STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

Appeal No. 2016-AP-406

MICHAEL CHOUGH,
Defendant-Appellant.

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 REPLY BRIEF

ANTHONY D. COTTON
State Bar No. 1055106
Kuchler & Cotton, S.C.
1535 E. Racine Avenue
PO Box 527
Waukesha, Wisconsin 53186
Tel: (262) 542-4218
Fax: (262) 542-1993
Attorneys for Defendant-Appellant

TABLE OF CONTENTS **PAGE**

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

The State's arguments sidestep the issues raised in Mr. Chough's initial brief.

I. THE STATE IGNORES THE ELEPHANT IN THE ROOM: BECAUSE IT IS UNKNOWN WHEN MR. CHOUGH OPERATED A MOTOR VEHICLE, THE STATE DID NOT DEMONSTRATE PROBABLE CAUSE TO ARREST FOR OPERATING A MOTOR VEHICLE WHILE INTOXICATED.

For reasons that are not clear, the State begins its probable cause analysis with a discussion of reasonable suspicion. (State's Br. 7-9). The State then cites *Zalaski v. City of Hartford*, 723 F.3d 382, 390 (2d Cir. 2013), for a definition of "arguable probable cause," a term relevant in determining whether qualified immunity applies in a federal civil suit challenging law enforcement conduct under 42 U.S.C. § 1983. This term has no relevance in the present case. The State's decision to cite this lower standard instead of the proper standard, discussed on the very same page of *Zalaski*, should not be permitted to mislead this Court. 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." *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 391-92, 766 N.W.2d 551, 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.

As Mr. Chough argued in his initial brief, no evidence introduced by the State at the motion hearing tends to make it more probable that he 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. The State fails to develop any argument whatsoever in its brief that law enforcement possessed any information suggesting when Mr. Chough may have operated a motor vehicle, and this Court should not develop one on its behalf. "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (quoting *State ex rel. Blank v. Gramling*, 219 Wis. 196, 199, 262 N.W. 614, 615 (1935)).

II. THE STATE ACKNOWLEDGES "ITS BURDEN TO ESTABLISH THE ADMISSIBILITY OF THE PROFFERED EXPERT TESTIMONY REGARDING RETROGRADE EXTRAPOLATION" EXACTLY ONCE IN ITS BRIEF: IN THE SECTION TITLE.

The State's analysis of this second issue is difficult to follow. Its brief devotes several pages of its brief to a discussion of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and the factors a court should consider when determining the admissibility of proposed expert testimony, but the State fails to assert that the circuit court made any findings regarding them. The State treats the circuit court's conclusions regarding retrograde extrapolation as if they constitute

factual findings supported by the record before the circuit court. The State observes that this Court must examine whether the circuit court "examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." (State's Br. 7). The State identifies no facts of record that the circuit court examined, no acknowledgement of the proper legal standard, and no evidence that the circuit court utilized a rational process to reach its conclusions.

The State cites *Ancho v. Pentek Corp.*, 157 F.3d 512, 518 (7th Cir. 1998), in support of its assertion that "[t]here is no requirement that the trial court 'recite the *Daubert* standard as though it were some magical incantation.'" (State's Br. 21). Fair enough. But the court in *Ancho* held that, on the record before it, "when the trial judge's decision is read in totality, we deem it to be sufficiently clear that he very definitely relied on the *Daubert* standard when rendering his oral ruling." 157 F.3d at 518. In fact, the State conveniently fails to include the beginning of the sentence it quotes: "Trial judges need only follow (i.e., adhere to) *Daubert* when making a [FED. R. EVID.] 702[1] determination; they are not required to recite the *Daubert* standard as though it were some magical incantation." *Id*. (internal citation omitted). In the present case, the circuit court neither adhered to *Daubert* nor recited its standards.

[1] As discussed in Mr. Chough's initial brief, FED. R. EVID. 702 is the federal equivalent of Wis. Stat. § 907.02.

