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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No.2016AP001774CR

State of Wisconsin
Plaintiff-Respondent,

v.
Scott F. Ufferman,
Defendant-Appellant.

On Appeal From A Judgment of the Circuit Court For Forest

County Case No. 2015-CM-000146,

Hon. William F. Kussel, Jr, Presiding.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES PRESENTED

I. Did the inadequate explanation for refusing to admit the ambulance record entry pursuant to §908.03(6) result in an erroneous exercise of discretion?

Answered "No" by the Circuit Court.

II. Does the foundation to impeach an expert require that expert consider the impeaching exhibit reliable?

Answered "No" by the Circuit Court.

III. Does publication by an elected IBNS Fellow of a peer reviewed article in an official journal of IBNS constitute undisputed recognition by enough experts in the profession that Fellow must be judicially noticed pursuant to §908.03(18) as an expert?

Answered "No" by the Circuit Court.

IV. Was Exhibit 27 capable of the type of prejudice within the ambit of §904.03?

Answered "Yes" by the Circuit Court.

V. Do the foundation requirements for a criminal defendant's scientific theory disputing the State's opinion require the same level of scientific reliability as that opinion by the State's expert?

Answered "Yes" by the Circuit Court.

VI. Was the trial fair if defendant was wrongfully not allowed to cross examine the State’s expert with the defense theory applied through the ambulance records, NHTSA Exhibit 7 and Iain McGregor Exhibits 26 and 27?

Not answered by the Circuit Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not necessary.

STATEMENT OF THE CASE

NATURE OF APPEAL

This is an appeal by the defendant who was found guilty by a jury of driving with a detectable amount of a controlled substance, 2.2 ng of Delta-9. Since Ufferman had OWI convictions in 1989 and 1991 this was a third offense. Ufferman will ask this Court to vacate the conviction and remand for a new trial based upon erroneously excluded evidence and hypothetical questions of the State's expert.

The three areas of evidence rulings constituted prejudicial error for the reason the theory of defense could not be presented. The defense argued, through hypothetical questions, trauma from the auto crash at 7:22 P.M. released Delta-9 stored in fat cells resulting in the 2.2 ng test at 9;30 P.M. The test applied to Delta-9 not in the bloodstream at the time of the accident, therefore the defendant was not guilty.

The three evidence rulings under review excluded an ambulance record entry, prohibited cross-examination with a NHTSA DRE publication, and excluded research by Iain McGregor of Sydney, Australia. Ufferman must first show

the ambulance record of the 2mm equal pupil size in Ex 8 p. 4 was admissible without the necessity of calling EMT intermediate Melinda Chaney. The Circuit Court failed to exercise discretion on the record when excluding the document without explaining the reason for requiring the live witness.

Defendant's attempt to introduce evidence of a normal equal pupil size at Ex 7 p.3, a NHTSA DRE manual, through cross-examination of the State's expert was denied. The scope of cross examination was limited to only the domain set forth by the witness as to what was necessary for the witness to form an opinion. Cross-examination concerning admissible evidence for impeachment does not require reliance by the expert on the impeachment evidence.

Had Exhibits 8 and 7 been admitted Ufferman had a factual basis to allege equal normal pupil size, which was evidence he was not using THC at the time of the accident. During pre-trial Exhibit 27, the contents of an audio (Ex 26) from an Australian Broadcasting Company's September 11, 2013 episode at Exhibit 14, was not allowed in evidence.

The audio described a study of THC users who underwent 35 minutes of exercise, and 2 hours after stopping exercise

tested false positive for Delta-9. Dr. Iain McGregor opined in the audio, **“If someone’s caught in a very bad accident, that’s extremely stressful can cause them to burn fat that THC might come out of that and they’d give a positive drug test and that has huge implications for the culpability in that accident situation if they’re positive for cannabis.”** Ufferman’s theory was the severity of the accident and 2 hour 8 minutes time frame transferred to McGregor’s 35 minute exercise stress followed by a two hour test time frame. The attempt to admit Exhibit 27 raises several evidence issues.

