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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MICHAEL CHOUGH,
Defendant-Appellant.

Appeal No. 2016-AP-406

Kenosha County Circuit Court
Case No. 2012-CT-159

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND ORDERS OF THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE MARY KAY WAGNER PRESIDING

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED

1. Was Mr. Chough illegally arrested without the required quantum of probable cause?

   Circuit Court's answer: No.

2. Did the State meet its burden to establish the admissibility of the State's proffered expert testimony regarding retrograde extrapolation?

   Circuit Court's answer: Yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Chough anticipates that the parties' briefs will "fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant." Wis. Stat. § (Rule) 809.22. The present case is not eligible for publication. *See* Wis. Stat. § (Rule) 809.23(b)(4).

STATEMENT OF FACTS

Kenosha County Sheriff's Deputy Eric Klinkhammer testified for the State on two separate occasions in this case. The first occasion was at a June 13, 2012, hearing on Mr. Chough's motion to suppress evidence on grounds that he was arrested without probable cause. (R.67). The second occasion was at Mr. Chough's jury trial on June 9, 2015. (R.81). Deputy Klinkhammer was the State's only witness at the motion hearing, and, according to his testimony at that hearing, on February 26, 2012, sometime between 6:00 A.M. and 7:00 A.M., (R.67:11.13-14), he proceeded to a trailer park after receiving information that a man was

trying to find shelter there. (R.67:4.12-15). At some earlier time, Deputy Mark Malecki, "had called out a vehicle in the ditch" near a freeway off ramp. (R.67:4.11-12).

Deputy Klinkhammer testified at the motion hearing that when he first made contact with Mr. Chough, the appellant was in the driveway of a trailer in the trailer court. (R.67:5.11). Deputy Klinkhammer claimed to notice Mr. Chough exhibiting "slightly thick tongue sounding speech," an odor of intoxicants, and an "unsteady gait." (R.67:5.12-14). Upon speaking with Mr. Chough, Deputy Klinkhammer learned that Mr. Chough had visited his brother in Chicago and had fallen asleep while driving. (R.67:5.20-24). Mr. Chough admitted to drinking an unspecified amount of alcohol the night before, (R.67:15.8-10), but stated that he did not "drink a lot." (R.67:17.1-3). Deputy Klinkhammer did not ask how long the vehicle had been in the ditch. (R.67:16.6-8)

Deputy Klinkhammer asked Mr. Chough to complete field sobriety tests, and Mr. Chough "asked if he could talk to his attorney." (R.67:7.13-22). Deputy Klinkhammer attempted to have Mr. Chough complete field sobriety tests again, and Mr. Chough asked if he could speak with an attorney first. (R.67:20). Mr. Chough was then arrested, (R.67:9.4-7), and Deputy Klinkhammer never asked Mr. Chough to submit to a preliminary breath test ("PBT") prior to his arrest. (R.67:18.7.8).

At the June 13, 2012 motion hearing, Mr. Chough called three residents of Oakwood Estates as witnesses, all of whom had spoken with Mr. Chough on the

morning of February 26, 2012. One of those residents was Patricia Schumacher, who testified that on the morning in question she had contact with Mr. Chough and did not notice any signs of intoxication throughout their interaction. (R.67:27.6-23). Ms. Schumacher also testified that she had the opportunity to observe Mr. Chough walking between her trailer and another trailer, and nothing about his walking was unusual. (R.67:27.3-8). Another Oakwood Estates resident, Robert Lichter, testified that he had contact with Mr. Chough that morning and that Mr. Chough was "very polite" and did not appear to be intoxicated or suffering from any issues with his balance. (R.67:33-34).

The final Oakwood Estates resident who testified at the motion hearing was Danny Anderson. Mr. Anderson testified that he had been employed as a Deputy Sheriff for 10 years, and had undergone extensive training in the detection of intoxicated persons. (R.67:41.23-42.9). Mr. Anderson testified that he watched Mr. Chough walk toward him from approximately 25 yards away, and that there was nothing "unusual" or "unsteady" about his gait. (R.67:41.3-9). Mr. Anderson also testified that he allowed Mr. Chough to sit in Mr. Anderson's pickup truck with him to get warm, and that although he did detect a "faint" odor of alcohol on Mr. Chough's breath, Mr. Chough "was talking pretty normal" and was not exhibiting thick tongued speech. (R.67:42.12). Mr. Anderson further testified that he believed that Mr. Chough "was not intoxicated" when he spoke with him. (R.67:44.9).

Mr. Chough's jury trial occurred on June 8 and June 9, 2015. According to his testimony at Mr. Chough's jury trial, on February 26, 2012, at approximately 6:40 A.M., Deputy Malecki was on patrol traveling northbound on I-94 when he happened upon a vehicle that had left the roadway and come to a stop in a ditch. (R.81:29.1-6). The vehicle was empty, and appeared to have been exiting the freeway on the off ramp when it drifted from the ramp into the ditch, coming to a stop in the snow after striking a deer fence at a low rate of speed. (R.81:39.1-8). Dispatch contacted the registered owner of the vehicle, who stated that he knew nothing about the crash and that the vehicle would likely be operated by his son, Michael Chough. (R.81:30.10-21). Kelly Hempel, a dispatcher at Jensen Towing, testified at trial that she received a call from a Michael Chough at 6:03 A.M. on the morning of February 26, 2012, requesting a tow truck. (R.81:60). A tow truck arrived, and dispatch advised that someone from Oakdale Estates, a nearby trailer park, called to report that "a subject was knocking on doors and attempting to find a place to rest." (R.81:31.6-11).

Oakwood Estates resident Patricia Schumacher testified at trial that she had contact with Mr. Chough on the morning in question, and that he did not appear to be drunk. (R.81:72.16-20). Oakwood Estates resident Danny Anderson also testified that he interacted with Mr. Chough that morning and that Mr. Chough "wasn't intoxicated at that time . . . ." (R.81:82.16-17).

