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.

REPLY BRIEF

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
Telephone: (414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES CITED

ARGUMENT

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

A. The certified drug recognition evaluator's opinion was expert testimony.

In this case, Nathan Peskie testified that he was a certified drug recognition evaluator. (44:7-9). Peskie testified that unlike the "average" law enforcement officer, a drug recognition evaluator has advanced training to determine impairment and the cause. (44:10-11). When evaluating an individual suspected to be under the influence of drugs, a drug recognition evaluator follows "a standardized and systemic 12-step procedure." (44:12-19). After describing his training and the 12-step evaluation protocol in detail to the jury, Peskie testified that he conducted a "partial" evaluation on Mr. Chitwood and that in his opinion Mr. Chitwood was under the influence of a narcotic analgesic and a central nervous system depressant which rendered him incapable of operating a motor vehicle safely. (44:21-22, 42, 45-47, 54).

In his brief, Mr. Chitwood asserted that Peskie's opinion is expert testimony because it is based on "scientific knowledge." (Def.-App.'s Br. at 24-26). Assuming for the sake of argument, but not conceding, Mr. Chitwood alternatively asserted that Peskie's opinion is expert testimony because it is based on "specialized knowledge." (Def.-App.'s Br. at 27).

The State appears to agree that Peskie's testimony is expert testimony. However, without any explanation or argument, the State concludes that Peskie's testimony is based on specialized knowledge, not scientific knowledge. (State's Br. at 13).

B. The State has failed to establish that a certified drug recognition evaluator's opinion based on an incomplete protocol is the product of reliable principles and methods.

The State agrees that the circuit court's reasoning for overruling Mr. Chitwood's objection to Peskie's testimony was "wrong," but that Peskie's testimony was still admissible. (*See, e.g.,* State's Br. at 15-16). However, contrary to the State's argument, Peskie's testimony was not admissible.

As the State acknowledges, the proponent of the expert testimony is generally required to establish that the opinion is the product of reliable principles and methods. (State's Br. at 17).

In ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 593-94 (1993), the United States Supreme Court provided a list of factors that a circuit court may use when determining that testimony is reliable. These factors include: (1) whether the expert's theory or technique "can be (and has been tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) "the known or potential rate of error" of a particular scientific technique, and (4) whether the subject of the testimony has been generally accepted. ***Id.***

The State emphasizes that the ***Daubert*** standard is "flexible." (State's Br. at 4, 29). While it is true that the standard is flexible, it "has teeth" and "the goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***State v. Giese***, 2014 WI App 92, ¶ 19, 356 Wis. 2d 796, 854 N.W.2d 687 (citation omitted). "'[N]o matter how good' experts' 'credentials' may be, they are 'not permitted to speculate.'" ***Tamraz v. Lincoln Elec. Co.***, 620 F.3d 665, 671 (6th Cir. 2010) (quotation omitted).

Here, an examination of the studies referenced by the State, case law, and Peskie's testimony reflects that the State has failed to establish that an incomplete protocol is the product of reliable principles and methods.

1. Studies.

The State's brief references several studies, but does not provide a copy of the studies in the appendix. Counsel could not find three of the seven studies to review.[1]

Out of the studies referenced, the State indicates that only one used an incomplete protocol—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). (State's Br. at 21).[2] This is significant because at issue here is an incomplete protocol, not a complete protocol.

Moreover, an examination of the Heishman study does not support that an incomplete protocol with missing steps is the product of reliable principles and methodology. The State notes that "[t]he 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." (State's Br. at 22-23). This contrasts sharply with accuracy rates the State cites from other studies that appear to have

[1] Counsel was unable to locate: (1) U.S. Dep't of Transp. Nat'l Highway Traffic Safety Admin., *Drug Evaluation and Classification Program*, *Briefing Paper* (July 1992); (2) "the Minnesota Study (1993)"; and (3) a "Hlastala study." (*See* State's Br. at 20-21).