The Circuit Court refused to take judicial notice McGregor was recognized as an expert by members of his scientific field. Had McGregor been judicially noticed as an expert pursuant to §908.03(18), the trial court then described further hurdles.

There was an insufficient showing of reliability and scientific foundation. The context, a television audience, rendered the episode more prejudicial than probative.

Review of the ruling, based upon the same record as before the Circuit Court, is basically plenary. The probative value of McGregor’s CD was understated since an original reason for §908.03(18) was the use of medical

writings to aid in establishing causation. Understated or not, the probative value exceeded the prejudicial value because there could be no prejudice for §904.03 purposes. The science broadcast was not confusing to the public.

Rule §908.03(18) is not based upon the author's opinion being generally accepted, but only requires the author be recognized by other experts. The foundation for a defense theory is far less demanding than a scientific opinion attempting to prove a fact.

The entire case was based upon the 2.2ng representing a detectable amount in the driver's blood at the time of the accident. Less than 1 ng is reported as not detectible. The trial lacked due process in that the defendant was unable to present an innocent explanation for the 2.2 ng.

Defense Evidence Pretrial Filings

The case was set for a pretrial conference on March 31, 2016 (13). On March 28, 2016 the defense filed Treatise No. 4, (20) (which would become exhibit 14); and an abstract of Treatise No. 4 (21), (which would become Exhibit 15). The pre-trial conference set the 12 member jury trial for June 30, 2016. (64-6).

On April 7, 2016 the defense filed the ambulance

record (27). A pre-trial statement (31) explaining the defense theory was filed June 13, 2016. The defense theory need only be supported by possibilities (31-2). The Delta-9 that was tested was stored in fat and released by stress from the accident (31-3).

On June 27, 2016 the defense filed an appendix (41). The eight entries supported a motion (39) to take judicial notice of Iain McGregor as an expert. McGregor's background was set forth in a memorandum (40).

There is no doubt McGregor is an expert (41-2-7). One aspect of McGregor's CV applies to International Behavioral Neuroscience Society (IBNS). IBNS was founded in 1992 and elects individuals as a Fellow who have made substantial contributions to the society and to the field of behavioral neuroscience (41-19).

McGregor has been a Fellow in IBNS since 2005 (41-6); a 2012 speaker at IBNS in Hawaii (41-6), represented Australasia as a councilor (41-7). He also on June 4, 2015 chaired a 2 hour presentation at the IBNS 2015 annual meeting (41-24).

One of the peer reviewed publications of IBNS is Neuroscience and Biobehavioral Reviews (41-19). McGregor was a co-author of an article therein (41-20). The

defense expected to obtain judicial notice Iain McGregor was not only an expert in fact, but also recognized as an expert by and through IBNS.

Final Pretrial Conference

The Court conducted a pretrial conference the morning of the jury trial. The most significant developments would be the Court's view of the three key evidence issues. The Court would not take judicial notice Iain McGregor was an expert (71-12:16-13:5). This was a discretionary decision however the judge ruled the record was insufficient to allow judicial notice of an issue that was not subject to any type of reasonable dispute (71-13:20-14:11).

The discussion as to a detectable amount, and a reportable amount, brought up the 1 ng threshold for the lab to report (71-2:23-22:19). The discussion as to the accident causing the 2.2ng release (71-23:24-24:3) turned to two admissibility points – hearsay and relevance of McGregor's CD (71-25:12-18). The Court ruled the State expert would have to acknowledge the expertise of the author Iain McGregor (71-26:18-23).

Further, the Court required more than a theory, but something that's generally accepted in the scientific community (71-32:7-10). The Court has some persoral

knowledge of drug dissipation patterns, and thought THC can be detected 30 days after use (71-33:17-24). Foundation would be based upon the witnesses relying upon the document (71-35:2-6). This ruling, the requirement of reliance, would shape the contours of the limits of cross-examination.