Deputy Malecki testified that he traveled from the scene of the accident to Oakwood Estates and, after speaking with the resident of Lot 95, proceeded to Lot

119, where he observed Mr. Anderson and Mr. Chough standing in the driveway. (R.81:32.25-33.5). Deputy Malecki made contact with Mr. Chough in the driveway and, according to Deputy Malecki, upon asking if his name was Michael, Mr. Chough responded by stating, "Yes, I'm not going to lie, I've been drinking." (R.81:33.19-25). Deputy Malecki stated that he detected an odor of intoxicants coming from Mr. Chough's breath, and noticed that Mr. Chough had "glassy eyes." (R.81:34.6-13). Deputy Malecki asked if anyone else was in the car, and Mr. Chough replied that "there was no one else." (R.81:34.19-22). According to Deputy Malecki, Mr. Chough had no trouble standing still, was not observed losing his balance or swaying, and answered questions politely and appropriately. (R.81:46.3-23). Deputy Malecki then began speaking with Mr. Anderson, a resident of Lot 119, while Deputy Klinkhammer "took over speaking with Mr. Chough." (R.81:35.5-7).

Deputy Klinkhammer testified at trial that when he first saw Mr. Chough on the morning of February 26, 2012, Mr. Chough was at Oakdale Estates, in the driveway of Lot 119, speaking with Deputy Malecki. (R.81:100.15-20). Prior to speaking with Mr. Chough, Deputy Klinkhammer did not speak with any residents of the trailer park. (R.81:122.18-22). Deputy Klinkhammer testified that his contact with Mr. Chough occurred sometime after 7:00 A.M., (R.81:102.3-6), and claimed at trial that Mr. Chough's speech was "like thick-tongued and drunk sounding." (R.81:101.12-14). According to Deputy Klinkhammer, Mr. Chough stated that he had visited his brother in Chicago the night before and "fell asleep

while he was driving." (R.81:101.18-21). Mr. Chough had also told Deputy Klinkhammer that he had consumed "a little bit" of alcohol the night before. (R.81:101.24-102.2).

Deputy Klinkhammer testified that at no point in his interaction with Mr. Chough did he observe any stumbling, falling, or problems maintaining balance. (R.81:125.12-126.2). Deputy Klinkhammer also testified that he did not know when the car accident took place or how long Mr. Chough may have stayed in the vehicle after the accident, (R.81:134.4-6), and never saw Mr. Chough walk from the vehicle to Oakwood Estates. (R.81:127.24-128.1). Deputy Klinkhammer escorted Mr. Chough to the front of his squad car and ordered Mr. Chough to complete field sobriety tests. (R.81:102-103). In response, Mr. Chough asked if he could speak with a lawyer. (R.81:131.17-21). Instead, Mr. Chough was arrested and transported to the hospital, where he consented to a legal blood draw. (R.81:104.3-7). The reported result of the testing of his blood sample by the Kenosha County Department of Human Services, Division of Health, was .094 grams of ethanol per 100 milliliters of blood. (R.81:184.23-185.1)

CASE HISTORY

A criminal complaint filed on February 27, 2012, charged Mr. Chough with Operating a Motor Vehicle While Intoxicated – 3rd Offense. (R.1). An amended complaint filed on July 18, 2014, added a charge of Operating With Prohibited Alcohol Concentration – 3rd Offense. (R.31, App.1). As discussed above, Mr. Chough filed a "Notice of Motion and Motion to Suppress Evidence, No Probable

Cause," on April 10, 2012. (R.4, App.4). That motion was denied by the circuit court at a hearing held on June 13, 2012 (R.67, App.10). A "Notice of Motion and Motion to Suppress Statements," filed on August 13, 2012 (R.12), was denied by the circuit court at a hearing held on October 15, 2012 (R.69).[1]

At the conclusion of that hearing, a jury trial was scheduled for March 11, 2013. The trial was subsequently adjourned to June 24, 2013, adjourned again to November 18, 2013, and adjourned again to March 24, 2014. Upon Mr. Chough's filing of a "Motion to Preclude State From Relying Upon the Statutory Presumptions Concerning the Admissibility of Blood Test Result" at the jury status hearing held on March 6, 2014 (R.23), the trial was adjourned again to July 28, 2014. At the hearing held on that motion on April 17, 2014 (R.72), Assistant District Attorney Jennifer Phan agreed that the State would be required to present expert testimony to establish the probative value of the blood test result. (R.72:3.17-22).

At the jury status hearing held on July 17, 2014 (R.74), the State, by Assistant District Attorney Zachary Wittchow, filed a "Notice of Motion and Motion to Reconsider the Issue of the Statutory Presumption Concerning Admissibility of Blood Test Results." (R.29). The circuit court denied that motion at a hearing held on July 22, 2014 (R.75). However, because the Amended

[1] Mr. Chough does not challenge that decision in this appeal.

Criminal Complaint (R.31), as well as the State's Amended List of Witnesses and Demand For Discovery (R.33), had only been filed the Friday before that Tuesday hearing, the trial was adjourned again to November 10, 2014. The trial was subsequently adjourned again to February 2, 2015 (see R.40 and 41).

As discussed below, Mr. Chough learned on the morning of February 2, 2015, that the State intended to introduce retrograde extrapolation testimony at trial, and so the trial was adjourned again to June 8, 2015. Mr. Chough's "Motion to Exclude Testimony of Carlton Cowie," filed on April 27, 2015 (R.47, App.26), and the denial of that motion is discussed in great detail below. Mr. Chough was found guilty at trial on June 9, 2015 (see R.54 and 55), and sentenced to 45 days jail (*see* R.56). He filed a Notice of Intent to Pursue Post-Conviction Relief on June 15, 2015 (R.60), and a Notice of Appeal on February 24, 2016 (R.65, App.59).

ARGUMENT

For the following two independent reasons, Mr. Chough's conviction in the present case cannot stand.

I. STANDARDS OF REVIEW.

When reviewing a circuit court's denial of a motion to suppress evidence, this Court upholds a circuit court's findings of fact unless they are clearly erroneous. *State v. Grady*, 2009 WI 47, ¶ 13, 317 Wis. 2d 344, 352, 766 N.W.2d 729, 733. However, whether such findings of fact establish probable cause to

arrest is a questions of law that this Court reviews independently. *State v. Phillips*, 2009 WI App 179, ¶ 6, 322 Wis. 2d 576, 585, 778 N.W.2d 157, 161-62.

"The determination of whether a witness is qualified to testify as an expert under [Wis. Stat. §] 907.02 is a matter within the discretion of the circuit court." *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 89, 245 Wis. 2d 772, 833, 629 N.W.2d 727, 756 (citing *Glassey v. Continental Ins. Co.*, 176 Wis. 2d 587, 608, 500 N.W.2d 295, 304 (1993)). This Court sustains such determinations "so long as the circuit court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." *Id*.

