STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CASE NO. 2016AP406

State of Wisconsin,

Plaintiff-Respondent,

v.

Michael Chough,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE MARY WAGNER, PRESIDING
CIRCUIT COURT CASE NO. 2012CT000159

BRIEF OF PLAINTIFF-RESPONDENT

SUBMITTED BY:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WISCONSIN CASES CITED

STATUTES CITED

STATE OF WISCONSIN
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ISSUES

1. Did deputies have sufficient probable cause to arrest the defendant for Operating While Intoxicated?

   Trial Court Answer: Yes.

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

   Trial Court Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Kenosha County District Attorney's Office is not requesting oral argument or publication as the issue before

the court can be resolved through the application of existing law to the facts of this case.

STATEMENT OF THE FACTS

A suppression motion was held on June 13, 2012 in which Kenosha County Sheriff's Deputy Eric Klinkhammer testified for the State that on the morning of February 22, 2012 he was dispatched to the area of I-94 and KR for an accident of a car in a ditch. **(Suppression R:4.1-12).** Residents from a nearby mobile home court immediately east of the accident scene were reporting an individual was trying to find shelter. **(R:4.12-17).** Deputy Klinkhammer testified that he made contact and identified the defendant. **(R:4.20-23**). Deputy Klinkhammer further testified that the defendant had an unsteady gait, smelled of intoxicants and had a slightly thick tongued speech. **(R:5.11-14)**.

Deputy Klinkhammer testified that he spoke with the defendant in the driveway of a residence. **(R:6.10)** The defendant stated he had been driving, coming from his brother's in Chicago, had been drinking, and had fallen asleep during the accident. **(R:5.20-24).** Deputy Klinkhammer asked the defendant to perform Standardized Field Sobriety Tests, to which the defendant "asked if he could talk to his attorney." **(R:18.5-6).** Deputy Klinkhammer testified he

believed, based on his training and experience, the defendant was impaired and he was placed under arrest for Operating While Intoxicated. **(R:9.3-5).** The defendant then submitted to a legal blood draw. **(R:9.24-25).**

At the June 13 2012 suppression motion, three of the mobile home park residents that had contact with the defendant also testified. Two residents, Patricia Schumacher and a Robert Lichter, that spoke with the defendant testified that they do not have training in detecting impairment. **(R:30,37).** Ms. Schumacher testified that she did not notice any signs of intoxication during her interaction with the defendant. She also testified that the defendant was some distance away from her, approximately four feet away and they spoke through a cracked door. **(R:29. 1-19).** Ms. Schumacher also testified that she was not staring at the defendant's eyes to see if they were bloodshot. **(R:30. 4-7).** Ms. Schumacher testified that she did not notice anything unusual about his walking, in addition to the fact that she had just woken up and was still sleepy. **(R:27,30).**

When Mr. Lichter was asked if the defendant had issues with balance, he clarified that he did not pay much attention to the defendant because his wife was ill and he was distracted because he wanted to get go and get back to

his wife. **(R:34,36).** Mr. Lichter did testify that the defendant did not appear to be intoxicated. Mr. Lichter clarified that he only opened the inside door, leaving his storm door closed. **(R:36. 7-8).** Mr. Lichter testified that the defendant talked about going into a ditch and was waiting for a tow truck. **(R:37. 13-18).**

The third resident, Mr. Danny Anderson, previously employed as a sheriff in Hampton, Virginia for almost 9 years, was the third witness for the defense at the suppression motion. ***See*** **(R:41. 15-16).** Mr. Anderson testified that it was "chilly out" while he was outside having a cigarette. **(R:39. 13-15).** Mr. Anderson saw the defendant walking towards him. The defendant stated he had an accident and was cold, looking for a place to warm up. **(R:40. 22-24).** Mr. Anderson let the defendant sit in his truck and wait. Mr. Anderson indicated he had previous training in observing signs of intoxication. **(R:41. 23-24).** Mr. Anderson originally testified that he watched the defendant walk 25 yards and there was nothing "unsteady" about his walk and nothing about his speech that sounded intoxicated. **(R:41. 3-9*)***. Mr. Anderson further testified that he could detect a faint odor of alcohol on the defendant's breath, his pupils looked a little dilated, he slurred a couple of words and he stumbled as he walked.

(R:42-44). Despite this, Mr. Anderson testified that he concluded the defendant appeared not to be intoxicated. **(R:44. 9**).

