STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No.: 2015AP001243-CR

ALI GARBA,

Defendant-Appellant.

AN APPEAL FROM WAUKESHA COUNTY CIRCUIT COURT
TRIAL COURT CASE NO. 2013CT000951
HONORABLE MICHAEL J. APPRAHAMIAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent ("State") submits that oral argumentation is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STANDARD OF REVIEW

"Appellate courts review the 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. The circuit court's decision "will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts of the record." Id.

Weather a jury instruction is appropriate under the specific facts of a case is subject to independent review. State v. Jensen, 2007 WI App 256, ¶ 8, 306 Wis. 2d 572.

ARGUMENT

I. THE CIRCUIT COURT APPROPRIATELY EXERCISED ITS DISCRETION WHEN IT EXCLUDED THE DEFENSE'S EXPERT OPINION TESTIMONY.

Wisconsin has adopted the Daubert standard for admissibility of expert testimony. Id. ¶ 17 (referring to Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993)). When a party offers expert testimony and the opposing party raises a Daubert challenge, the trial court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co., LTD v. Carmichael, 526 U.S. 137, 152, 119 S.Ct. 1167 (1999). This requirement for proof of the reliability of the expert's method comes "under Wis. Stat. §907.02 (2011-12), as amended in 2011 to codify the standard from Daubert and its progeny." Giese, ¶ 2 (footnote omitted). Under that standard, expert testimony is admissible if: (1) it is relevant; (2) the witness is qualified as an expert; and (3) the evidence will assist the trier of fact in determining

an issue of fact. State v. LaCount, 2007 WI App 116, ¶ 15, 301 Wis. 2d 472.

The trial court, in its role as the gatekeeper, must exclude expert testimony that is not reliable and which invades the province of the jury to finds facts. Giese, ¶ 18. The court must do "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 593-94. The proposed testimony must derive from the scientific method; good grounds and appropriate validation must support it. Id. at 590. Moreover, even if the testimony is marginally relevant, the court may excluded the evidence it if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. State v. Hibl, 2009 WI App 52, ¶ 31, 290 Wis. 2d 595. The court should not allow an expert to conjecture or speculate on the issues. Giese, ¶ 19.

Here, the trial court conducted the Daubert hearing, and both defense expert witnesses were subject to a thorough and extensive examination. The record of their testimony demonstrates that their

testimony failed to satisfy the standards of reliability required under Daubert and its progeny. The court correctly ruled that their opinions lacked the indicia of reliability necessary to survive a Daubert inquiry and challenge under §907.02. Their opinions draw speculative conclusions about the jagged hump phenomenon while ignoring the solid procedures and safeguards utilized by the Madison Laboratory of Hygiene in forensic testing. Their testimony also draw unsubstantiated opinions between the jagged hump phenomenon and ethanol determination. Their opinions are not supported with any data or reliable principles, as identified by the Daubert rubric, and they fail to address any methodology that experts should follow in forensic blood testing cases.

The defense experts laid no reliable ground work for determining accurate alcohol blood test results and the jagged hump phenomenon. They could not explain the cause of the jagged hump. They failed to provide any proof that the jagged hump on the chromatograms altered the analytical functioning of the lab machines. They failed to provide any proof that the jagged hump effected the accuracy and reliability of the lab testing equipment and reported blood test

results. They failed to demonstrate any link between the jagged hump and alcohol blood testing. Their testimony lacked sufficient reliability to satisfy Daubert.

The experts did not satisfy the foundation requirements under Daubert and challenge under §907.02. As noted by the circuit court that the defense experts substituted their own ipse dixit for reliable scientific proof on the essential points. (R. 21, p. 23, Appellant's App. B). The circuit court did not abuse its discretion by denying the defense expert testimony at trial.

II. WIS JI-CRIMINAL 2669 DID NOT CREATE AN UNCONSTITUTIONAL PRESUMPTION.

A circuit court has broad discretion in deciding whether to give a requested jury instruction. State v. Coleman, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). This broad discretion also extends to the court's choice of language and emphasis in framing the instructions. State v. Dix, 86 Wis.2d 474, 486, 273 N.W.2d 250 (1979). So long as the court fully and fairly informs the jury of the law that applies to the charges for which a defendant is tried the court properly exercises its discretion. State v. Ferguson, 2009 WI 50, ¶ 9, 317 Wis.2d 586.

However, weather a jury instruction is appropriate under the specific facts of a case is subject to independent review. Jensen, ¶ 8.

To adequately address if a jury instruction created an unlawful presumption it is first necessary to identify and define the different types of presumptions and if they are constitutional. A presumption allows a "trier of fact to determine the existence of an element of the crime-that is, an 'ultimate' or 'elemental' fact-from the existence of one or more 'evidentiary' or 'basic' facts." State. Gardner, 2006 WI App 92, ¶ 9, 292 Wis. 2d 682 (citing Ulster County Court v. Allen, 442 U.S. 140, 156, 99 S.Ct. 2213 (1979)).

A presumption can be permissive, which "allows-but does not require-the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one," or it can be mandatory, requiring that the trier of fact "*must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts," Id. Permissive presumptions are, in general, constitutional as long as there is a rational connection between the basic fact and the elemental fact. Id. at ¶ 10. A mandatory presumption, however, whether

conclusive or rebuttable, is not constitutional because it relieves the State of its burden to prove every element of an offense beyond a reasonable doubt. Id. (citing Sandstrom v. Montana, 442 U.S. 510, 521-24, 99 S.Ct. 2450 (1979)).

Garba argues that the jury instruction given by the trial court was unconstitutional because it could be misinterpreted by a jury as a mandatory conclusive presumption and as such the trial court failed to instruct the jury in the manner required by Wis. Stat. § 903.03(3). Garba contends the following three sentences in the jury instruction given by the trial court could be interpreted by a jury as a mandatory conclusive presumption:

> The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.

WIS JI-Criminal 2669. (R. 25, Appellant's App. K).

Garba argues that using the term "recognizes" creates the implication of the indisputable existence of a fact not subject to

dispute, i.e. the soundness of the scientific method used by the testing device to measure his alcohol concentration. Garba, however, fails to provide any legal authority or even adequately explain how a "mandatory conclusive" presumption can be created not from the instruction itself, but from what one word in the instruction could possibly imply. Garba further fails to provide any authority or even adequately explain how the "scientifically sound method" itself is an essential element of either the OWI or PAC charges. Garba's argument on this issue is insufficiently developed and unsupported by references to legal authority and therefore should not be considered. Block v. Gomez, 201 Wis. 2d 795, 811, 549 N.W.2d 783 (Ct. App. 1996), Post v. Schwall, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990).

CONCLUSION

For all the reasons stated above, the State respectfully requests that the Court affirm the circuit court's decision.

Date this _____ day of March, 2016.

Respectfully,

_____
Bryan C. Bayer
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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief with proportional serif font. The length of this brief is 1,430 words long.

Dated this _____ day of March, 2016.

_____

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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_____ day of March, 2016.

_____

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