II. BECAUSE IT IS UNKNOWN WHEN MR. CHOUGH OPERATED A MOTOR VEHICLE, THE STATE DID NOT MEET ITS BURDEN OF DEMONSTRATING PROBABLE CAUSE TO ARREST HIM FOR OPERATING A MOTOR VEHICLE WHILE INTOXICATED, AND THE CIRCUIT COURT'S RULING SHOULD BE REVERSED.

The circuit court's denial of Mr. Chough's motion to suppress for lack of probable cause to arrest should be reversed. At the motion hearing held on June 13, 2012, the State failed to meet its burden of demonstrating that probable cause existed to justify Mr. Chough's arrest for operating a motor vehicle while intoxicated. The facts of the present case are unusual. The record from the motion hearing reveals that law enforcement did little to investigate when Mr. Chough may have operated a motor vehicle, and the State offered little to no evidence establishing when Mr. Chough may have operated the vehicle.

Mr. Chough was never observed operating a motor vehicle by law enforcement. No witnesses reported that Mr. Chough was observed operating a

vehicle. The only evidence offered by the State at the motion hearing to show that Mr. Chough operated a motor vehicle was Mr. Chough's purported statement to law enforcement that he had fallen asleep while driving. Deputy Klinkhammer was the only witness to testify for the State, and he never investigated when Mr. Chough may have operated a vehicle. Deputy Klinkhammer testified at the motion hearing that he did not know when he responded to the scene, and could only estimate that he had contact with Mr. Chough sometime between 6:00 AM and 7:00 AM. The State presented no evidence from which one could determine when Mr. Chough operated a motor vehicle, or even develop a rough estimate of what time Mr. Chough may have operated an automobile. Without evidence that Mr. Chough operated a motor vehicle close in time to his interaction with law enforcement, Deputy Klinkhammer's observations of Mr. Chough lack any probative value in any OWI investigation, and fail to establish probable cause to arrest Mr. Chough for operating a motor vehicle while intoxicated.

A warrantless arrest is unlawful unless it is supported by probable cause. *State v. Blatterman*, 2015 WI 46, ¶ 34, 362 Wis. 2d 138, 164, 864 N.W.2d 26, 38 (citing *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 391, 766 N.W.2d 551, 555). Probable cause to arrest an individual for operating a motor vehicle while intoxicated "refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." *Lange*, ¶ 19, 317 Wis. 2d at 391-92, 766 N.W.2d at

555. The State bears the burden of showing that probable cause to arrest existed at the time of arrest. *Id*., ¶ 19, 317 Wis. 2d at 392, 766 N.W.2d at 555.

In determining whether probable cause exists, Wisconsin courts "examine the totality of the circumstances and consider whether the police officer had 'facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant . . . committed or [was] in the process of committing an offense.'" *Blatterman*, ¶ 35, 362 Wis. 2d at 164, 864 N.W.2d at 38 (alteration in original) (quoting *State v. Richardson*, 156 Wis. 2d 128, 148, 456 N.W.2d 830, 838 (1990)).

Probable cause to arrest is a high standard that requires information sufficient to lead a reasonable officer to believe that a defendant's guilt is more than a mere possibility. *Id*., ¶ 35, 362 Wis. 2d at 164-65, 864 N.W.2d at 38 (quoting *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506, 508 (Ct. App. 1985)). Probable cause is determined on a case-specific basis, and the "quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case." *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836, 840 (1971) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)).

At the motion hearing held on June 13, 2012, Deputy Eric Klinkhammer testified to the information he gathered prior to making the decision to arrest Mr. Chough for operating a motor vehicle while intoxicated. At the time of Mr. Chough's arrest, Deputy Klinkhammer had been told that "[a] vehicle was in the

ditch at KR and the interstate on the off ramp." (67:4.11-12). He had also been told that "there was no driver in the vehicle." (67:4.16.17). He had also learned that "a subject was trying to find shelter" at a nearby trailer park. (67:4.21-23). No one made any claim that the subject appeared to be intoxicated. (67:12.6-8). Deputy Klinkhammer testified that he didn't know at what time he responded to the trailer park area, nor did he know "what time the original call was." (67:11.14-15). Instead, he estimated that he made contact with Mr. Chough in the "early morning" somewhere around "six, seven o'clock." (67:11.13-14). When Deputy Klinkhammer arrived, Mr. Chough was being escorted to the end of a driveway in the trailer park by another deputy. (67:13.11-13).

Deputy Klinkhammer claimed that while being escorted to the end of the driveway, Mr. Chough exhibited an "unsteady gait." (67:13.17-20). Mr. Chough was not observed by Deputy Klinkhammer to trip, fall over, or use any person or object to help himself maintain balance. (67:14.2-8). Deputy Klinkhammer's observations of Mr. Chough's "unsteady gait" were not corroborated by Patricia Schumacher (67:27), Robert Lichter (67:33), or Danny Anderson (67:41), three citizen witnesses who had contact with Mr. Chough in the trailer park on the morning in question, all of whom testified at the motion hearing that Mr. Chough did not appear to be unsteady or intoxicated. There is no evidence that Deputy Klinkhammer spoke with any residents of the trailer park about their interactions with Mr. Chough before making the decision to arrest him for operating a motor vehicle while intoxicated.

According to Deputy Klinkhammer, Mr. Chough also "smelled of intoxicants" and had "slightly thick tongue sounding speech." (67:5.13-14). Mr. Chough admitted to driving the vehicle and stated that he had fallen asleep during the accident. (67:5.20-24). Deputy Klinkhammer observed that "the odor of intoxicants got stronger as [Mr. Chough] spoke." (67:6.14). Mr. Chough stated that he had consumed an unspecified amount of alcohol the night before while visiting his brother in Chicago. (67:5.20-23). Deputy Klinkhammer never asked Mr. Chough what he had to drink, or when he had his first or last drink, but Mr. Chough did explain that he had not had a lot to drink the night before. (67:16.25-17-3).