At trial Ms. Kelly Hempel, a dispatcher from Jensen Towing, testified that on February 26, 2012 she received a call from AAA through their contract with AAA to "wench" out a vehicle off the side of the road "over by KR and I94". **(Jury Trial Trascript:58. 10-11).** Ms. Hempel testified that the AAA member that called for service, was the defendant. The defendant called at 6:03 AM for service. ***(R:*59. 15-18).** Ms. Hempel testified that she spoke with the defendant once when he was at the vehicle. **(R:60. 4-15).** The tow truck had an estimated arrival of 30 minutes. ***Id***. She then attempted several times to contact him again, but the defendant had left the scene. **(R:62. 3-23).**

At trial, the State's expert, Carlton Cowie, testified to a range of blood alcohol contents using the retrograde extrapolation based on the unknown time of driving estimating a blood alcohol content for driving at 6:00 AM, 5:30 AM, and 5:00 AM. Mr. Cowie based his opinion on standard elimination rates for a slow eliminator, an average eliminator, and a fast eliminator. ***(R:*200-202).** Mr. Cowie also testified that the reported result of the

defendant's blood sample by the Kenosha County department of Human Services, Division of Health, was .094 grams of ethanol per 100 milliliters of blood . ***(R:199. 2-8).***

ARGUMENT

I. Standard of Review

In reviewing a denial of a motion to suppress, the Court of Appeals upholds the circuit court's findings of fact unless they are clearly erroneous or contrary to the great weight and clear preponderance of the evidence. ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997; *State v. Allen*, 226 Wis. 2d 66, 70, 593 N.W. 2d 504 (Ct. App. 1999). Whether the facts satisfy the constitutional requirement of reasonableness is a question of law and should be reviewed de novo. ***Id***. The appellate court values a trial court's decision on the question. ***Scheunemann v. City of West Bend***, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

"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)). The Wisconsin Supreme Court noted that on review, the court will sustain the circuit court's discretionary determination 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. The Deputies Had Probable Cause to Arrest the Defendant for Operating While Intoxicated Offense.

Where there is no unlawful conduct, a stop may be justified based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct indicate that criminal activity is afoot. ***See State v. Waldner,*** 206 Wis.2d 51, 57, 556 N.W.2d 681, 684-85 (1996).

Whether an officer had reasonable suspicion is an objective test and the suspicion must be "grounded in specific, articulable facts and reasonable inferences from those facts....". ***Id.*** at 56, 556 N.W.2d at 684 (citation omitted). The focus is on the totality of the circumstances, not individual facts standing alone. ***See Id.*** at 58, 556 N.W.2d at 685. There are specific articulable facts that demonstrate that the defendant either was driving while intoxicated or was violating a traffic law.

Whether an officer had reasonable suspicion is an objective test and the suspicion must be "grounded in

specific, articulable facts and reasonable inferences from those facts....". ***See State v. Waldner,*** 206 Wis.2d 51, 56, 556 N.W.2d 681, 684 (1996) (citation omitted). The focus is on the totality of the circumstances, not individual facts standing alone. ***See Id.*** at 58, 556 N.W.2d at 685.

Under the totality of the circumstances test, Deputies Klinkhammer and Malecki had reasonable suspicion for a number of reasons such as a car in a ditch that hit a fence, an individual nearby seeking shelter in the cold in proximity to the crash, early time of morning, the defendant having an unsteady gait, smelling of intoxicants and had slightly thick tongued speech. **(Suppression R:5. 11-14).** These specific articulable facts demonstrate that the defendant could likely be violating a traffic law. Considering the totality of the circumstances, an objective officer would have reasonable suspicion to detain the defendant.

> [S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

State v. Anderson, 155 Wis.2d 77, 84, 454 N.W.2d 763 (1990). This was the totality of the information available to Deputies Klinkhammer and Malecki at the time. Officers are allowed to arrest individuals based on probable cause to believe that they committed a crime. ***Wis. Stat. 968.07(1)(d***).

"[T]he term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation. " ***Zalaski v. City of Hartford*** 723 F.3d 382, 392; (quoting *Locke v. United States,* 11 U.S. 339, 7 Cranch 339, 348, 3 L.Ed. 364 (1813) (Marshall, C.J.))).

