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C O U R T O F A P P E A L S **CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2015AP2608-CR

v.

Lory F. Kerk,

Outagamie County Case
No. 13 CT 932

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION
ORDERED AND ENTERED IN OUTAGAMIE COUNTY CIRCUIT COURT
BRANCH II, THE HONORABLE NANCY J. KRUEGER PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

Was the testimony of Amy Miles admissible as expert witness opinion testimony pursuant to Wis. Stat. § 907.02 and Daubert?

The trial court answered this question in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the defendant-appellant, Lory F. Kerk (hereinafter "Kerk")

anticipates that the briefs of the parties will fully meet and discuss the issues on appeal. Publication would be appropriate as the published opinion would establish a new rule of law or modify, clarify or criticize an existing rule. Wis. Stats. §§ 809.22 and 809.23(1)(a)1.

STATEMENT OF THE FACTS AND CASE

Kerk was stopped on August 2, 2013 by Fox Valley Metro Police Department Officer Michael Grumann shortly before 9:00 p.m. for driving 35 miles-per-hour in a 25 miles-per-hour speed zone. (R: 35:60). Officer Grumann testified that he noticed a moderate odor of alcoholic beverages emanating from Kerk, and observed that Kerk had watery eyes. (R. 35:63). Kerk told the officer that she did consume some alcohol approximately six hours earlier. (R. 35:64). She also told the officer that she had taken validly prescribed Vicodin and Prozac at approximately 3:30 p.m. that day. (Id).

Following Kerk's performance on standardized field sobriety tests, Officer Grumann took Kerk into custody for operating under the influence. (R. 35: 85). Kerk

was first taken to a local hospital so a blood draw could be conducted. (R. 35:88).

On August 27, 2013 the defendant, Lory F. Kerk, was charged with Operating a Motor Vehicle while Under the Influence as a 3rd Offense. (R. 2). The complaint alleged that Kerk had alcohol, fluoxetine, norfluoxetine, and hydrocodone in her bloodstream while she was driving. (R. 2).

As the case proceeded, the state filed a witness list with the court indicating that it would be calling Amy Miles from the Wisconsin State Laboratory of Hygiene (hereinafter Hygiene Lab). (R. 12). In response, trial counsel for Kerk filed a motion to limit Miles' testimony pursuant to Wis. Stat. § 907.02. (R. 17; App. 111). Specifically, the motion sought to prevent Miles from offering her opinion that the combination of alcohol and prescription drugs detected in Kerk's bloodstream would impair her ability to operate a motor vehicle. (R. 17:1-2; App. 111-112).

The state filed a response brief arguing that Miles testimony was allowable pursuant to Wis. Stat. § 907.02 and the Daubert standard. (R. 18; App. 114). On

February 13, 2015 the trial court held a motion hearing wherein it denied Kerk's motion to exclude or limit Miles' testimony. (R. 33:7; App. 107). The court determined that Miles had the requisite education, training, and experience to testify as to the degree of Kerk's impairment. (R. 33:4-7; App. 104-07).

The case eventually proceeded to a jury trial, wherein Miles did offer testimony regarding Kerk's impairment. (R. 35: 125, 164-65). When discussing the substances found in Kerk's bloodstream, Miles first explained that hydrocodone is mostly commonly known as Vicodin. (R. 35:159). Miles went on to testify that Specifically, the following testimony was presented:

Q: Back to the question. If someone displays all six clues of the HGN, meaning, the lack of smooth pursuit [sic], maximum deviation, and the onset of nystagmus prior to 45 degrees in both eyes, demonstrates an inability to walk a straight line heel to toe as instructed, difficulty maintain balance, leg and eyelid tremors, would those be -- would those factors be consistent or inconsistent with a person who's under the influence of alcohol and hydrocodone?

A: Consistent.

Q: And using those same hypothetical factors, and based on your training and education and experience, would those factors be consistent to inconsistent with an individual who is less able to exercise the clear judgment and steady hand needed to safely operate a motor vehicle?

A: It would be consistent.

Following the presentation of all evidence, the jury returned with a verdict of guilty. (R. 35: 223). The trial court accepted the finding of guilt and entered judgment against Kerk. (R. 35:227). Kerk now appeals.

STANDARD OF REVIEW

The proponent of evidence, in this case the state, has the burden to establish that the evidence is admissible. State v. Leighton, 2000 WI App 156, ¶47, 237 Wis. 2d 709, 616 N.W.2d 126.

A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and in

accordance with the facts of record. State v. Yang, 2006 WI App 48, ¶10, 290 Wis. 2d 235, 712 N.W.2d 400. Whether a trial court's decision to admit or exclude evidence comports with legal principles, however, is reviewed *de novo*. Id.

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING AMY MILES TO OFFER OPINION TESTIMONY REGARDING IMPAIRMENT PURSUANT TO WIS. STAT. § 907.02.

A. Wis. Stat. § 907.02 And The Daubert Rule Set Forth The Admissibility Requirements Of Expert Opinion Testimony.

Wis Stat. § 907.02 provides that:

"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 the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case."

This statute was amended in 2011, putting Wisconsin in line with the Federal Rules of Evidence

and other jurisdictions following the Daubert line of cases. State v. Giese, 2014 WI App 92, ¶17, 356 Wis.2d 796, 854 N.W.2d 687.