The Court was concerned if McGregor and/or NHTSA would be more prejudicial than probative (71-35:20-21). The Court did not play the 4-5 minute CD (Ex 26) (71-39:6-9) however ruled the TV audience context raised a risk of undue prejudice (71-39:10-19).

McGregor's exercise testing was not cumulative (71-41:1-3) because no one else had done similar research (71:41:6-11). Based in part at Ex 27, being a summary, and also not peer reviewed in the scientific community, McGregor's evidence was not allowed (71-43:9-21) for lack of foundation.

Some of the points discussed were the inability of defense counsel to read from an exhibit (71-36:7-8); only paraphrasing would be allowed (71-50:2) but only if the witness agrees to the expertise of the exhibit author (71-19:6-9). Defense counsel disagreed, arguing impeachment on

cross examination can extend to documents the witness does not agree with (71-50:8-9). The trial court ruled otherwise (71-50:20-25).

Exhibit 10, a NHTSA statement, would be allowed as a general principle (71-51:16-20). Otherwise, the Court was skeptical of the probative value generally of defendant's proposed exhibits (71-51:12-16), and also reliability (71-52:6-17).

The Jury Trial

Prior to the first witness Exhibit 4, the box containing the entire NHTSA DRE manual, was deemed an exception to the hearsay rule (71-141:8-10). Whether a cross examination was allowed was deferred for further decision (71-143:25-144:3). The defense wanted to use NHTSA for impeachment (71-149:20-21), at one point the Court thought a person's eyes could fluctuate (71-149:24-150:5).

Jason Novak

Deputy Jason Novak was the initial investigating officer of a one vehicle accident (71-173:4-9). The time of the accident was 5:22 P.M., June 1, 2016 (48-Ex40-1). The photographs show the vehicle hit a tree (48-Ex 33) and

had left the road in the opposite direction of a curve (48-Ex 34). Ufferman was in pain and had blood on his forearms (71-172:14-15). His eyes were “squinty” (71-175:21), and Novak called the rescue squad (71-176:19).

Ufferman told Novak he was reaching for an object, took his eyes off the road, which caused the accident (71-192:11-12).

Novak smelled no marijuana (71-189:8), and the airbag deployed (71-189:18). Defense counsel cross-examined Novak about signs of drug impairment, however Novak was not a drug recognition expert (71-191:71-192:1-2). Novak believed the pupils were of equal size (71-193:1-2), but did not believe pupil size would be unequal if someone was under the influence of cannabis (71-194:15-24).

Defense counsel attempted to introduce the ambulance record which showed 2mm equal pupil size. The Court ruled Ex 8 could only be used for impeachment (71-194:7-13).

Novak couldn’t recall if Ufferman’s pupils were dilated (71-196:5). The attempt to cross-examine with Ex 8 (71-195:7-12) would be rejected (71-197:7-19).

The vehicle was a total loss (71-207:13) and Ufferman was struck in the chest (71-207:22).

Karen Minx

This witness took the blood sample at the hospital, and could not remember any details (71-216:24)(48-Ex40)

Adam Winkler

Deputy Adam Winkler went to St. Mary's Hospital in Rhinelander to get a blood sample. Ufferman was in the emergency room on a bed hooked up to an IV. (71-222:1-6). Ufferman was transferred to another hospital section for a scan, and told a nurse he smoked marijuana the previous day (71-223:20-23). The defendant agreed at 7:13 P.M. to take a blood sample. (49-Ex 39).

Winkler is not a drug recognition expert (71-229:2). The sample was taken at 7:30 P.M. (48-Ex 40). The result was zero ethanol and 2.2 ng Delta-9 (48-Ex 41).

Ufferman described a steel plate in his neck as a physical defect (48-Ex 38-1)(71-232:6-8). The defendant described the cause of the accident as **"I was trying to grab something that I dropped and went into the ditch"** (48-Ex 38-2).

William Johnson

William Johnson has been with the State Laboratory of hygiene for 27 years (71-235:1-2)(48-Ex32).

