STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016AP001474-CR

BRANDON ARTHUR MILLARD,

Defendant-Appellant.

On Notice of Appeal from the Judgment of Conviction and
from an Order Denying Post-Conviction Relief Entered
in the Circuit Court for Rock County,
The Honorable Richard T. Werner, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

The crux of this case and appeal is the horizontal gaze nystagmus ("HGN") test given by the officer because the officer testified that after administering it he concluded that Mr. Millard was impaired and arrested him. (R.97:75-76.) The problem is that defense counsel seemingly did not recognize the importance of the HGN test and failed to do anything to keep it out of evidence. Most importantly for this appeal is that the trial court erred in concluding that Wisconsin's amended expert testimony rule, Wis. Stat. § 907.02, did not apply to the HGN test. Under Amended Rule 907.02, the HGN test and the Officer's testimony regarding it should be subject to the expert testimony requirements.

The State in addressing the issue relies solely on the unpublished case of *State v. Warren*, 2012AP1727-CR, 2013 WL 163520 (Ct. App. Jan. 16, 2013) (cited by Appellant in his initial brief and attached in his appendix at A-App. 105) and a handful of non-Wisconsin cases. At no time, however, does the State address Rule 907.02 and the Wisconsin cases discussing it. The State also makes numerous statements of fact without ever citing to the record, either simply citing to a transcript below or often without any citation whatsoever. (See, e.g., State Br. at 6-7.)

I. HGN TESTS SHOULD BE SUBJECT TO THE EXPERT WITNESS STANDARD.

Neither *Warren* nor *State v. VanMeter*, 2014AP1852-CR, 2015 WL 7432604 (Ct. App. Nov. 24, 2015) (A-App. 107), the other unpublished case cited by Appellant in his initial brief, discussed HGN and Amended Rule 907.02 or Wisconsin case law applying the new rule and its adoption of the federal standard enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Under the new rule, the trial court serves a gate-keeper role and should focus on the expert's principles and

methodology, not the conclusion. *State v. Giese*, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687. Yet, under the State's and trial court's position, the trial court will never get to that important role in this type of case because of the claim that HGN is merely an observation and does not require expert testimony. The reliance on *Warren* and *VanMeter* even as persuasive authority (because they are unpublished) is misplaced, because those cases in turn rely solely on the conclusions from *City of West Bend v. Wilkens*, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324.

Wilkens should not control the analysis because it was prior to the amended rule and did not address HGN. Moreover, the Court in *Warren* never analyzed the issue of the admissibility of HGN evidence under the newly amended rule. Instead, the Court simply referred back to the holding in *Wilkens* that field sobriety tests are merely observational and not subject to expert testimony standards. *Warren*, ¶8 (A-App. 106.) This, however, does not consider the significant difference between the HGN and other field sobriety tests at issue in *Wilkens.*

The difference between HGN at issue here and the other field sobriety tests at issue in *Wilkens* is important. Expert testimony is allowed when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Wis. Stat. 907.02. *See also State v. Watson*, 227 Wis.2d 167, 188, 595 N.W.2d 403 (1999). In addition, before a court can find that expert testimony is required, it must involve a matter that is "not within the realm of the ordinary experience of mankind." *Netzel v. State Sand & Gravel Co.*, 51 Wis.2d 1, 6, 186 N.W.2d 258 (1971). "In contrast, expert testimony is not necessary to assist the trier of fact concerning matters of common knowledge or those within the realm of ordinary experience." *Racine County v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶28, 323 Wis. 2d 682, 781 N.W.2d 88. The HGN test is not within the realm of ordinary experience and required expert testimony.

Whether a defendant can recite the alphabet, put his or her finger to the nose, or walk heel to toe correctly, arguably are all "within the realm of ordinary experience" for which a jury does not need expert testimony. Jurors generally do not need an expert to inform them that a person impaired by alcohol may stumble, lack coordination, or not be able to correctly recite the alphabet. Thus, *Wilkens* held that the field sobriety tests were merely observational. 2005 WI App 36, at ¶17. However, a juror's common knowledge does not generally extend to how the eyes react to an officer holding a stimulus 12-15 inches from the suspect's nose and moving it to check for nystagmus. See instructions for HGN at Andrew Mishlove and James Nesci, *Wisconsin OWI Defense: The Law and Practice*, 116-17 (2013). Moreover, if the tests are not administered correctly, the results are "inherently unreliable." *Id.* at 114. It is not within the realm of ordinary experience for a juror to be able to judge if the officer administered the test correctly. Thus, expert testimony regarding HGN is necessary to form the evidentiary basis for its admission into evidence at trial. Furthermore, Officer Welte testified at trial as if he were an expert, without any objection by defense counsel. (R.97:69-75.)

