this Court should affirm Chitwood's judgment of conviction.

Dated this 25th day of August, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,583 words.

Dated this 25th day of August, 2015.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 25th day of August, 2015.

_____
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