At no time during his interaction with Mr. Chough did Deputy Klinkhammer ask what time the accident occurred, and the transcript of the motion hearing reveals that no effort was made by law enforcement to determine when Mr. Chough actually operated the vehicle. (67:16). Following some very brief questioning, Deputy Klinkhammer asked Mr. Chough to perform field sobriety tests. (67:7.13-14). Mr. Chough asked if he could speak with an attorney first. (67:7.20-22). Although Deputy Klinkhammer was in possession of a preliminary breath testing device at the time, he never asked Mr. Chough to submit to a PBT. (67:18.2-8). Mr. Chough never refused to perform field sobriety tests, but he did ask if he could speak with an attorney. (67:20.17-21). Mr. Chough was then arrested. (67:9.4-5).

In a recent unpublished opinion, this Court upheld a circuit court's probable cause determination where the arresting officer did not observe the defendant operate a motor vehicle. In *County of Winnebago v. Kosmosky*, 2015 WI App 75, 365 Wis. 2d 196, 870 N.W.2d 248 (Table), 2015 WL 4633397 (App.61), an officer responded to a report of an unconscious female passed out in a vehicle parked at a gas station. *Id*., ¶ 2. When the officer arrived to the scene, EMTs reported that the vehicle was on when they arrived, and that the suspect said she had pulled over because she was feeling the effects of alcohol. *Id*. The vehicle was parked over the line of two separate parking stalls, and the responding officer testified that the defendant seemed awake, but lethargic, had bloodshot, glassy eyes, and slurred speech. *Id*., ¶ 3. The officer also noticed a distinct odor of alcohol emanating from the vehicle's interior. *Id*. This Court held that, based upon the facts established at the motion hearing, probable cause to arrest had been established, and there was no need for the arresting officer to testify as to when the defendant operated her vehicle. *Id*., ¶ 9.

The facts in the case at bar are distinguishable from the facts in *Kosmosky* in a number of ways. First, Mr. Chough was not found unconscious inside of a parked vehicle – he was never observed inside of, or near, any vehicle whatsoever, and his condition at the time of speaking with law enforcement was not consistent with someone who was so intoxicated he or she might "pass out" or become unconscious. In *Kosmosky*, the officer was informed that the defendant's vehicle was observed to be on, with the defendant inside of it, when EMTs arrived. In the

instant case, no witnesses reported that Mr. Chough's vehicle was on or running, nor were there any reports that he had recently operated the vehicle. Mr. Chough did admit to driving at some unknown time, but that is the extent of the record at the motion hearing as it pertains to what time the vehicle was operated. Although Deputy Klinkhammer did report that Mr. Chough smelled of intoxicants and exhibited "thick tongue" speech, such observations cannot be sufficient to establish probable cause to arrest for operating a motor vehicle while intoxicated when there is no evidence whatsoever suggesting when Mr. Chough operated a motor vehicle. Alcohol consumption itself is not an offense, and without some idea of when the vehicle was operated, Deputy Klinkhammer's observations lack any probative value.

This Court has also upheld a circuit court's finding of probable cause to arrest for operating a motor vehicle while intoxicated after a defendant was not observed driving by law enforcement but was ultimately arrested at a hospital after being involved in a serious motor vehicle accident. *State v. Wille*, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994). In *Wille*, the Rock County Sheriff's Department responded to a highway traffic accident. *Id*. at 677, 518 N.W.2d at 326. Wille's car was in flames when the deputy arrived, and a witness at the scene explained the circumstances of the accident. *Id*. at 677, 518 N.W.2d at 327. Wille, who was hospitalized following the accident, smelled of intoxicants and, upon seeing officers enter his hospital room, spontaneously stated, "I have to quit doing this." *Id*. at 677-78, 518 N.W.2d at 327. This Court held that, under the totality of

the circumstances, law enforcement had probable cause to arrest that defendant. *Id*. at 684, 518 N.W.2d at 329.

Unlike the defendant in *Wille*, Mr. Chough was not in a serious car accident – his vehicle became stuck in the ditch after leaving an off-ramp at a low rate of speed. His vehicle was not found engulfed in flames after smashing into another parked vehicle, nor did any witness on the scene claim to see Mr. Chough operating his vehicle at any time. Deputy Klinkhammer did testify that Mr. Chough smelled of intoxicants, but without any evidence of recent operation of a motor vehicle, mere evidence of alcohol consumption cannot, in and of itself, establish probable cause to believe that a crime was committed.

In *State v. Lange*, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551, the Supreme Court of Wisconsin upheld a circuit court's finding of probable cause to arrest based upon the driving observed, the investigating officer's experience conducting OWI investigations, the time of day that the driving was observed, and the officer's knowledge of the defendant's prior OWI conviction. *Id*. In *Lange*, officers observed "wildly dangerous driving that [suggested] the absence of a sober decision maker behind the wheel." *Id*., ¶ 24, 317 Wis. 2d at 395, 766 N.W.2d at 556. Several factors contributed to the Court's probable cause finding, including the investigating officer's experience of investigating over 100 OWI cases, the fact that the accident occurred when "bar time" traffic was known to travel the area, and the fact that by the time of arrest, the officer was aware that the

defendant had a prior conviction for operating a motor vehicle while intoxicated. *Id*., ¶¶ 30-33, 317 Wis. 2d at 396-97, 766 N.W.2d at 557-58.

The facts in the present case are different from the facts in *Lange* in that, unlike the officer in *Lange*, Deputy Klinkhammer did not observe dangerous driving, or any driving whatsoever. While the officer in *Lange* had investigated over 100 OWI cases, the record from Mr. Chough's motion hearing is devoid of any reference to the number of OWI investigations conducted by Deputy Klinkhammer. He was asked if he comes "into contact with impaired drivers frequently," to which he responded, "[n]ot so much now that I'm on day shift, but very frequently in the past." (67:6). It is unclear what "frequently" means to Deputy Klinkhammer, and the State did not explore the issue further at the motion hearing.

Unlike *Lange*, in which the incident in question occurred when "bar time" traffic was known to occur, Deputy Klinkhammer testified that he did not know when his contact with Mr. Chough occurred, but estimated that it was in the morning, sometime between 6:00 AM and 7:00 AM. Given that the contact occurred during Deputy Klinkhammer's "day shift," it would seem that, according to his own testimony, coming into contact with an impaired driver at this time of day is not a common or "frequent" occurrence. The State did not elicit any testimony indicating that 6:00 AM or 7:00 AM is a time of day associated with elevated levels of intoxicated drivers. Also, there was no evidence at the motion

hearing indicating that, prior to Mr. Chough's arrest, Deputy Klinkhammer became aware of any prior OWI convictions.