The State never confronted these issues in its brief. In addition to relying on *Warren*, it cites to other state court opinions. (Br. at 10-12.) First, as noted in Appellant's initial brief, other courts have rejected the conclusion that the tests are not scientific and therefore admissible under Rule 702. *See, e.g., United States v. Horn*, 185 F. Supp. 2d 530 (D. Md. 2002). Second, Wisconsin law applies, not other state law. Under Wisconsin law, as noted above and in his initial brief, HGN and testimony regarding such should be subjected to Amended Rule 907.02.

II. MR. MILLARD WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

The State's response is that HGN is not scientific evidence requiring expert testimony and that trial counsel

made a strategic decision not to rigorously cross-examine the officer about the HGH. First, as argued above, HGN is scientific evidence requiring expert testimony and counsel was deficient in not contesting it. Second, the State's strategy argument misstates the law.

Appellate courts disapprove of second-guessing trial counsel's selection of trial tactics. However, it is not a complete deference to trial counsel's decisions. Strategic decisions must be "based upon rationality founded on the facts and the law." *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). The Wisconsin Supreme Court specifically rejected both the State's and the trial court's position here that just because it was a claimed trial strategy that it is immune from being ineffective assistance of counsel. "[W]e cannot ratify a lawyer's decision merely by labeling it, as did the trial court, 'a matter of choice and of trial strategy.'" *Id.* In addition, a so-called strategic decision based on an erroneous interpretation of the law is deficient performance. *State v. Coleman*, 2015 WI App 38, ¶43, 362 Wis. 2d 447, 865 N.W.2d 190, citing *State v. Thiel*, 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 305.

The State does nothing more than repeat trial counsel's claim that he had a different strategy of attacking the blood draw and tests. (Br. at 12.) That strategy was not mutually exclusive of also attacking the HGN tests and this Court should not just rubber stamp the trial court's decision because trial counsel claimed he had a different strategy. There was no reason why counsel could not have pursued a strategy focusing on the blood evidence and still have attacked the HGN test evidence. Nor did counsel offer any reason why he did not do so. He simply said it was not his strategy. (R.99:11.) The trial court then found that it was a reasonable strategy decision. (R.78:2, A-App. 102.) Yet, this is exactly what the Court in *Felton* warned against.

Furthermore, the "strategy" of not attacking the HGN test and failing to bring a *Daubert* challenge was based on the

claim that counsel had not seen any decisions. (R.98.11-12.) If counsel had reviewed *Wilkens* and the cases cited in it, he should have known of the possible avenues of challenge. As the Courts have stated, a strategy based on an incorrect view of the law is deficient performance. *Coleman*, 2015 WI App at ¶43.

The Court in *Felton* stated what the prudent-lawyer standard required: "The prudent-lawyer standard requires that strategic or tactical decisions must be based upon rationality founded on the facts and the law." 110 Wis. 2d at 502. Here, counsel's decision not to contest the HGN tests by either a *Daubert* challenge or by cross-examining the officer thoroughly was not based on a rationality founded on the facts and the law. The basis for the officer concluding that Mr. Millard was impaired and for the arrest was the HGN test. (R.97:75-76.) Counsel, however, ignored it. Counsel also appeared ignorant of the details of the change in Rule 907.02 and case law applying it. Therefore, his decisions were not rationally based on the law and the facts and thus are deficient.

The second prong that a defendant must establish for ineffective assistance of counsel is prejudice. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984).

Trial counsel's performance undermines the confidence in the outcome of this case and thus meets the standard of prejudice. *See State v. Jenkins*, 2014 WI 59, ¶37, 355 Wis. 2d 180, 848 N.W.2d 786. The HGN test played a substantial part of the State's case both for probable cause for arrest and for the jury to find him impaired. Counsel did nothing to attack the HGN test, the credibility of the officer on applying the test, or the underpinnings of the scientific

basis for the HGN test. Therefore, counsel's defective performance was prejudicial to Mr. Millard and his right to effective assistance of counsel under the Sixth Amendment was violated.

CONCLUSION

For the above reasons and those set forth in his initial brief, Appellant respectfully requests that this Court reverse the trial court, vacate the judgment of conviction, and remand this matter to the Circuit Court for a new trial.

Dated this 21st day of November, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1775 words.

Dated this 21st day of November, 2016.

Signed:

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CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 21st day of November, 2016.

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