[2] The State indicates, without any citation to Mr. Chitwood's brief, that "Chitwood is wrong to suggest that no study has used an incomplete protocol." (State's Br. at 21). Counsel disagrees that any such claim or suggestion was made in Mr. Chitwood's initial brief. (*See* Def-App.'s Br. at 28 (simply noting that "the State presented no evidence that an incomplete drug recognition protocol is reliable" as opposed to stating that no study has ever used an incomplete protocol)).

used complete protocols. (*See* State's Br. at 22 (noting Richard P. Compton, *Field Evaluation of the Los Angeles Police Department*, U.S. D.O.T. H.S. 807012 (1986) (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); Preusser, et al., *Evaluation of the Impact of Drug Evaluation and Classification Program on Enforcement and Adjudication*, National Highway Traffic Safety Administration, U. S. D.O.T. H.S. 808 058 (1992) (overall confirmation rate comparing the DRE's conclusion with laboratory test results of 84.1%); Adler & M. Burns, *Drug Recognition Expert* (DRE) *Validation Study*, Final Report to the Governor's Office of Highway Safety, State of Arizona (1994) (DRE's findings were consistent with laboratory findings in 91% of the cases studied)).

Further, notably, it appears that the Heishman study simply utilized an incomplete protocol and was not specifically examining the accuracy or error rates when an incomplete protocol is conducted. *See* Heishman, at 470 (stating that "the protocol was an abridged version of the DEC used in law enforcement contexts. In this study, DRE's did not question subjects about recent drug use, nor did they interrogate subjects to solicit admissions about drug use."). The Heishman study does not examine the accuracy rate when one step of the protocol was missing compared to two missing steps, or alternatively, how accuracy is affected when a particular step is missing. In addition, the title of the Heishman study reflects that the substances used were "ethanol, cocaine, and marijuana," not the particular prescription medications involved in this case.

Thus, unlike a situation in which experts have differing opinions about the reliability of a certain methodology, here, there is simply no support that an incomplete protocol is reliable, much less an incomplete protocol with the number and type of steps missing in this case.

In addition, the State does not cite any recent studies. The only studies referenced by the State were all dated years ago—with the earliest study dated 1984 and the latest study dated 1996.[3] (*See* State's Br. 19-24). When attempting to locate the studies referenced by the State, counsel found at least one more recently published online study—Greg Kane, *The methodological quality of three foundational law enforcement drug influence evaluation validation studies,* Journal of Negative Results in Biomedicine (Nov. 4, 2013) (*available at* www.jnrbm.com) (App. 101-112)[4]—that heavily criticizes three commonly referenced drug influence evaluation studies, including Compton and Adler, which the State references for error rates. (*See* State's Br. at 22).

Lastly, the State broadly concludes that "[w]here, 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 a jury." (State's Br. at 24). However, to be clear, ***State v. Giese***, cited by the State, does not state that every time there is some type of "incomplete test" or "invalid assumption," such matters should be left to cross-examination and a determination by a jury. 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687. The holding in ***Giese*** is limited to the specific facts of the case. In ***Giese***, this Court concluded that expert testimony "about *retrograde extrapolation in Giese's particular case* was admissible under ***Daubert***." ***Id.***, ¶ 25.

---

[3] The "Hlastala study" reference in the State's brief does not include a date, and as noted above, counsel was unable to locate it to determine a date and review the content.

[4] The Journal of Negative Results in Biomedicine website states that it is a "peer-reviewed, online journal that provides a platform for the publication and discussion of unexpected, controversial, provocative and/or negative results in the context of current tenets." *See* www.jnrbm.com (last visited November 5, 2015).

2. Case law.

Courts in other jurisdictions have found drug recognition evaluator testimony admissible. *See, e.g.,* ***State v. Sampson***, 6 P.3d 543 (Or. Ct. App. 2000).

However, counsel is not aware of, nor does the State cite, any case in which a court admitted a drug recognition evaluator's opinion based on an incomplete protocol with the same steps missing as in this case due to an individual's head injuries.