In *State v. Kasian*, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996), this Court upheld a circuit court's probable cause finding where a defendant was found lying next to a van that had been involved in a collision with a telephone pole. *Id.* In *Kasian*, the arresting officer came upon the scene of a one-vehicle accident and observed a damaged van next to a telephone pole. *Id.* at 622, 558 N.W.2d at 691. The engine of the van was running and smoking, and the defendant was found lying next to the van, emitting a strong odor of intoxicants. *Id.* The defendant also exhibited slurred speech. *Id.* This Court held that, under the totality of the circumstances, the officer had probable cause to arrest the defendant for operating a motor vehicle while intoxicated. *Id.* at 622, 558 N.W.2d at 691-92.

Unlike the defendant in *Kasian*, Mr. Chough was not found anywhere near a motor vehicle. In addition, there is no indication that Mr. Chough's vehicle was running when it was observed by law enforcement. The record at the motion hearing is conspicuously silent on the condition of the vehicle that was found in the ditch. There is no evidence that it was running, smoking, or even that the engine was warm. There is no indication that any officer even bothered to place a hand on the hood of the vehicle to check for warmth to determine whether it had been operated recently. It is true, again, that Deputy Klinkhammer testified that he detected an odor of intoxicants and "thick tongue" speech, but how that evidence is relevant to the probable cause analysis in this specific case is unclear, given the

utter dearth of evidence that was presented at the hearing as to when the motor vehicle was operated.

The record at the motion hearing is insufficient to establish probable cause for an arrest for operating while intoxicated because it contains no evidence suggesting that Mr. Chough operated a motor vehicle while intoxicated. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. No evidence introduced by the State at the motion hearing tends to make it more probable that Mr. Chough operated a motor vehicle while intoxicated. It may tend to make it more probable that Mr. Chough consumed alcohol at some time prior to his being arrested, but it does not support a finding of probable cause to arrest him for operating a motor vehicle while intoxicated.

III. TO THE EXTENT THAT THE CIRCUIT COURT ACTED AS A GATEKEEPER AT ALL FOR THE PURPOSE OF DETERMINING THE ADMISSIBILITY OF EVIDENCE REGARDING RETROGRADE EXTRAPOLATION, ITS FINDING THAT THE GATE WAS LEFT OPEN BY THE LAST GUY DOES NOT PROVIDE A LEGAL BASIS FOR LETTING IN EVERYONE ELSE.

The test for the admissibility of expert testimony is commonly referred to as the "*Daubert* test" and was derived from three United States Supreme Court cases: *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). The reliability standard in these cases was incorporated into FED.

R. EVID. 701 and 702, which govern the admission of lay and expert testimony in the federal courts.

In 2011, the state legislature revised the Wisconsin statutes relating to lay testimony and expert testimony, Wis. Stat. §§ 907.01 and 907.02, to conform to FED. R. EVID. 701 and 702. *See* 2011 Wis. Act 2, §§ 33-38, 45. Wis. Stat. § 907.02 now reads:

> (1) 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 based upon sufficient facts or data, 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.
>
> (2) Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.

The effect of this change was to adopt the "*Daubert* test" for the admission of expert testimony. *In re Commitment of Knipfer*, 2014 WI App 9, ¶ 3, 352 Wis. 2d 563, 842 N.W.2d 526; *see also Daubert*, 509 U.S. 579 (1993).

The circuit court's gate-keeping function under the *Daubert* standard ensures that an expert's testimony is based on a reliable foundation and is relevant to the material issues in a given case. *State v. Giese*, 2014 WI App 92, ¶ 18, 356 Wis. 2d 796, 805, 854 N.W.2d 687, 691 (citing *Daubert*, 509 U.S. at 589 n.7). When determining whether expert testimony is admissible under *Daubert*, "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].'" *Id*., ¶ 18, 356 WIs. 2d at 806, 854 N.W.2d at 691 (quoting *Daubert*, 509 U.S. at 592). 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. *Id*. (citing *Daubert*, 509 U.S. at 593-94). "The standard is flexible but has teeth. The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Id*., ¶ 19.

"The determination of whether a witness is qualified to testify as an expert under [Wis. Stat. §] 907.02 is a matter within the discretion of the circuit court." *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 89, 245 Wis. 2d 772, 833, 629 N.W.2d 727, 756 (citing *Glassey v. Continental Ins. Co.*, 176 Wis. 2d 587, 608, 500 N.W.2d 295, 304 (1993)). This Court sustains such determinations "so long as the circuit court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." *Id*.

"Proponents of the expert testimony . . . 'have to demonstrate by a preponderance of the evidence that their opinions are reliable.'" *State v. Chitwood*, 2016 WI App 36, ¶ 35, 2016 WL 1442450 (*citing* FED. R. EVID. 702 advisory committee's note to 2000 amendments). As the proponent of the testimony at issue in the present case, the State had the burden of demonstrating that "the scientific principles and methods that the expert relies upon have a reliable foundation 'in

the knowledge and experience of [the expert's] discipline.'" *Giese*, ¶ 18, 356 Wis. 2d at 806, 854 N.W.2d at 691 (quoting *Daubert*, 509 U.S. at 592).

The State never made any attempt to demonstrate anything of the sort in the present case, and the circuit court expressly disavowed any reliance on "the facts of record." Instead, the circuit court based its determination that the testimony was admissible on its personal belief that "there is validity in retrograde extrapolation." (R.81:155.1-2, App.54). The circuit court denied Mr. Chough an opportunity to challenge the reliability of the scientific principles and methods used by the State's expert witness "[b]ecause I think that it is valid and it's been shown to be valid and it's common understanding that it's valid." (R.81:156.11-13, App.55).

A. What happened here.

The issue of testimony regarding reverse extrapolation in the present case was first introduced by the State on the morning of jury selection on February 2, 2015. During a discussion of the blood test results' having been stripped of the presumption of reliability, *see* Wis. Stat. § 885.235, Assistant District Attorney Jennifer Phan explained to the court,

> We did plan on using the blood test, we do have one of our experts coming in. It's my understanding the court already ruled we do have expert testimony was allowed with extrapolation, so he will be coming in testifying to the blood alcohol results as well as extrapolating back to the time of what we believe the incident occurred and the – what we believe the window would be for the blood alcohol during that time frame.