The Wisconsin Supreme Court held in ***State v. Paszek***:

> Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.

50 Wis. 2d 619, 624-25, 184 N.W.2d 836, 839-40 (1971) (citations omitted).

A trial court is in the best position to decide the weight and relevancy of testimony and an appellate court must give substantial deference to the trial court's better ability to assess the evidence. ***In re Deannia D.***, 288 Wis. 2d 485, 494, 709 N.W.2d 879 (Ct. App. 2005). (citations omitted). Here, the only witness at the evidentiary hearing presented by the State was Deputy Klinkhammer. The trial court did not explicitly state that it found Deputy Klinkhammer credible at the suppression hearing on June 13, 2012, but the trial court's ruling accepts Deputy Klinkhammer's observations of the defendant as fact. The trial court found that the defendant, "[W]as not in custody, that he was not threatened or coerced in any manner to answer the questions, that a reasonable person wouldn't have considered themselves to be in custody at the time." ***(Suppression R:26. 10-15).***

It is clear by the testimony at the suppression hearing by Deputy Klinkhammer, a veteran of the Kenosha Sheriff's Department of 19 years, that there was a reported accident of a vehicle in the ditch that hit a fence, "a quarter mile, if that" from a trailer court. **(R:24. 3-11).** Deputy Klinkhammer made contact with an individual, identified as the defendant, that was trying to seek shelter at the trailer court by knocking on multiple

resident's doors. ***(*R:4. 11-23*).*** The defendant had called for a tow truck, but never called for police assistance. ***(*R:24. 20-24*).*** At this point in the investigation, based on the totality of the circumstances Deputy Klinkhammer had reasonable suspicion to believe that the defendant was involved in a traffic violation.

Deputy Klinkhammer clearly indicated that after making contact with the defendant at the trailer park, the defendant's gait was unsteady, he smelled of intoxicants and had slightly thick tongued speech. **(R:5. 11-14).** Deputy Klinkhammer testified that based on his training and experience that he believed that the defendant was possibly intoxicated. **(R:5. 15-17).** Deputy Klinkhammer went on to describe his training in detecting impaired drivers at his initial training, continual refresher trainings every two or three years at in-service, being an intoximeter operator, as well as coming into contact with impaired drivers throughout the course of his career. **(R:6. 18-25)**. Throughout his testimony, Deputy Klinkhammer explained that the defendant admitted to driving the vehicle that was in the ditch, admitted to drinking, but stated he had fallen asleep during the accident. **(R:6 1-9*).*** It was based on the totality of this information that Deputy Klinkhammer testified that he, based on his training and experience,

formed an opinion as to whether the defendant was impaired. **(R:7. 5).** After the defendant refused to perform Standard Field Sobriety Tests, Deputy Klinkhammer then had sufficient *probable cause* to place the defendant under arrest for Operating While Intoxicated. **(R:9).** "Arguable probable cause [to arrest] exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." ***Zalaski v. City of Hartford,*** 723 F.3d 382, 390 (2d Cir.2013). (internal quotation marks omitted)). Probable cause to arrest an individual for operating a motor vehicle while intoxicated:

> [R]efers 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.

State v. Lange, 317 Wis.2d 383, 391-92, 766 N.W.2d 551,555.

At the suppression hearing, the defense called three of the trailer park residents. The first, Patricia Schumacher testified that an Asian male had knocked on her door one morning. Ms. Schumacher stated she asked him what he wanted and "he didn't answer. I asked again and he didn't answer, so I told him to go away and I closed the

door and called the sheriff." **(R:27. 1-2).** Ms. Schumacher further testified that the defendant looked cold as it was freezing outside. **(R:27. 8-10*).*** Ms. Schumacher testified that she did not smell alcohol, but that the defendant was some distance away from her, approximately four feet away and through a cracked door. **(R:29. 12-20).** Ms. Schumacher also testified that she was not staring at the defendant's eyes to see if they were bloodshot in addition to the fact that she had just woken up and was still sleepy. **(R:30. 4-11).**

Robert Lichter was the second witness to testify for the defense at the suppression hearing. Mr. Lichter testified the defendant knocked on his door and asked if he could get warm. **(R:33. 6-11).** Mr. Lichter explained he only opened the inside door, leaving his storm door closed. **(R:33. 9**). Mr. Lichter testified that he did not pay much attention to the defendant because his wife was sick, having troubles and he wanted to go. **(R:34. 3-17).** Mr. Lichter testified the defendant talked about going into a ditch and was waiting for a tow truck. **(R:37. 13-19).**