And the State cites *Goebel v. Denver and Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000), for two propositions: that a trial court need not "apply all of the factors suggested in *Daubert* or *Kumho* [*Tire v. Carmichael*, 526 U.S. 137 (1999)]," and that, "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." (State's Br. 21). In the present case, however, the circuit court utterly failed do just that.

The State cites *United States v. Roach*, 582 F.3d 1192, 1207 (10th Cir. 2009), to exemplify the requirement that a court "make specific findings on the record that testimony is reliable." (State's Br. 27). In *Roach*, "the district court chose not to conduct a *Daubert* hearing before trial, deferring the issue to be decided after objection. When defense counsel made such an objection, the court responded, . . . 'I've determined that the jury may consider [Miller] as an expert and give [his expert testimony] such consideration as they deem appropriate.'" *Id*.. The Court of Appeals observed, "These statements simply do not include any factual findings indicating the basis of the court's determination . . . ." *Id*. Therefore, it held, "the court erroneously admitted Officer Miller's testimony without the required findings of reliability." *Id*.

In its search for anything resembling "specific findings on the record that testimony is reliable," the State cites the circuit court's statements at the July 22, 2014, motion hearing regarding "the issue of the blood draw being outside the three[-]hour time frame and the loss of the presumption by the State." (State's Br.

27). The State notes that the circuit court "clearly found the practice to be 'standardized' . . . ." (State's Br. 28). As the passage quoted in the State's brief makes clear, however, "the practice" in question was not retrograde extrapolation; the circuit court was discussing the requirement that the State establish that its lab "take[s] valid tests, they apply standards and so on." (R.75: 28.19-20).[2]

The State then implies, however, that the circuit court's characterization of that lab's testing as "pretty standardized" constitutes a ruling on the admissibility of testimony regarding retrograde extrapolation. The State accuses Mr. Chough of having, on the day of jury selection, "requested a Daubert hearing again despite the trial court's previous rulings" on the subject. (State's Br. 28). The State does not cite any "previous ruling," because the circuit court made no such ruling, and even explicitly deferred such a ruling at the previous hearing. (R.79:6-7). Nor could the circuit court have made such a ruling on July 22, 2014, since the State did not provide notice that it intended to solicit such testimony until over six months later, as a jury pool was being brought to the courtroom. When that occurred, the circuit court granted Mr. Chough's request for an adjournment of the trial, explaining, "I want them to be able to rebut the scientific evidence." (17.21-22, 24-25).

[2] The Defendant noted this very distinction in his initial brief. (Def. Br. 27 n.3).

The State cites *State v. Giese*, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687, for the proposition that "[r]etrograde analysis is generally considered to be a reliable scientific discipline." (State's Br. 23). But both the circuit court and this Court relied on the record developed at the *Daubert* hearing in *Giese* to support its conclusion that the testimony was admissible. *See id.*, ¶¶ 15, 25-27. That other courts have held similar testimony admissible in other cases, based on the record presented in those cases, hardly gives other courts a free pass in cases before them to admit testimony given the same label. As the Supreme Court observed, "Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy." *Kumho Tire*, 526 U.S. at 151. If general acceptance within the discipline does not provide a free pass, then neither can general acceptance by courts.

The State cites *United States v. Pena*, 586 F.3d 105, 110 (1st Cir. 2009), in support of its assertion that "a *Daubert* hearing is not necessary when other courts have found the scientific evidence sufficiently reliable under the *Daubert* analysis." (State's Br. 20). Nothing in *Pena* supports that assertion. The district court in *Pena* relied on the record before it when admitting expert testimony. While the district court "declined to hold a *Daubert* hearing and initially denied Pena's motion to exclude the fingerprint evidence," *id.*, its final decision was based on the testimony presented by the government. *Id.* The circuit court in the

present case had no such record before it when it held that the State's proposed expert testimony was not only admissible, but scientifically valid. The State does not cite a single case upholding a *Daubert* analysis that did not rely on facts in the record before the trial court.