There was a spreadsheet in the laboratory that estimated the time of last use in this case was just under two hours prior to 7:30 P.M. (71-241:24-242:10). That spreadsheet was not brought to trial.

Johnson is not a drug recognition expert and did not believe using cannabis would have a tendency to make pupil size unequal (71-242:16-24), but it is possible cannabis use had a tendency to make pupils dilate (71-242:25-243:2). Johnson generally recognized NHTSA as accurate with respect to drug recognition (71-244:10-24).

Exhibit 4, (84-Ex4) the NHTSA DRE manual, was offered in its entirety (71-246:11-15). Exhibits 5, 6, 7 and 10 are portions of Exhibit 4. Cross examination as to Ex 5 (71-245:1-7) was deferred pending voir dire on scope of Johnson's expertise. (71-248:3-24). The voir dire found Johnson to be an expert in the areas of human response to THC (71-252:20-25).

Johnson agreed if pupils are of equal size, that is a normal finding (71-254:12-14). Dilated pupils is caused by cannabis (71-255:11-15). Johnson did not remember what a normal pupil size was (71-256:2-5). A dispute developed if Ex 7 (71-255:18-21), as to what NHTSA considers a normal pupil size, (71-256:22-24) could be used on cross-

examination. The jury was excused. (71-257:18)

The Court inquired of the existence of a medical record that showed what Ufferman's pupil sizes were (71-258:9-13) Ex 9, the ambulance record, had an equal 2mm entry. (84-Ex 8-4). Exhibit 9 is an enlarged portion of Exhibit 8. The Court would exclude Exhibit 8 without a live witness to lay the foundation for the entry. (71-261:-262:4). A distinction was drawn between use and admission to use Ex 8 (71-263:17-21).

The ambulance entry had to be introduced through some type of witness (71-266:24-25). Defense counsel was not allowed to read from the exhibit, that would make defense counsel a witness (71-270:20-23) Without Exhibit 8's pupil size, defense counsel could not tie the relevance of defendant's on the scene pupil size to the normal pupil size of NHTSA in Exhibit 7 to the case (71-277:14-20).

The voir dire turned to Exhibit 7 (71-272:18-22). William Johnson gave a final opinion he did not know what normal pupil size in daylight would be, and would not rely solely on Exhibit 7 to answer that question (71-273:19-274:5). Defense counsel argued NHTSA by definition was reliable (71-274:8-12).

The Court reached a decision during voir dire on the

use of Exhibits 8 and 7. Cross-examination thereon was denied. (71-274:23-275:9). The Court thought, since the testimony was the pupils were of equal size, the line of questions was cumulative (71-278:23-279:5). Defense counsel needed a normal and equal finding, a factor not specified in the evidence. NHSTA Ex 7 would add that factor (71-279:22-280:1). The Court maintained its position, (71-280:8-13) thinking the issue not significant (71-279:13-16). The jury returned (71-280:22).

THC is stored in fatty tissue (71-289:24-25). The question about exercise placing the body under stress resulted in a voir dire (71-290:1-18). The Court conducted a voir dire as to the qualifications of the witness on this point (71-291:10-297:17). The witness was not qualified to answer questions as to release of THC from stored fat caused by stress.

Cross-examination with respect to Exhibit 10 resulted in another line of voir dire questions by the Court (71-299:3-300:5). The Court allowed limited further questioning. The NHTSA passage in Ex 10 was generally agreed to (71-302:12-16). A one ng threshold is a necessary prerequisite for Delta-9 lab reporting (71-303:24-304:3).

Johnson maintained the two hour time (5:30 P.M.) was an estimate (71-305:18-32). The question as to marijuana smell accompanying the last use was determined irrelevant (71-306:12-13).

The hypothetical question about stress from the accident being a possible cause of THC tested two hours later was outside Johnson's expertise (71-307:2-7). Johnson was unable to answer a hypothetical question if Ufferman was using marijuana at the time of the accident his eyes would so indicate (71-307:21-308:12). Johnson would not be surprised to see some dilation in such a case (71-308:13-16).