Danny Anderson, a previous sheriff in Hampton, Virginia for almost 9 years, was the third witness for the defense at the suppression motion. ***See*** **(R:41).** Mr. Anderson testified that it was "chilly out" while he was

outside having a cigarette. **(R:39. 13-15).** Mr. Anderson saw the defendant walking towards him. The defendant stated he had an accident and was cold, looking for a place to warm up. **(R:40. 22-24).** Mr. Anderson indicated he had previous training in observing signs of intoxication. **(R:41. 23-24).** Mr. Anderson testified he could detect a faint odor of alcohol on the defendant's breath, his pupils looked a little dilated, slurred a couple of words and stumbled as he walked. **(R:42-44).** Despite this, Mr. Anderson testified that he concluded the defendant appeared not to be intoxicated. **(R:44. 9**).

Two of the three defense witnesses did not have training in detecting signs of intoxication. However, Mr. Anderson, a former sheriff and Deputy Klinkhammer, both of who have training and experience in detecting signs of impairment, may have disagreed on the ultimate conclusion, but testified that the defendant had an odor of alcohol on his breath/smelled of intoxicants, stumbled as he walked/gait was unsteady, and slurred speech/thick lounged speech. Mr. Anderson testified to the additional fact of the defendant's pupils looking a little dilated as well. Deputies Klinkhammer and Malecki had sufficient probable cause to arrest the defendant for Operating While Intoxicated based on the totality of the circumstances

known to them at the time believing, as reasonable officers, that a crime had been committed. "Probable cause exists if at the time of the arrest, the facts and circumstances within the officer's knowledge ... are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." ***Thayer v. Chiczewski,*** 705 F.3d 237, 246 (7th Cir.2012) (citations and quotations omitted). Probable cause "requires only that a probability or substantial chance of criminal activity exists; it does not require the existence of criminal activity to be more likely true than not true." ***Id.*** (citations and quotations omitted). "Probable cause is a fluid concept that relies on the common-sense judgment of the officers based on the totality of the circumstances." ***Id.*** at 246–47 (citations and quotations omitted). Making a determination on probable cause requires the court to step into the shoes of a reasonable person in the officer's position. ***Id.*** at 247. "This is an objective inquiry; [the court does] not consider the subjective motivations of the officer." ***Id.***

This Court upheld a circuit court's finding of probable cause to arrest for operating a motor vehicle while intoxicated when a defendant was not seen driving the

motor vehicle after a crash and admission by the driver at the hospital of, "I have to quit doing this." ***State v Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994). This Court held under the totality of the circumstances test that law enforcement *did* have probable cause to arrest. ***Id.*** at 684. Very similarly in our case, the defendant was involved in a car accident, made self-admissions, and was found in a separate location from the vehicle. In addition in our case, the deputies had the additional information of watching the defendant walk with an unsteady gait and smelling "like a brewery". **(Suppression R:15. 15-17)**.

A reasonable police officer can reasonably conclude that an individual that admitted to drinking, driving, and crashing his vehicle and only calling for assistance from a tow truck, not the police, probably committed a crime. ***See State v. Paszek,*** 50 Wis. 2d 619, 624-25, 184 N.W.2d 836, 839-40 (1971) (citations omitted). This is in addition to the other factors known to the deputies at the time of the defendant's arrest: defendant's gait was unsteady, he smelled of intoxicants and had slightly thick tongued speech. **(R.5).** Deputy Klinkhammer testified that the defendant "[S]melled like a brewery," and had a "[T]ypical intoxicated person walk". **(R:13-15).** Based on these

factors, the deputies had probable cause to arrest the defendant for operating while intoxicated.

III. The State Met Its Burden to Establish the Admissibility of the Proffered Expert Testimony Regarding Retrograde Extrapolation.