(6.11-20). That understanding was incorrect; the circuit court had previously ruled that it would "allow Mr. Cowie[2] to testify as an expert," (R.75: 41.3-4), but as Mr. Chough noted on February 2, 2015, "if what the state is intending to do is introduce scientific retrograde extrapolation we believe we have the right to have notice of that and the actual report or summary of the report of the expert so that we can respond to it possibly." (9.4-9). Later in the hearing, Mr. Chough discovered from the State that

> it turns out they've actually done the specific retrograde extrapolation. Ms. Phan has given me this morning because she doesn't have a formal report on that, she has her handwritten notes. And I think it's Mr. Cowie, their expert, . . .[b]ut the details of the retrograde extrapolation are a surprise in the sense that we're just getting the calculations today.

(14.23-15.9).

As a result, Mr. Chough requested an adjournment so that he could have "an opportunity to either raise a *Daubert* challenge against the report and or the expert or bring in our own expert to rebut what they've given us today." (17.10-14). The State responded, "There is a case, *Giese* case talks about a *Daubert* [hearing] is not necessary for the retrograde extrapolation." (17.15-17). The court

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[2] Carlton Cowie had been on the State's witness list for some time, but the State never filed any notice of its intent to call Mr. Cowie as an expert witness until it provided Mr. Cowie's CV to the Defendant less than two weeks before one of the trial dates. As the circuit court explained in its response to the Defendant's objection, "Well, of course, he's an expert. He's the guy who does the blood testing. Maybe you don't know that because you're not from Kenosha County, but Carlton Cowie is the guy that runs the lab and there would be no reason to have him on as an expert witness other than that he did the blood testing." (July 22 32.13-20).

granted an adjournment, explaining, "I want them to be able to rebut the scientific evidence." (17.21-22, 24-25).

Mr. Chough received Mr. Cowie's report on April 3, 2015, (*see* R.78:3.17-22), and promptly moved the circuit court via a motion filed on April 14, 2015, "for an order excluding the testimony of Mr. Cowie on the grounds that his proffered testimony fails to meet the grounds for admission as announced in" *Daubert* and Wis. Stat. § 907.02(1). (R.47, App.26) At a status hearing on April 28, the circuit court observed, "Well, we're going to have to at the trial – I'm going to figure out Mr. Cowie's ability to retrograde alcohol content. [sic] . . . I don't know whether he has it or not." (R.78:3.23-25, 4.3-4). The State requested that Mr. Chough's motion be heard before trial, and so a *Daubert* hearing was scheduled for May 29, 2015, at which the State would "have him come down and testify." (R.78:4.16).

1. *Daubert* hearing.

At the hearing held on May 29, 2015, the circuit court began by inviting Mr. Chough to "argue why you think there needs to be a *Daubert* hearing and there should be one." (R.79:3.15-17, App.31). The court then interrupted Mr. Chough's answer to assert that "there's nothing wrong with the science. It's just does the [S]tate have sufficient facts for him to be a relevant witness. And I don't know that." (R.79:5.15-18, App.33). The circuit court indicated that, "if the facts aren't in the record then Mr. Cowie's not going to be able to say much. You can make your objection at that time," outside of the jury, "[a]nd if his facts that he's

giving don't apply to this case then there's no point in having him. So we'll see." (R.79:6.24-7.9, App.34). The court then opined, contrary to its April 28 remarks, "I don't think he has voodoo science. I mean, I think retrograde is valuable." (R.79:8.9-10, App.36).

2. Jury selection.

On June 8, 2015, the date of jury selection, Mr. Chough reiterated his request to "have a *Daubert* hearing or at least voir dire witnesses outside the presence of the jury to see what data [Mr. Cowie] relied on so that we can, so that you can rule on whether there's a scientific basis for that testimony." (R.80:10.1-5, App.39). Mr. Chough noted that "we don't know what the method used was because we haven't had an opportunity to cross-examine Mr. Cowie about what methods he used, what data he relied on, . . . what articles he relied on, what studies he relied on." (R.80:11.10-13, 12.1-2, App.40-41). The circuit court interrupted this list to inform Mr. Chough that, "We're not getting into that. As you said in *Giese*, extrapolation is accepted in the – as legal basis." (R.80:12.3-7, App.41).

> There is a legal basis for it, and we will hear what he did and how he applied it. But I don't – there is no, based on prior use of the extrapolation of blood alcohol, unless he used some different kind of method than what's normally done, which is repeated here year after year after year after case after case after case. . . .
>
> So we will have an opportunity to ask him what methods he applied. And if he applied the methods that's been used for years in the courts I'm going to let him do it, and I'm going to find it's scientifically valid. The facts are what the jury is going to hear about and how he applied those facts to that formula. And that's fine.

> . . .
>
> So I'm not having a *Daubert* hearing separate and distinct from the trial. And I'm not going into articles and all the rest of it.
>
> . . .
>
> We're going to have him make an offer of proof. [The State will] do an offer of proof with Mr. Cowie on what he relied on and what formula he relied on, and then get – we're going to get going after he tells us.

(R.80:12.4-13.5, App.41-42). The circuit court did confirm, however, that this "offer of proof with Mr. Cowie" would occur outside the presence of the jury. (R.80:14.6-8, App.43).

3. Trial.

During the trial, after the jury had been excused for lunch, Mr. Chough moved "to exclude the one test entirely because I don't believe it's relevant based on this record." (R.81:146.5-7, App.45). The State then provided its offer of proof from Attorney Phan:

> [Mr. Cowie]'s going to say that the retrograde extrapolation that the basis for that doesn't matter what he ate except for an hour before. And he was with the police for that hour. So the police are able to say that he didn't have any food or drink in his possession. So he's going to be able to do the retrograde extrapolation without those factors. And so it doesn't – I understand what their argument is that it's based on all of these factors of the food and drink and whatnot, but he doesn't need that for the retrograde extrapolation. . . . He says it doesn't matter because the elimination rate is a set rate.

(R.81:147.10-25, App.46). This statement from Attorney Phan was the sole basis for the circuit court's ruling: "Yeah, I'm going to allow it. So if that's all that

Cowie's going to say then you've got your offer of proof. She's just given it to you." (R.81:150.3-6, App.49).