The jury left the courtroom (71-311:19).

Scott Ufferman

Defendant Scott Ufferman worked as a mason for 20 years (71-318:19-319:1). The day of the accident he was working for Herb Daniels, but went home to get a screw for a saw (71-319:19-20). There was loose gravel (71-320:13-321:1). He dropped a cell phone and overdrove the corner, losing control on the gravel (71-320:18-321:1). The vehicle was totaled (71-325:10-14). His sternum was cracked (71-322:19-22).

Ufferman used marijuana the day before the accident (71-325:15-21).

His prior health problems of a plate in two neck bones (71-324:22-325:9) partial disc removal and thoracic compression fracture cause Ufferman to use THC for pain relief. (71-325:9:18)

The Sentence

The twelve member jury found the defendant guilty (47). The sentence was 180 days in jail, 30 month revocation and a fine of $2,536 and a one year IID (53).

ARGUMENT

I. THE PUPIL SIZE ENTRY WAS A ROUTINE BUSINESS RECORD WITH NO CHALLENGE TO ACCURACY.

The standard of review for the decision by the trial court to require Melinda Chaney to testify live to provide a foundation for Exhibit 8 is an erroneous exercise of discretion. State v. Pittman, 174 Wis.2d 255, 268-69, 496 NW2d 74 (1993). The defendant sought to introduce the entry therein which stated **"Eyes-left: 2-mm" "Eyes-right:2-mm."** Circumstances suggest Melinda Chaney used a pupilometer. (84-Ex5-3) There is no challenge to the accuracy of this measurement.

The ambulance record was filed in compliance with §908.03(6m)(b)1, and was self-authenticating and self-identifying. §909.02(11). Clinical and non-diagnostic findings are routine entries which are business records for purposes of §908.03(6). State v. Rundle, 166 Wis.2d 715, 728-29, 480 NW2d 518 (Ct. App. 1992). Using the pupilometer by EMT-intermediate, Melinda Chaney, generated a clinical and non-diagnostic objective finding.

The Circuit Court was required to articulate an inaccuracy or irregularity in the record to support the requirement of a live witness. Id.n6. No such factor appears of record.

The Circuit Court's concern reading the entry would make defense counsel a witness is inapplicable since the entry was admissible as a business record. State v. Ellington, 288 Wis.2d 264, 278, 707 NW2d 907, 2005 WI App 243, ¶13 (Ct. App. 2005).

A discretionary determination which lacks the necessary explanation of record constitutes a failure to exercise discretion. State v. Hydrite Chemical Co. 220 Wis.2d 51, 64-65, 582 N.W.2d 411 (Ct. App. 1998). An independent review of the record is required, State v. Pittman, 174 Wis.2d 255, 268, 496 NW2d 74 (1993). There is no challenge to the accuracy of the measurement. State v. Ellington, 288 Wis.2d 264, 280, 707 NW2d 907, 2005 WI App 243 ¶16 (Ct. App. 2005). The decision not to admit the pupil size entry at Exhibit 8 into evidence was an erroneous exercise of discretion.

II. THE SCOPE OF IMPEACHMENT OF AN EXPERT IS NOT LIMITED TO WHAT THAT EXPERT DID OR WOULD RELY UPON.

The State's expert William Johnson during direct examination gave an opinion the most likely time of last marijuana use would have been just short of two hours before collection. (71-241:24-242:7) Johnson also observed typically cannabis is expected to dilate pupils (71-255:11-15).

The defense sought to impeach that opinion with evidence of what the actual pupil sizes were at Exhibit 8. The defense intended to impeach Johnson's opinion the pupil sizes were not dilated. According to NHTSA Exhibit 7, normal pupil size under direct outdoor light ranges from 2.0 to 4.5 mm. Ufferman wanted to introduce Exhibit 7 to prove his pupils were not dilated, but normal. (71-277:21-23)

After a voir dire William Johnson's expertise was determined broad enough to be questioned about pupil size. (71-252:20-25). The Circuit Court's evaluation of Johnson's expertise is reasonable. State v. Chitwood, 369 Wis.2d 132, 139, 879 NW2d 786, 2016 WI App 36 ¶9 (Ct. App. 2016). William Johnson could not remember what the normal pupil range was. (71-265:2-5) This prompted another voir dire.