In ***State v. Aman***, 95 P.3d 244, 249 (Or. Ct. App. 2004), the court held that "an incompletely administered DRE protocol is not, itself, admissible as scientific evidence." In ***Aman***, 11 of the 12 drug recognition evaluation steps were completed. ***Id.*** at 246. The only step missing was the twelfth step—the toxicological confirmation. ***Id.*** at 246, 247. ***Aman*** stated that:

> Here, there is no evidence that 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.

Id. at 249.

The State, here, argues that ***Aman's*** 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." (State's Br. at 28).

However, even if ***Aman's*** reasoning is flawed because the toxiciological confirmation plays no part in the officer's

opinion, that does not help the State's argument in this case. Here, more than one step was missing. Moreover, the steps missing in this case all play a "part" in a drug recognition evaluator's opinion. Peskie testified that he did not conduct the blood alcohol test, did not conduct the Rhomberg test, the walk and turn test, the one leg stand tests, the one stand, the finger-to-nose test, the lack of convergence test, or five of the six pupil tests. (*See, e.g.,* 44:58, 65, 71-74, 76; 47:Exh. 16).[5]

Lastly, in ***State v. Baity***, 991 P.2d 1151, 1161 (Wash. 2000), the court held that "[a] properly qualified expert may use the 12-step protocol and the chart of categories of drugs to relate an opinion about the presence or absence of certain categories of drugs in a suspect's system." The court "emphasize[d], however, that our opinion today is confined to situations *where all 12-steps of the protocol* have been undertaken." ***Id.*** at 1160 (emphasis added). While it is possible, as the State points out, that ***Baity*** may be interpreted as leaving the issue of an incomplete protocol for another day, ***Baity***, at minimum, is significant in that it distinguishes between a situation where all 12-steps are completed and a situation where there is an incomplete evaluation.

3. Officer Peskie's testimony.

The State's brief notes that some experts may be qualified on the basis of experience and training alone. The reasoning for this is that "[s]ome 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." (State's Br. at 24-35). However, notably, unlike testimony from some experts, such as a physician, the accuracy of an incomplete drug recognition protocol *can* be evaluated.

---

[5] The State's brief notes that Officer Peskie failed to perform the breath alcohol test and the standardized field sobriety tests. (at 9). However, the brief fails to note that Officer Peskie did not conduct the lack of convergence test and five of the six pupil tests. (*Id.*).

Moreover, Peskie's training and experience does not provide "ample assurances" that his testimony was the product of reliable principles and methods and rested on sufficient facts. (State's Br. at 30-31).

First, as noted above, Peskie did not complete the blood alcohol test, did not conduct the Rhomberg test, the walk and turn test, the one leg stand tests, the one stand, the finger-to-nose test, the lack of convergence test, or five of the six pupil tests. (*See, e.g.,* 44:58, 65, 71-74, 76).

Second, according to Peskie, in order to be certified, he had to have 80 hours of classroom training and 40 hours of field certification. (44:7, 11, 12). While Peskie was given partially completed face sheets in the classroom portion and recertification, none of his field certification training involved an incomplete protocol or an evaluation of an injured person. (44:33-34, 35-36, 43). And unlike the field certification, which requires an officer "to be proficient up to 80%," there is no testimony in the record that the classroom component or recertification involving the partially completed face sheets had a proficiency requirement.

Additionally, although a rolling evaluation log was moved into evidence indicating toxicology results (44:19-20; 47:Exh. 15), the log did not indicate whether there was a full or partial evaluation conducted,[6] or if the individuals at issue were actually impaired.[7] (44:44-45). Thus, it is unknown how

[6] Peskie testified that the only way to tell if a full or incomplete evaluation was done was to review the underlying face sheets or narrative reports, none of which were entered into evidence. (44:44-45).

[7] There is a difference between correctly determining whether an individual has drugs in his system and determining whether an individual is impaired by the drugs in his system. (44:84). This difference is particularly important, where, as in this case, Mr. Chitwood was not disputing the presence of drugs in his system, but whether he was impaired. (*See, e.g.,* 44:192, 202).

many times Peskie conducted incomplete evaluations, and when he did, how many times he correctly determined that the individual was impaired.

Lastly, Peskie testified that he did not know what Mr. Chitwood's specific medical history was in this case and did know for sure Mr. Chitwood's current medical condition. (44:35, 68-69).

