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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
AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED
AND ENTERED IN OUTAGAMIE COUNTY CIRCUIT COURT BRANCH 2,
THE HONORABLE NANCY J. KRUEGER PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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INTRODUCTION

The defendant-appellant, L o r y F . K e r k
(hereinafter, "Kerk"), relies on all the authority
and reasoning set forth in his original brief-in-
chief and incorporates that submission into this
reply brief. In addition, he submits the following
responses to the arguments in the brief of the
Plaintiff-Respondent.

ARGUMENT

I. Amy Miles lacked the proper expertise to offer testimony relating to impairment at trial.

The state relies upon State v. Donner, 192 Wis. 2d 305, 531 N.W.2d 369 (1995) to support its argument that Miles had the proper expertise to testify. (Resp. Br. 6). Specifically, the state points to the fact that, as in Donner, Miles had observed dosing scenarios where she observed individuals consume alcohol and the effects it had on them. (Resp. Br. 6-7).

This argument is problematic, because it ignores the fact that Miles testified to impairment as it related to a combination of alcohol and medications. Miles conceded that she had never once observed a dosing scenario that involved a combination of alcohol and hydrocodone, the medication present in Kerk's bloodstream. (R. 35:168). If this case solely involved alcohol, then the state would be correct in its application of Donner, but that isn't the case here. Because Miles has never observed a dosing

scenario involving a combination of alcohol and medications, the case is more analogous to State v. Bailey, 54 Wis. 2d 679, 196 N.W.2d 664 (1972). In Bailey, as argued more fully in the Defendant-Appellant brief, the testimony of the expert was excluded due to the fact that the witness had never observed a dosing scenario.

In the present case, while Miles has observed dosing scenarios involving alcohol, she hasn't observed a dosing scenario involving the effects of alcohol combined with medications. Because Kerk's blood alcohol concentration (BAC) was below 0.08, the state argued at trial that Kerk was impaired based upon a combination of alcohol and medications. (R.35: 200-201). Without having any experience actually observing individuals who had consumed a combination of alcohol and hydrocodone, Miles lacked the proper experience and training necessary to have survived the Daubert challenge.

II. Amy Miles lacked any basis for her conclusions.

While the state is correct that Miles testified to a hypothetical situation, she lacked the qualifications necessary to offer such an opinion on the hypothetical question presented to her regarding impairment of an individual who had the amount of alcohol and hydrocodone in their system that Kerk did.

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 _____ day of April, 2016.

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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 April, 2016.

Jaymes K. Fenton

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 three (3) pages.

Dated this _____ day of April, 2016.

Jaymes K. Fenton

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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 April, 2016.

Jaymes K. Fenton

CERTIFICATION OF MAILING

I hereby certify that:

This brief was, on April 27, 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 April 2016.

Jaymes K. Fenton