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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

2015AP002608-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Lory F. Kerk,

Defendant-Appellant.

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ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT  
COURT II FOR OUTAGAMIE COUNTY

The Honorable Nancy J. Krueger, Presiding

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BRIEF OF PLAINTIFF-RESPONDENT

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**ISSUE PRESENTED**

Should Amy Miles have been allowed to testify as an expert witness regarding the effects of alcohol and drugs on the human body pursuant to Wis. Stat. § 907.02 and Daubert?

The trial court answered this question in the affirmative.

**POSITION ON ORAL ARGUMENT AND PUBLICATION**

Oral argument is not necessary because the issues raised on appeal will be fully addressed within the briefs.

Wis. Stat. § 809.22(2)(b). Publication should not be necessary, as this case will not serve to further clarify any existing rule. Wis. Stat. § 809.23(1)(a)1.

#### **STATEMENT OF THE CASE**

On the night of August 2, 2012, Officer Grumann stopped Lory F. Kerk (hereinafter "Kerk") after observing her speeding. (R. 35:59-60). Before he approached her car, Kerk exited her vehicle. (R. 35:62). As he approached her, he could smell a moderate odor of alcoholic beverages coming from her person and noticed that her eyes were watery. (R. 35:63). When Officer Grumann asked Kerk if she had been drinking, she said she had one smaller drink about six hours earlier. (R. 35:64). She also stated that she had taken Vicodin approximately five and a half hours earlier. (Id). Officer Grumann then administered several field sobriety tests and observed signs of impairment for nearly every test. (R. 35:65-84). Based on this information, Officer Grumann felt Kerk was under the influence of an intoxicant, placed her under arrest, and took her to St. Elizabeth Hospital where a legal blood draw was conducted. (R. 35:85, 88). This blood draw occurred one hour after Kerk was stopped. (R. 35:90).

The State subpoenaed Amy Miles (hereinafter "Miles") of the Wisconsin State Laboratory of Hygiene (hereinafter "Hygiene Lab") in preparation for trial. (R. at 12). Kerk's trial counsel objected, and the court held a motion hearing to determine the admissibility of Miles' testimony. (R. at 33). The court found that Miles "clearly has a great deal of training, education, and experience in the area of drugs, as well as alcohol, and, specifically, driving impairment." (R. 33:6). The court also specifically pointed out,

"the methods used to determine the level of these drugs and alcohol in Miss Kerk's system are accepted. They are reliable. They are methods typically employed, and are well accepted in the scientific community, ... those techniques have been referenced in case law, both in Wisconsin and elsewhere, and courts have found them to be widely used and scientifically based and appropriate in forensic testing.

The Court notes that some of the publications that are noted in Miss Miles' CV specifically address prescription medication, as well as combining certain prescription drugs with alcohol; and, also, how those prescription drugs relate to human performance. Clearly, those publications, her participation in those publications, and authorship in some of them, as well as peer review for journals that deal with those issues would qualify her to testify on the issue in question here."

(R. 33:6-7). The court then concluded that Miles would be permitted to testify to Kerk's impairment or, in the alternative, to the impairment of a hypothetical person of Kerk's height and weight. (R. 33:7-8).

The case then went to jury trial. After a thorough direct that focused on Miles' qualifications and explanations of how drugs and alcohol generally affect bodies, the State asked two hypothetical questions:

Q: If someone displays all six clues of HGN, meaning lack of smooth pursuit, 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 maintaining 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 or 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.

(R. 35:164-165).

The jury returned a verdict of guilty, and the trial court accepted the finding of guilt and

entered a judgement against Kerk. (R. 35:223, 227).

### **STANDARD OF REVIEW**

"Appellate courts review a circuit court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard. 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." (Internal citations omitted). State v Giese, 2014 WI App 92, 356 Wis 2d 796, 804; 854 NW2d 687, 691 (2014) review den 862 NW2d 602 (Wis 2015).

### **ARGUMENT**

#### **I. THE TRIAL COURT DID NOT ERR IN ALLOWING AMY MILES TO TESTIFY AS AN EXPERT WITNESS ON IMPAIRMENT CAUSED BY DRUGS AND ALCOHOL.**

Miles' extensive training and experience regarding how drugs and alcohol cause impairment qualified her to testify as an expert witness at Kerk's trial. A glance through Miles' Curriculum Vitae shows that Miles has had extensive training relating to impairment caused by drugs, alcohol, or the mixture of both. According to State v. Giese, "The question is whether the scientific principles and methods that the expert relies upon have a reliable foundation 'in



the knowledge and experience of [the expert's] discipline.' Relevant factors include whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community." (Citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 n. 7, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)) (Internal citations omitted). 356 Wis 2d at 806. Miles work is widely accepted in the scientific community. (R. 35:146, 147). Miles' work has been subject to peer review and publication. (R. 33:7).

Kerk cites State v. Bailey, 54 Wis 2d 679; 196 NW2d 664 (1972) as evidence that Miles' testimony should be excluded; however, this case is dissimilar in a critical aspect. Unlike Miles, the chemist in Bailey had never previously observed the effects of alcohol on a person whose BAC he tested, and therefore could not testify to those effects. Id. at 685.

This case is similar to State v. Donner, 192 Wis 2d 305, 317; 531 NW2d 369, 374 (1995), a case in which the Court of Appeals distinguished Bailey. "Unlike the chemist in Bailey, MacMurray testified to her substantial experience and observations regarding persons who had participated in the "dosing" experiments." Id. at 318. As

in Donner, Miles has observed many dosing scenarios. (R. 35:155-156). MacMurray also received extensive training and education in BAC testing and related studies on impairment. 192 Wis 2d at 317. Miles has also received extensive training, education, and has even presented on the effects of alcohol and drugs on the body. (See, R. 35:128, 129, 130, 131, 157, 167). Furthermore the court found the fact that MacMurray had testified previously as an expert to be relevant to her qualifications to testify in Donner. 192 Wis 2d at 317. Miles has also been called upon to testify before: during the Daubert hearing, the trial court noted "she has been permitted to render expert testimony, and has done so on three occasions where she was challenged in Daubert proceedings in the State of Wisconsin." (R. 33:6).

**II. MILES DID NOT TESTIFY SPECIFICALLY REGARDING  
KERK'S IMPAIRMENT.**

Miles did not testify specifically to Kerk's impairment, but instead limited her observations and opinions to hypothetical situations and general information about how drugs and alcohol effect the body. (See, R. 35:125-173).

### **CONCLUSION**

Amy Miles offered proper expert testimony that was supported by the facts and based upon reliable principles and methods. The trial court did not err in allowing this testimony. Therefore, the State respectfully requests that the Court affirm the judgment.

Respectfully submitted this 12th day of April, 2016.

By: \_\_\_\_\_  
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**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is eight (8) pages.

Dated this 12th day of April, 2016

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**CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY**

I certify that on April 12, 2016, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: April 12, 2016

Signature: \_\_\_\_\_

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 12th day of April, 2016.

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