It is not enough when the expert's only support for the accuracy of the method is the expert's own say-so. *See* ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 157 (1999). Therefore, this Court should find that State has failed to establish that Peskie's opinion based on an incomplete drug recognition evaluation was admissible.

C. The error was not harmless.

In order for an error to be harmless, the State, as the party benefiting from the error, must prove that it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *See* ***State v. Harvey***, 2002 WI 93, ¶¶ 40, 46, 254 Wis. 2d 44, 647 N.W.2d 189.

In this case, the State argues that the "evidence strongly demonstrates that Chitwood drove while under the influence of several drugs to the degree that rendered him incapable of safely driving." (State's Br. at 38).

However, whether an error is harmless is a distinct inquiry from the sufficiency of the evidence. "Time and time again, the [United States] Supreme Court has emphasized that a harmless error inquiry is not the same as a review for whether there was sufficient evidence at trial to support a verdict." ***Mark D. Jensen v. Marc Clements***, ___, F.3d ___ (7th Cir. 2015). In ***Kotteakos v. United States***, 328 U.S. 750 (1946), the United States Supreme Court has explained its harmless error analysis as:

> And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had on the jury's decision….The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence.

Id., at 764-66; *see also* ***Satterwhite v. Texas***, 486 U.S. 249, 258-59 (1988); ***Sullivan v. Louisiana***, 508 U.S. 275, 279 (1993); ***Fahy v. State of Conn.***, 375 U.S. 85, 86 (1963).

Here, allowing Peskie to opine that Mr. Chitwood was driving under the influence of drugs and was incapable of driving safely based on an incomplete drug recognition protocol was not harmless. At trial, the State elicited detailed testimony regarding Peskie's drug recognition evaluator training, his drug recognition evaluator certification, and the 12-step drug recognition protocol. (*See, e.g.,* 44:7-10, 11-12, 13-19). The State also moved into evidence Peskie's resume (44:7-8; 47:Exh. 12), his drug recognition certification (44:9-10; 47:Exh. 13), a drug recognition card (44:14; 47:Exh. 14), a rolling evaluation log (44:19-20; 47:Exh. 15), and the drug influence evaluation for Mr. Chitwood (44:22; 47:Exh. 16).

In addition, during closing arguments, the State utilized Peskie's opinion to bolster its argument and highlight the fact that he was a drug recognition evaluator:

> He's a drug recognition evaluator and in his opinion, the defendant at the time of driving was under the influence of a controlled substance – or I'm sorry, a central nervous system depressant and a narcotic analgesic.
>
> Also in his opinion, the defendant, based on those drugs in his system and the observations he made, was incapable of safely operating his motor vehicle. He's had a great deal of training in making these determinations and he's had a number of cases in which he's made these

> determinations. In every one of those determinations it's independently reviewed prior to recertification….

(44:181-82).

The State's emphasis on the fact that Peskie was a certified drug recognition evaluator and the drug recognition protocol invited the jury to incorrectly believe that Peskie's opinion was based on reliable, possibly scientific, principles or methods. Consequently, this error was not harmless. *See* ***State v. Aman***, 95 P.3d 244, 249 (Or. Ct. App. 2004) ("The potential for scientifically based evidence to exert influence on a jury is manifest….We cannot say that there is little likelihood that the error in admitting the incomplete DRE protocol results affected the verdict.").

Moreover, contrary to the State's suggestion (at 39), drug recognition evaluator Peskie's opinion that Mr. Chitwood was under the influence and incapable of operating a motor vehicle safely based on an incomplete drug protocol was not merely cumulative evidence. While Essigner opined "about Chitwood's ability to drive safely twice" (State's Br. at 35 n. 7), Essigner was not certified as a drug recognition evaluator and had not been to any of the training. (39:257-58, 269).[8] In addition, unlike Peskie, Essigner's opinion regarding Mr. Chitwood was not based on any type of standardized test or protocol. Essigner did not conduct any field sobriety tests or the horizontal gaze nystagmus test due to Mr. Chitwood's injuries. (39:241-42, 261-64).