The witness explained during voir dire he would not solely rely upon Exhibit 7 to form an opinion as to range of normal pupil size (71-274:3-4). Exhibit 7 could not be used on cross-examination. (71-274:23-275:9) The essence of the Circuit Court's position was cross-examination was immaterial as to an exhibit upon which the expert neither did, or would, rely upon to form an opinion.

Defendants can challenge a State's expert's opinion by cross-examination as to completeness, or by impeaching evidence. State v. Walstad 119 Wis.2d 483, 518, 351 NW2d 469 (1984). The scope of cross-examination as to completeness becomes irrelevant when the expert witness neither has or would rely upon the exhibit to form an opinion. Knoll v. State 55 Wis. 249, 255, 56 NW 369 (1882).

The defense sought to impeach Johnson with Exhibit 7. Unlike cross-examination as to completeness of an opinion, cross examination for impeachment is not limited by what the expert would rely upon. Impeachment from a treatise would not depend on William Johnson having been willing to rely on that treatise. State v. Watson 64 Wis.2d 264, 274, 219 NW2d 398 (1974).

One form of impeachment is contradiction on a material fact. Rogers v. State 93 Wis.2d 682, 690, 287 NW2d 774 (1980). Defense counsel contemplated using treatises for impeachment (41-1,2) **"I can impeach him with the document if he disagrees with it."** (71-50:8-9) **"I can ask him if he agrees with what NHTSA has determined."** (71-260:21-22) The Circuit Court erred by limiting impeachment to the

domain of reliance set by the witness. Limiting impeachment to what the witness considers relevant nullifies the fifth aspect of Rogers.

This error is harmless if Exhibit 7, and the opinion therein was not admissible. Defendant could use a copy instead of an original issue. Lievrouw v. Roth, 157 Wis.2d 332, 354n8, 459 NW2d 850 (Ct. App. 1990).

Exhibit 7 is self-authenticating and self-identifying, as a part of the entire publication at Exhibit 4. §909.02(5). Obtaining a copy of Exhibit 4 from NHTSA's website is sufficient identification and authentication of the entire copy of the publication. Williams v. Long 585 F. Supp. 2d 679, 689 (D.Md.2008).

Exhibit 4 is admissible both as a government publication, §908.03(8), and a learned treatise. §908.03(18). Lievrouw v. Roth, 157 Wis.2d 332, 355n9, 459 NW2d 850 (Ct. App. 1990). Lievrouw, as applicable to a government publication, was upheld in Sullivan v. Waukesha County 218 Wis. 2d 458, 472, 578 NW2d 596 (1998).

NHTSA publications are within the domain of §908.03(8) and remain admissible as to opinions therein which are reliable. Guild v. General Motors Corp. 53 F. Supp 2d 363, 366 (WD-NY 1999). The opinion on pupil size at Exhibit 7

is part of the twelve step drug recognition process, which has been determined to be reliable. State v. Chitwood, 369 Wis.2d 132, 155, 879 NW2d 786, 2016 WI App 36 ¶34 (Ct. App. 2016).

William Johnson recognized NHTSA as authoritative. (71-243:3-244:24). State v. Morgan 251 Or. App. 99, 107, 284 P3d 496 (Ore. Ct. App. 2012). The reliability of the author, NHTSA, is similar to the Wisconsin Department of Transportation for purposes of §908.03(18) foundation. Lievrouw v. Roth, 157 Wis.2d 332, 355n9, 459 NW2d 850 (Ct. App. 1990). When used on cross examination for impeachment filing forty days prior to trial was not necessary for Exhibit 7 to be admitted as substantive evidence. Asani v. Cascade Mountain, Inc. 223 Wis. 2d 39, 50, 588 NW2d 321 (Ct. App. 1998).