A trial court using the *Daubert* standard must still qualify a witness to testify about the evidence at issue. If the testimony is predicated upon specialized knowledge, the witness is considered an expert, and the testimony is controlled by Wis. Stat. § 907.02. Expert witnesses must, of course, assist the trier of fact to understand the evidence or to determine a fact in issue. **Wis. Stat. § 907.02(1).** In addition, the witness must be qualified to testify as an expert based on knowledge, skill, experience, training, or education. ***Id.*** The expert may testify as to an opinion if the testimony is based on 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. ***Id.***

The *Daubert* Court outlined a number of factors to consider when making determination whether the witness is qualified to give his or her opinion regarding such testimony. ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***,

509 U.S. 579, 592-93 (1993). In addition, a trial court must also consider the means of making its determination by conducting a hearing, statutory review, or like in our case, judicial notice. ***See Id.***

Courts must assess whether the reasoning or methodology underlying the testimony is scientifically valid, as well as whether the reasoning or methodology properly can be applied to the facts at issue. ***Id.*** The Court outlined the following factors to be used in making such an assessment.

First, whether the theory or technique can be (and has been) tested. ***Id.*** This factor incorporates the fundamental concept of scientific methodology, which is based on generating hypotheses and testing them. ***Id.*** Second, whether the theory or technique has been subjected to peer review and publication. ***Id***. Publication, by itself, does not stand as a requirement to admissibility because some innovative theories may not have gotten to the publication stage. ***Id.*** Third, whether a particular scientific technique has a known or potential rate of error, as well as any existence and maintenance of standards controlling the technique's operation. ***Id.*** Fourth, whether there is a "general acceptance" within the scientific community of the theory or technique. ***Id.*** The consideration of widespread

acceptance generally suggests that particular evidence is admissible. ***Id.*** The factors identified in *Daubert* are meant to be helpful but not definitive. ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 151 (1999). The factors do not necessarily apply in every instance where reliability of scientific testimony is challenged, and even if the factors apply, they may not be on even grounds. ***Id.*** A court need not apply each factor in every case, and there may be additional factors that are more applicable in a particular case. ***Id***. The real focus of the trial court must be on the principles and methodology, *not* the conclusions. ***Daubert***, 509 U.S. at 595. Thus, trial courts are left to *substantial discretion* in determining the admissibility of expert evidence.

As the United States Supreme Court stated in *Kumho Tire*, "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." ***Id***. at 152. The trial court has broad discretion in deciding what procedure to use in making a determination as to the reliability of scientific evidence under *Daubert*. Trial courts have the option of taking judicial notice of the reliability of scientific evidence, just as in our current case. In particular, the *Daubert* Court noted that if a

trial court decides to take judicial notice of the reliability of scientific evidence, a hearing as to that issue would no longer be necessary. If a theory or technique is "so firmly established as to have attained the status of scientific law," then the theory or technique need not be examined at all. ***Daubert,*** 509 U.S. at 592, n. 11. Other courts have indeed embraced this concept and noted that a *Daubert* hearing is not necessary when other courts have found the scientific evidence sufficiently reliable under the *Daubert* analysis. ***U.S. v. Pena***, 586 F.3d 105, 110 (1st Cir. 2009).

Further, when appellate courts have reviewed a trial court's decision where it declined to hold a *Daubert* hearing, the appellate courts apply an abuse of discretion standard, and have upheld the trial court's decision. ***Id***. Declining to hold a *Daubert* hearing is further justified if the defense fails to produce any novel challenge. ***U.S. v. Mitchell***, 365 F.3d 215, 246 (3rd Cir. 2004). "[A] district court would not abuse its discretion by limiting, in a proper case, the scope of a *Daubert* hearing to novel challenges to the admissibility of latent fingerprint identification evidence – or even dispensing with the hearing altogether if no novel challenge was raised." ***Id***. This does not in any way shift the burden to the defense.

Rather, the *Daubert* Court itself suggested that judicial notice on these issues is appropriate to preserve scarce judicial resources. *Daubert*, 509 U.S. at 582, n. 11.

There is no requirement that the trial court "recite the *Daubert* standard as though it were some magical incantation." ***Ancho v. Pentek Corp***., 157 F.3d 512, 518 (7th Cir. 1998). Nor does the trial court have to apply all the factors suggested in *Daubert* or *Kumho*. ***Goebel v. Denver and Rio Grande Western R.R. Co.***, 215 F.3d 1083, 1088 (10th Cir. 2000). However, when faced with a party's objection, the trial court must adequately demonstrate by specific findings on the record that the gatekeeping duty has been performed. ***Id***.