The State indicates that Sara Schreiber, the forensic toxicologist "[held the opinion that *Chitwood* could probably not safely operate his car." (State's Br. at 37 (citing 44:130-32) (emphasis added). However, to be clear, Schreiber's opinion regarding whether an individual could safely drive

[8] Essigner testified that approximately four or five years ago he had training with respect to determining whether someone is under the influence of drugs. (39:194-95). However, Essigner testified that it was a "very brief training"—a two hour presentation. (39:195).

was for an *average person* with an average tolerance. (44:136, 138-39). Schreiber had never met Mr. Chitwood, did not know his medication tolerance, and did not review any of his medical records before she testified in this case. (44:135, 138-39, 140-41, 144). Thus, Schreiber could not say with certainty that Mr. Chitwood's ability to drive was impaired. (44:138-39). Schreiber testified in pertinent part during cross-examination:

> DEFENSE COUNSEL: With the test results we have in this case, you can't say that 100 percent of cases would mean that that an individual cannot safely drive, correct?
>
> SCHREIBER: I can't say that a hundred percent, no. I would certainly say that there's a high probability that would, but I suppose you could have an opportunity where an individual has a – a very good tolerance to these drugs and can handle those levels, but since they're all above what you would expect under kind of normal and therapeutic, I would be very surprised to see some great driving under this combination of drugs.
>
> DEFENSE COUNSEL: Okay. So – and you're speaking about – when you say there would be a high probability of impairing somebody's ability to drive, that is – is that with the average person with the average tolerance?
>
> SCHREIBER: Right.
>
> DEFENSE COUNSEL: Okay.
>
> SCHREIBER: These studies are done with individuals that are sort of naïve to the drug. You know, they're not done necessarily with patients that are chronically taking the drug. Those types of situations would be known, you know, more by their physician as to how they would affect – be affected by the drug itself. The combination, though, still does not allow me to disregard the effects of each of the drugs as they combine together.
>
> …

DEFENSE COUNSEL: So if [Mr. Chitwood] had been one of those individuals with a very high tolerance, he might be one of those cases where these levels would not impair his ability to drive, correct?

SCHREIBER: There is that chance. That would have to then be substantiated and would be sort of evident with a prescription drug history, what was prescribed by the physician, because certainly if the individual has a high tolerance, you would expect that the prescribed level of drug would be a higher concentration compared to the average individual as well. And that would then be reflected in the – in the prescription drug history and those records.

DEFENSE COUNSEL: But you don't know what that prescription drug history is in Mr. Chitwood's case, correct?

SCHREIBER: I don't.

…

DEFENSE COUNSEL: Are you able to testify with certainty that Mr. Chitwood's ability to drive a vehicle was impaired as a result of these medications?

SCHREIBER: The testimony that I gave on direct examination is that my opinion is that there would be an impairment in the ability to safely operate a motor vehicle given these concentrations and their combination.

DEFENSE COUNSEL: In a regular person, correct?

SCHREIBER: Correct.

DEFENSE COUNSEL: But because you don't know Mr. Chitwood's medical history, you can't say with certainty that that applies to him, correct?

SCHREIBER: Correct. Nor did I evaluate his driving. I was not there at the scene. That information may, you know, be available there.

(44:134, 136, 138-39).

Lastly, the State notes that "[t]he toxicological result confirmed Mr. Chitwood's admission of taking oxycodone and identified the other drugs in his system." (State's Br. at 37, 39). However, at trial, the defense did not dispute that Mr. Chitwood had taken medications—the issue was whether they impaired his driving. (*See, e.g.,* 44:192, 202).

Therefore, allowing Peskie to opine based on an incomplete drug recognition evaluation that Mr. Chitwood was under the influence and incapable of operating a motor vehicle safely was not harmless. The State cannot prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***Harvey***, 254 Wis. 2d 44, ¶¶ 40, 46.

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 5th day of November, 2015.

Respectfully submitted,

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
Telephone: (414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

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 3,999 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 5th day of November, 2015.

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
Telephone: (414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page