Under the statute and Daubert rule, certain predicates must be met before an expert can offer an opinion. Id. ¶18. Specifically, the testimony must be based upon sufficient facts or data; must be the product of reliable principles and methods; and the witness must have applied those principles and methods reliably to the facts of the case. see Daubert v. Merrill Dow Pharmaceuticals, Inc, 509 U.S. 579, 592-95, 113 S.Ct. 2786 (1993).

The purpose of the Daubert rule is to prevent the jury from being exposed to conjecture testimony under the guise of being an expert opinion. Giese, 2014 WI App 92, ¶19; see also Daniel D. Blinka, The Daubert Standard in Wisconsin: A Primer, WISCONSIN LAWYER, March 2011, at 60 ("[c]oursing through Daubert lore is a palpable fear of ipse dixit ('because I said so') testimony"); Ralph Adam Fine, Fine's Wisconsin Evidence 34 (Supp.2012) ("Under Daubert the testimony of the witness is to be 'more than subjective belief or

unsupported speculation.'" (quoting Daubert, 509 U.S. at 590)).

The circuit court should not have rendered Miles an expert on prescription medications and their effect on a driver, the issue of ultimate fact in this case.

B. Miles Should Not Have Been Qualified As An
Expert To Offer Testimony On Whether Kerk Was
Impaired.

The circuit court should not have rendered Miles an expert on prescription medications and their effect on a driver. A laboratory chemist may not testify as to the physiological effect that the medications would have on Kerk. see State v. Bailey, 54 Wis. 2d 679, 684-85, 196 N.W.2d 664 (1972). Here, Miles does not have a medical degree, nor does she have a degree in pharmacology. (R. 35:166-67). Miles lacks the expertise to be able to reliably testify as to whether the amounts of alcohol and hydrocodone detected in Kerk's bloodstream would impair Kerk's ability to operate a vehicle.

1. The Testimony Of Miles Was Not Based On Sufficient Facts And Data.

Miles did not have sufficient facts and data on which to base her opinion. At trial, Miles testified that, in regards to the hydrocodone, Kerk's blood contained "13 nanograms per milliliter", and that the therapeutic range would be under 50 nanograms per milliliter. (R. 35:161). Miles went on to explain that it is possible for somebody to build up a tolerance to a drug such as hydrocodone. (R. 35:162). Miles later testified on cross-examination that she had not examined Kerk's medical history, had absolutely no knowledge of when Kerk was first prescribed hydrocodone, and had no knowledge of whether Kerk had developed a tolerance to hydrocodone or if it affected her more greatly than an average person. (R. 35:169-70).

Miles lacked the sufficient facts to make a determination of whether or not Kerk was impaired by the hydrocodone. The amount of hydrocodone detected in Kerk's bloodstream was well below the high end of the therapeutic range. Miles further had no information

available to her that would suggest that Kerk could have been impaired by the presence of hydrocodone. To the contrary, Miles conceded that it was certainly possible that Kerk could have developed a tolerance to the hydrocodone. Without any sufficient information regarding Kerk's actual medical history, Miles lacked the facts necessary to reach the conclusion that Kerk was impaired.

2. Miles' Testimony Was Not The Product Of Reliable Principles And Methods.

Because she lacks the proper knowledge, training, and experience, the methods used by Miles to reach her conclusion were not reliable. Three factors for the court to consider in relation to a determination of reliability are: (1) whether the technique or theory has been subject to peer review and publication; (2) whether the technique or theory has been generally accepted in the scientific community; and (3) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. see Daubert 509 U.S. at 592-95.

In Bailey, the court determined that a chemist who

tested a blood sample was not qualified to offer his opinion as to how a person would react to those levels of alcohol. Baily, 54 Wis. 2d, 684-85. Essentially, the court determined that merely knowing the levels of alcohol within a person's bloodstream was not sufficient to testify as to the physiological effects.

Here, Miles testified that she has observed "dozens and dozens" of dosing scenarios, where subjects consume alcohol and are subjected to field sobriety tests. (R. 35:156). However, on cross-examination, Miles conceded that she has never observed such a scenario where the subject has also been given hydrocodone, or any other drug for that matter. (R. 35:168). These dosing scenarios is what Miles used as a basis for her opinion testimony that Kerk was impaired, however, Miles has absolutely no observational experience on impairment when alcohol is mixed with hydrocodone. Similar to Bailey, Miles has no knowledge or expertise beyond knowing the levels of hydrocodone and alcohol in Kerk's bloodstream, and no specialized knowledge about how somebody will react to the combination of those substances. Therefore, Miles

failed to utilize reliable principles and methods in formulating her opinion in this case.

CONCLUSION

Amy Miles offered improper expert opinion testimony that was unsupported by the facts and not based upon reliable principles and methods. The trial court erred in allowing this testimony. Based upon this error, Kerk respectfully requests that her conviction be reversed and the case remanded to circuit court for a new trial with instructions regarding the extent to which Miles may offer testimony.

Dated this 15th day of March, 2016.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents

of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of March 2016.

Jaymes K. Fenton

BRIEF FORMAT CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has twelve (12) pages.

Dated this _____ day of March 2016.

Jaymes K. Fenton

ELECTRONIC COPY CERTIFICATION

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. § 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.

Jaymes K. Fenton

CERTIFICATION OF MAILING

I hereby certify that:

This brief was, on March 15, 2016, delivered to the United States Postal Service (USPS) for delivery to the Clerk of Court of Appeals within three calendar days pursuant to Wis. Stat. § 809.80 (3) (b). I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this _____ day of March 2016.

Jaymes K. Fenton