The State accurately quotes *United States v. Mitchell*, 365 F.3d 215, 246 (3rd Cir. 2004), regarding the propriety of "dispensing with the [*Daubert*] hearing altogether if no novel challenge was raised." (State's Br. 20). But the State's reliance on *Mitchell* is ironic for several reasons. First, not only is the decision itself a thorough 48-page analysis that discusses the scientific field in that case, but the district court in *Mitchell* "held a five-day hearing pursuant to [*Daubert*] to rule on the admissibility of the government's and Mitchell's proposed expert testimony. The record of this marathon hearing alone comprises nearly one thousand pages of testimony and a similarly voluminous array of exhibits." 365 F.3d at 222. This renders the passage cited by the State mere dicta. Second, as discussed below, the State argues that the circuit court in the present case took judicial notice of the validity of retrograde extrapolation. But the Court of Appeals in *Mitchell* held that "it was error for the [district c]ourt to take judicial notice" of scientific conclusions. *Id*. at 252.

The State asserts that a *Daubert* hearing "was not necessary due to the validity of the science" (State's Br. 30), embracing the circuit court's disturbing language over the language of Wis. Stat. § 907.02. Framing the issue as such lets the State avoid addressing the circuit court's failure to address the issues listed in §

907.02. In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) , the United States Supreme Court was highly critical of the respondent's focus on "whether animal studies can ever be a proper foundation for an expert's opinion . . . ." *Id*. at 144. "Rather than explaining how and why the experts could have extrapolated their opinions from these seemingly far-removed animal studies, respondent chose 'to proceed as if the only issue [was] whether animal studies can ever be a proper foundation for an expert's opinion.'" *Id*. (citation omitted).

The State and the circuit court have done the same in the present case, eschewing any consideration of whether *this witness*'s testimony in *this case* was admissible under § 907.02(1). Just as the issue in *Joiner* "was whether *these* experts' opinions were sufficiently supported by the animal studies on which they purported to rely," *id*. at 144 (emphasis in original), the issue in the present case is the admissibility of Mr. Cowie's testimony, not whether "the science was valid." The State's assertion that Mr. Chough "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" (State's Br. 24), implicitly concedes that Mr. Chough was denied the opportunity through cross-examination to question Mr. Cowie about the science itself.

A. The State cannot evade review by invoking the phrase "judicial notice" on appeal.

Mr. Chough closed the *Daubert* section of his initial brief by comparing the circuit court's findings regarding the validity of Mr. Cowie's retrograde

extrapolation analysis to the taking of judicial notice of the same, and cited the discussion of judicial notice in *State v. Barnes*, 52 Wis. 2d 82, 187 N.W.2d 845 (1971). Mr. Chough intended this comparison as a critique of the circuit court's analysis, given the obvious inapplicability of judicial notice to the present issue. The State goes beyond conceding in its brief that the comparison is apt, but instead asserts that the circuit court *did* take judicial notice in the present case. (State's Br. 18, 19).

The State's revisionist history does it no favor. "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." Wis. Stat. § 902.01(5). This did not occur in the present case. In addition, when judicial notice is taken, the same statute requires the circuit court to "instruct the jury to accept as established any facts judicially noticed." *Id*. No such instruction was given. As Mr. Chough noted, 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." *Barnes*, 52 Wis. 2d at 89, 187 N.W.2d at 848.[3]

[3] The State makes no attempt in its brief to meet "the burden of demonstrating that there was no reasonable possibility that the error contributed to the result." *In re Commitment of Jones*, 2013 WI App 151, ¶ 14, 352 Wis. 2d 87, 96-97, 841 N.W.2d 306, 311 (citing *State v. Dyess*, 124 Wis. 2d 525, 545, 370 N.W.2d 222, 231-32 (1985)).