The circuit court received no evidence regarding the issues listed in Wis. Stat. § 907.02, "if the testimony is based upon sufficient facts or data, 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." Despite this lack of any factual record regarding even the definition of "retrograde extrapolation," the circuit court declared, "You don't have to have a hearing on things that are common science. This is common science and accepted in Wisconsin Courts. So I'm not having a hearing on retrograde blood alcohol. We're not doing that." (R.81:157.9-14, App.56).[3]

In fact, when Mr. Chough explicitly objected that he was being denied "a chance to attack the scientific theory" (R.81:156.6-7, App.55), the Court confirmed, "Well, I'm not going to let you" (R.81:156.8-9, App.55):

> Because I think that it is valid and it's been shown to be valid and it's common understanding that it's valid. So we're going [past] that. You may attack how he figures out his numbers and calculations, yes. But not about whether or not when you apply this with this knowledge and this knowledge and this knowledge that, you know, 99 percent shows whatever. Okay? We got it?

(R.81:156.11-19, App.55). Mr. Chough was affirmatively denied the opportunity to challenge whether Mr. Cowie's testimony was "based upon sufficient facts or

[3] The circuit court had expressed a similar opinion earlier in the case about any potential *Daubert* challenges to the blood-testing procedure itself. (R.71:7-8).

data, . . . the product of reliable principles and methods, and [whether he] applied the principles and methods reliably to the facts of the case." *See* § 907.02(1).

Had Mr. Chough been given such an opportunity, the circuit court would have heard, outside the presence of the jury, that the only test result on which Mr. Cowie based his calculations was obtained from a gas chromatograph that produced unacceptably high results during its quality control testing of known samples on the day that Mr. Chough's blood sample was tested. (R.81:214-216). "The accuracy of the most indisputable scientific theory is subject to its application in particular conditions. The application of any virtually undisputed scientific fact to the immediate surrounding conditions must be explained in ascertaining its accuracy." *State v. Hanson*, 85 Wis. 2d 233, 245, 270 N.W.2d 212, 218 (1978).

B. Courts must make findings with the record they have, not the record they might want or wish to have at a later time.

When a circuit court is tasked with evaluating scientific principles and methods in a given case, the facts on which it must rely are those in the record before the court in that case. Nowhere in Wisconsin case law is that more apparent than in the appellate courts' treatment of the breathalyzer breath ampoule in the 1980s.

1. *Booth*.

In *State v. Booth*, 98 Wis. 2d 20, 295 N.W.2d 194 (Ct. App. 1980), the defendant "moved to suppress the results of the [breathalyzer] test because the

ampoule used had been destroyed immediately following administration of the test." *Id*. at 21, 295 N.W.2d at 195. At an evidentiary hearing, "Both the State and defendant presented expert witnesses who testified as to the desirability of preserving the test ampoule and the feasibility of retesting the ampoule to determine if the original breathalyzer reading was accurate." *Id*. at 22, 295 N.W.2d at 195.

The court of appeals observed, "The findings that preservation of the tested ampoule would not be difficult and that the chemicals therein would remain constant long enough for reanalysis are also supported by the expert testimony. A simple capping of the test ampoule would prevent spillage and allow for relatively easy storage." *Id*. at 23, 295 N.W.2d at 196. The court reiterated that "substantial expert testimony was offered to show how analysis of a used test ampoule would either corroborate or refute the original test results." *Id*. at 29, 295 N.W.2d at 199.

Characterizing the law at the time as reflecting that "due process rights are contravened where destroyed evidence is shown to be material to the dispositive issue of guilt or innocence," *id*. at 25, 295 N.W.2d at 197, and characterizing the materiality of the ampoule as "obvious," *id*. at 27, 295 N.W.2d at 198, this Court affirmed "the circuit court's finding that the ampoule used in the breathalyzer test constituted material evidence and that its destruction by the State denied defendant his constitutional right to due process of law," *id*. at 20, 295 N.W.2d at 195.

That decision, "in effect, created a presumption that the breathalyzer ampoule itself was material evidence since scientific testing could potentially

establish whether the ampoule contained the proper chemical mixture at the time the breathalyzer test was administered." *State v. Radeuge*, 100 Wis. 2d 27, 32, 301 N.W.2d 259, 262 (Ct. App. 1980). Less than two years later, the Wisconsin Supreme Court observed that "[t]he breathalyzer machine is useless without the test ampoule; therefore, the ampoule is a part of the device used and, as such, is covered by the language of" the applicable discovery statute. *City of Lodi v. Hine*, 107 Wis. 2d 118, 121, 318 N.W.2d 383, 384 (1982).

2. *Walstad*.

How, then, could the Wisconsin Supreme Court possibly determine just two years after *Hine* that, in fact, an "ampoule, had it been preserved, could not have been retested or reexamined in a manner that would provide relevant evidence either in respect to the accuracy of the original test or to the guilt or innocence of the defendant"? *State v. Walstad*, 119 Wis. 2d 483, 486, 351 N.W.2d 469, 471 (1984). The court did not simply rely on the factual findings endorsed by the Court of Appeals in *Booth*. The court was explicit in explaining that it was doing the exact opposite:

> [W]e specifically overrule and repudiate the entire line of cases stemming from *State v. Booth*, 98 Wis. 2d 20, 295 N.W.2d 194 (Ct. App. 1980), which hold that the destruction of the breathalyzer test ampoule warrants the suppression of the test results and which rely on the theory that a used ampoule is testable to determine blood alcohol and can supply material evidence in respect to a defendant's guilt or innocence. We conclude, *on the basis of the facts adduced in this record*, that the ampoule and its contents are not retestable, that they cannot be the source of relevant evidence, and that their destruction – and hence the inability to do a retest – does not deny a defendant due process of law. The test results therefore, are not

suppressible.

Id. (emphasis added). The court was also explicit in why it was reviewing the case:

> Certification was granted in this case because we shared the concern of the court of appeals that the evidence produced at the hearing in this case, and which was accepted by the trial court, eroded the factual basis on which *Booth* and its progeny were decided – that a used breathalyzer ampoule could be retested to produce evidence material to the tested subject's guilt or innocence. While the issue succinctly posed by the court of appeals in its request for certification was, "Should the results of a breathalyzer test be suppressed or the charge dismissed where the state fails to produce the test ampoule in accordance with a demand for it forty-three days after the test," the real issue stated in its request for certification was the court of appeals' concern that, "by holding that there is no scientific basis for retention of the ampoule, the trial court effectively overrules prior case law and obviates [Wis. Stat. §] 343.305(10)(d)."