In ***State v Giese,*** 356 Wis. 2d 796, 854 N.W.2d 687 (2014), Giese argued that an expert opinion is inadmissible under WIS. STAT. §907.02 claiming that the opinion failed to satisfy the statute due to insufficient facts and data because the expert relied upon "unprovable and improper assumptions" when forming an opinion. ***Id.*** at 798. Very similar to our case Giese's vehicle had crashed, Giese was located a distance from the crash, about three miles, he was lying in the roadway when located, Giese was swaying, smelled of alcohol, admitted to drinking, and stated he had

crashed his vehicle, but fell asleep on the road when walking home. ***Id. at 799***. Just as in our case, not knowing the exact time of the vehicle crash, the expert in Giese performed a "back extrapolation" making assumptions and calculated a range of possible blood alcohol concentrations based on different possible times of the crash. ***Id. at 801.*** Similarly to our case, the blood test result was not automatically admissible under WIS STAT. §885.235, but required expert testimony to establish probative value since the time of driving was unknown. ***Id.*** The court in *Giese* ruled that the expert's opinion about retrograde extrapolation was admissible stating that under *Daubert* the court performs "a gate –keeping function." ***Id. at 803*** The expert relied on not only the blood test result but also the "scenario". ***Id***.

At the June 9, 2015 jury trial, the State's expert, Mr. Carlton Cowie, was able to testify based on the known fact that the defendant called for a tow truck at 6:03 AM and the actual time and level of the known blood draw of the defendant. Assuming the driving occurred at 6:00 AM based on a known standard slow elimination rate, the defendant's blood alcohol rate would have been estimated at 0.113. **(Jury Trial R:202. 5-13).** This is well over the

legal limit. Mr. Cowie also testified that if the defendant had an average elimination rate his blood alcohol concentration estimation would have been a .123 and if he was a fast eliminator his blood alcohol concentration estimation would have been a .152. **(R:202. 13-16).** The State's expert followed this process estimating a driving time of 5:30 AM with slow, standard, and fast elimination rates of blood alcohol concentrations of .118, .130, and a .167. **(R:202. 16-21).** Mr. Cowie was able to use retrograde extrapolation to estimate that with a driving time of 5:00 AM, with the slow, standard, and fast elimination rates the defendant's estimated blood alcohol concentrations would have been a .123, a .138, or a .182 at the time of driving. **(R:202. 21-25).**

Retrograde analysis is generally considered to be a reliable scientific discipline. ***Giese*** at 808; *citing State v Burgess*, 188 VT. 235, 5A.3d 911 916-17 (2010); *Commonwealth v Senior*, 433 Mass. 453, 744 N.E. 2d 614, 619 (2001). Retrograde extrapolation is a widely accepted methodology in the forensic toxicology field. ***Id.*** The *Giese* Court ruled that "Giese still has the chance to undermine the assumptions that support the expert's opinion by introducing evidence or arguing the favor of competing

inferences from the known facts. But the expert's opinion is admissible under *Daubert." **Id**. at 810.* Just as in *Giese,* the defendant in our case was given the same opportunity at jury trial. The court ruled:

> 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 his knowledge and this knowledge and this knowledge that, you know, 99 percent shows whatever. Okay? We got it?

(Jury Trial R:155. 11-19). The defendant was given ample opportunity through cross-examination to question the State's expert on the basis for his findings regarding retrograde extrapolation or present contrary evidence. The trial court in no way limited the defendant in this respect at trial.

The Daubert standards are to be flexibly applied. As noted by the U.S. Supreme Court later in a case involving the testimony and opinion of a tire wear expert, where the expertise was based upon experience, which the Court characterized as determining

> … how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert* `s general holding— setting forth the trial

> judge's general "gatekeeping" obligation—applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. See Fed. Rule Evid. 702. We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert,* the test of reliability is "flexible," and *Daubert* `s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.

Kuhmo Tire Co v. Carmichael 526 U.S. 137, 141 (1999).

However, the court need not conduct a full *Daubert* hearing on admissibility where case law is overwhelmingly in favor of admitting it and the defendant has provided no strong reason to rule otherwise. ***U.S. v. Pena***, 586 F.3d 105 (1st Cir. 2009), a case involving testimony of a Massachusetts State Trooper with extensive experience in fingerprint matching testifying on the method he used and how he visually “matched” the defendant’s print with those found on a tossed gun.