The State relies on *Daubert*, 509 U.S. at 592-93, for the proposition that "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." (State's Br. 18). *Daubert* provides no support whatsoever for this passage. The phrase "statutory review" does not appear in *Daubert*. Other than universal truths like gravity and thermodynamics, *Daubert* makes no suggestion whatsoever that a trial court can make the necessary determinations without a factual record. To the contrary, "*Daubert* adds that the gatekeeping inquiry must be 'tied to the facts' of a particular 'case.'" *Kumho Tire*, 526 U.S. at 150 (quoting *Daubert*, 509 U.S. at 591) (internal citation omitted).

The State does not identify in its brief what specific facts were subject to judicial notice in the present case. Perhaps the circuit court could take judicial notice of Mr. Cowie's qualifications as "fact[s] generally known within the territorial jurisdiction of the trial court." Wis. Stat. § 902.01(2)(a). *But see Hoeft v. Friedli*, 164 Wis. 2d 178, 189-90, 473 N.W.2d 604, 608 (Ct. App 1991) (attorney's sense of humor not subject to judicial notice).

Later, the State asserts that "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." (State's Br. 19-20). *Daubert* says no such thing, because "the reliability of scientific evidence" is not a fact. *See United States v. Mitchell*, 365 F.3d 215, 252 (3rd Cir. 2004) ("Here, the Court took judicial notice of a scientific conclusion – something which is subject to revision –

not a 'fact.'"). The State does not identify any facts for which the circuit court took judicial notice.

Then the State asserts that "the *Daubert* Court itself suggested that judicial notice on these issues is appropriate to preserve scarce judicial resources." (State's Br. 21). The accuracy of this claim is contingent on identifying "these issues" to which the State refers. That paragraph quotes *Mitchell* regarding the propriety of "dispensing with the [*Daubert*] hearing altogether if no novel challenge was raised." (State's Br. 20). But *Mitchell* held that "it was error for the [district c]ourt to take judicial notice" of scientific conclusions. 365 F.3d at 252. The only discussion of judicial notice in *Daubert* was the observation that "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 [FED. R. EVID.] 201." 509 U.S. 582 n.11. Scientific laws, like the laws of thermodynamics or the law of gravity, are universal truths that have been repeatedly verified and never falsified, the scientific equivalent of "1 + 1 = 2". The State's error mimics the circuit court's: presuming retrograde extrapolation to be as unassailable a scientific concept as gravity.

Even if the circuit court had taken judicial notice of both Mr. Cowie's qualifications and the reliability of the principle and methods of retrograde extrapolation, the circuit court would still have been required, under Wis. Stat. § 907.02(1), to determine whether Mr. Cowie's testimony was "based upon sufficient facts or data" and whether Mr. Cowie "applied the principles and

methods reliably to the facts of the case." The circuit court itself acknowledged that it did not even know what methods Mr. Cowie applied in the present case, (R.80:12.9-16), and denied Mr. Chough the opportunity to present, for *Daubert* purposes, evidence regarding the reliability of his data. (R.81:214-216).

CONCLUSION

Mr. Chough's conviction must be reversed.

Dated this 29th day of July, 2016.

Respectfully submitted,

KUCHLER & COTTON, S.C.

_____

Anthony D. Cotton
Attorney for Defendant-Appellant
State Bar No. 1055106

1535 E. Racine Avenue
PO Box 527
Waukesha, Wisconsin 53186
Tel: (262) 542-4218
Fax: (262) 542-1993

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 reply brief produced with a proportional serif font. The length of this brief is 2,989 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 29th day of July, 2016.

KUCHLER & COTTON, S.C.

By: _____
Anthony D. Cotton
Attorney for Defendant-Appellant
State Bar No. 1055106

1535 E. Racine Avenue
PO Box 527
Waukesha, Wisconsin 53186
Tel: (262) 542-4218
Fax: (262) 542-1993