Id. at 489, 351 N.W.2d at 472-73.

The *Walstad* case was "the first in which [the Wisconsin Supreme Court] had the opportunity to review a detailed transcript of a trial court on the issue of whether or not a used breathalyzer test ampoule is retestable after some time has elapsed following the challenged test and whether a retest can furnish any evidence material or relevant to a suspect's guilt or innocence in respect to OMVWI (alcohol)." *Id*. at 504, 351 N.W.2d at 480. That the court thought this significant enough to note in its opinion is evidence of the importance of considering each individual case based on the factual record established in that case.

The importance of this is made even more clear by the observations made in Justice Abrahamson's concurrence: "The legislature's decision to codify the

holding in the *Booth* case is not necessarily negated by this court's decision in this case. The legislature may find merit in the position taken by the experts in the *Booth* case and by the defendant's expert in this case." *Id*. at 529, 351 N.W.2d at 492 (Abrahamson, J., concurring). This observation acknowledges that a court's factual findings are based on the record before it, and the record before another court in another case may support different, even contradictory, findings.

In *Giese*, for example,

> The circuit court held a hearing on the admissibility of the retrograde extrapolation. At the hearing, the State called the toxicologist who analyzed Giese's blood sample. The toxicologist testified about her educational background, her training to become a toxicologist, her eight years of experience with the state crime lab, and her particular training on the "effect of alcohol dissipation and elimination." She had performed retrograde extrapolation, which she also called "back extrapolation," in other cases. She was familiar with books and studies concerning back extrapolation and with the rates of alcohol absorption and elimination generally accepted in her peer community of forensic toxicologists. She testified as to the established average, fast, and slow rates of elimination and explained how those rates were the foundation for her calculation of a range of possible blood alcohol concentration levels for Giese at the time of his crash.

2014 WI App 92, ¶ 11, 356 Wis. 2d 796, 802, 854 N.W.2d 687, 689-90. In the present case, Mr. Chough indicated to the circuit court that "we don't know what the method used was because we haven't had an opportunity to cross-examine Mr. Cowie about what methods he used, what data he relied on, . . . what articles he relied on, what studies he relied on." (R.80:11.10-13, 12.1-2, App.40-41). The circuit court interrupted this list to inform Mr. Chough that, unlike the circuit court in *Giese*, "We're not getting into that. As you said in *Giese*, extrapolation is

accepted in the – as legal basis. There is a legal basis for it, and we will hear what he did and how he applied it." (R.80:12.3-7, App.41).

"Extrapolation" was "accepted" in *Giese* because the circuit court in that case made factual findings based on the record made at a *Daubert* hearing by the State as the proponent of the expert testimony at issue. The only record before the circuit court in the present case was Attorney Phan's offer of proof that Mr. Cowie would testify that "the retrograde extrapolation that the basis for that doesn't matter what he ate except for an hour before" and that "the elimination rate is a set rate." (R.81:147.10-25, App.46). Perhaps the retrograde extrapolation conducted by the toxicologist in *Giese* was legally admissible under *Daubert*. There is no basis in the record in the present case to conclude that Mr. Cowie's retrograde extrapolation met the standards of Wis. Stat. § 907.02(1).

C. Even worse, the circuit court barred effective cross-examination before the jury.

The circuit court's references to the "validity" of retrograde extrapolation, instead of the admissibility of Mr. Cowie's testimony, is not a mere slip of the tongue. To the contrary, the circuit court explicitly declared, "We're not going into [']is there a scientific basis to extrapolate.['] There is. And that's been accepted in drunk driving cases for years." (R.81:151.8-11, App.50).

Furthermore, when Mr. Chough objected that he was being denied "a chance to attack the scientific theory" (R.81:156.6-7, App.55), the Court confirmed, "Well, I'm not going to let you" (R.81:156.8-9, App.55):

> Because I think that it is valid and it's been shown to be valid and it's common understanding that it's valid. So we're going [past] that. You may attack how he figures out his numbers and calculations, yes. But not about whether or not when you apply this with this knowledge and this knowledge and this knowledge that, you know, 99 percent shows whatever. Okay? We got it?

(R.81:156.11-19, App.55). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. But the circuit court in the present case denied Mr. Chough an opportunity to cross-examine Mr. Cowie regarding "the scientific theory" behind reverse extrapolation. A ruling that expert testimony is admissible under *Daubert* is not the same as a presumption that the expert testimony is true. *See Giese*, ¶ 18, 356 Wis. 2d at 806, 854 N.W.2d at 691 ("The court is to focus on the principles and methodology that the expert relies upon, not the conclusion generated."). "Judges are not scientists." *Wisconsin Hosp. Ass'n v. Natural Resources Bd.*, 156 Wis. 2d 688, 726, 457 N.W.2d 879, 895 (Ct. App. 1990).

Just as a circuit court's taking "judicial notice of a disputed scientific fact, without informing the defendant and affording him the right of confrontation, is harmful; and the error affects a substantial right," *State v. Barnes*, 52 Wis. 2d 82, 89, 187 N.W.2d 845, 848 (1971), so was the circuit court's effectively taking judicial notice[4] of the validity of Mr. Cowie's retrograde extrapolation analysis.

[4] "Judicial notice is simply a process whereby one party is relieved of the burden of producing

CONCLUSION

Mr. Chough's conviction in the present case cannot stand.

Dated this 23rd day of June, 2016.

Respectfully submitted,

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evidence to prove a certain fact. The court accepts the fact as true without proof on the theory that the fact noticed is so well known that it would be superfluous and a waste of time to require proof of it." *Barnes*, 52 Wis. 2d at 86, 187 N.W.2d at 847. In the present case, the circuit court did exactly this.

CERTIFICATION OF FORM, LENGTH, AND ELECTRONIC COPY

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,237 words.

I further 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), and that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated this 23rd day of June, 2016.

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CERTIFICATION OF APPENDIX

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. § (Rule) 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 of 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 23rd day of June, 2016.

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