A trial judge need not expend scarce judicial resources reexamining a familiar form of expertise every time opinion evidence is offered.:

> Although the Frye decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or

> exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Federal Rule Evidence 201.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592, n. 11 (1993).

Similarly, at the motion hearing held on May 29, 2015 regarding the expert testimony on retrograde extrapolation of the blood taken from the defendant the trial court stated, " So there's nothing wrong with the science." The trial court further elaborates that, "[I] don't think he has voodoo science. I mean, I think retrograde is valuable." ***(*May 29, 2015 Motion Hearing R:8. 9-10).** This issue was originally brought up at the motion hearing on April 17, 2014 when the trial court questioned:

> And who is going to testify about the validity of that? I mean, how fast it dissipates, how quickly it increases or decreases or whatever.

(April 17, 2014 Motion Hearing R:6. 12-15). The State responded with "Well, I definitely – I have to have an expert for the blood, so I would be able to—". **(R:6. 16-18).** The defense countered with:

> My thought on that would be that, you know, there's obviously going to be an expert for the state that if we wanted to discuss with them elimination rate and things like that they would be qualified, I'm sure, to discuss those types of things.

***(*R.6-7).**

While the court is not required to hold a separate hearing when a *Daubert* challenge is raised, it is required to make specific findings on the record that testimony is reliable. See, for example, ***U.S. v. Roach,*** 582 F.3d 1192 (10th Cir. 2009). There, a detective testified at trial to his years of experience and knowledge concerning gangs and gang activity and the "tools of the trade" including guns, the intent being to tie the defendant to gangs as part of bolstering the inference defendant possessed the drugs in question and was dealing drugs.

> Roach does not argue that Miller's testimony lacked specialized knowledge or that it was irrelevant. Nevertheless, before admitting expert testimony, the district court is required to make specific, on-the-record findings that the testimony is reliable under *Daubert.*

Id. *at 1207.*

In our present case the trial court stated at a July 22, 2014 motion hearing when discussing the issue of the blood draw being outside the three hour time frame and the loss of the presumption by the State:

> I think you have to prove it with your expert. I mean, and you have to show that they take valid tests, they apply standards and so on. I don't think there's a Daubert requirement in, I mean, I don't think I have to have a separate Daubert hearing. It's pretty standardized testing as operated at the Wisconsin Lab…

(July 22, 2014 Motion Hearing R:28. 17-24). The trial court clearly found the practice to be "standardized" and with comments made at future hearings found it to be reliable science. Under current law, a Daubert hearing was clearly not required for testimony regarding retrograde extrapolation. The court reiterated its ruling again on the day of jury selection on June 8, 2015 when the defense requested a Daubert hearing again despite the trial court's previous rulings, "We're not getting into that. As you said in Giese, extrapolation is accepted in the – as legal basis." ***(Jury Selection R:12. 4-6).*** The trial court further elaborated***:***

> 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 methods than what's normally done, which is repeated here year after 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 method 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.
>
> I mean, you're going to cross-examine. She's going to have it put in. apparently it's – I don't think it's unheard of that formulas are used with belied facts or hypotheticals. Experts are allowed to express hypothetical opinions. So we'll give the hypothetical instruction, and I'm going to allow it. 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.

(R:12-14). An offer of proof was then given outside the presence of the jury by the state. The trial court further explained, "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." **(Jury Trial R:156. 9-14).** The trial court further stated, "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. So but how he did his is subject to your cross-examination." **(R:150. 7-11).** The trial court was accurate in their assessment in the widely accepted opinion of courts that retrograde extrapolation is a generally accepted scientific method. A number of courts applying the Daubert standard have opined just this. ***Giese*** at 692;

citing State ex rel Montgomery v Miller, 234Ariz. 289, 321 P.3d 454, 469 (Ariz.Ct.App.2014).

CONLUSION

For the stated reasons, it is respectfully requested that the decisions of the Circuit Court should be upheld as the arrest of the defendant was supported by sufficient probable cause and Daubert hearing was not necessary due to the validity of the science. Respectfully, the defendant's conviction in the present case should stand.

Dated at Kenosha, Wisconsin, this 12th day of July, 2016.

Respectfully submitted,

By: _____

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained within Section 809.l9(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 30 pages.

Dated this 12th day of July, 2016.

_____

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CERTIFICATION OF COMPLIANCE WITH 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 s. 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 July, 2016.

_____

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