Exhibit 7 contradicted William Johnson's opinion the time of the last use was just before the accident with evidence pupil sizes were normal. An erroneous exercise of discretion occurred through an error of law limiting impeachment to the domain of reliability set by the witness. State v. Hutnik 39 Wis. 2d 754, 763, 159 NW2d 733 (1968).

An independent review of the record would allow cross-examination. This a strict liability offense. State v. Luedtke 362 Wis. 2d 1, 45, 863 NW2d 592, 2015 WI 42 ¶77 (2015). A necessary, and only witness to admit the test result was William Johnson. Bullcoming v. New Mexico 564 US 131 S Ct. 2705, 2710, 180 L. Ed2d 610 (2011).

The scope of cross-examination when the State's strict liability case relies upon one witness is very broad. Rogers v. State 93 Wis.2d 682, 691, 287 NW2d 774 (1980). Limiting cross examination to deny impeachment with Exhibit 7 was an erroneous exercise of discretion. Ufferman next sought to impeach the day of last use.

III. IAIN MCGREGOR IS SUFFICIENTLY RECOGNIZED AS AN EXPERT FOR PURPOSES OF JUDICIAL NOTICE THROUGH §908.03(18).

William Johnson opined Ufferman used marijuana the day of the accident. (71-242:8-10) Ufferman denied this (71-323:16-17) and the State was skeptical (71-332:14-19)(71-341:15-21). Had Ufferman last used the day before, one explanation for the 2.2 ng was the research of Iain McGregor. Similarly, McGregor's subjects used the day before, passed the test prior to 35 minutes of exercise, and tested positive two hours later. The test is supposed to relate to the blood content at time of driving. Luedtke *supra.*

Ufferman sought to impeach Johnson's position the test fairly represented last use on the day of the accident with Iain McGregor's ABC presentation.

The defendant denies using marijuana the day of the accident and attributes the 2.2 ng test to Delta-9 released from fat cells by trauma from the accident. It is not illegal for Delta-9 to be stored in fat cells. The defense could oppose the State's expert with a learned treatise as opposed to calling a live witness. In re paternity of M.J.B., 144 Wis.2d 638, 654, 425 NW2d 404 (1988). The defense also can cross-examine the State's expert with a learned treatise. Lievrouw v. Roth, 157 Wis.2d 332, 354, 459 NW2d 850 (Ct. App. 1990), and impeach therewith. State v. Watson 64 Wis.2d 264, 274, 219 NW2d 398 (1974).

In either case the learned treatise can be admitted, §908.03(18), by the Court taking judicial notice the author is recognized in the profession or calling as an expert. The defense filed a pretrial application judicial notice be taken Iain McGregor be recognized as an expert for purposes of §908.03(18). A live witness is not necessary to introduce McGregor's background. Constantino v. David M. Herzog, M.D., P.C. 203 F3d 164, 173 (2nd Cir. 2000).

The Circuit Court refused to admit Exhibit 27 into evidence.

This decision involves several factors. The first factor is whether or not Iain McGregor is in fact an expert. The Circuit Court made no determination on this point. The background of Iain McGregor is not challenged and is set forth at (Ap. 188-193).

Since the credentials are not challenged the Circuit Court was not in a position to refuse expert status. James v. Heintz, 165 Wis.2d 572, 579, 478 NW2d 31 (Ct. App. 1991). It is not necessary a live witness testify as to those credential. Constantino v. David M. Herzog, M.D. P.C. 203 F3d 164, 173(2nd Cir. 2000).

The Circuit Court ruled it was not beyond dispute whether or not Iain McGregor was recognized by other experts as an expert. (71-12:17-14:195) The record before the Court on this point is set forth at (Ap.188-197). The standard of review, normally deferential, is substantially plenary in that both the Circuit Court and Court of Appeals are reviewing the same record concerning a scientific exhibit. In re Paoli Railroad Yard PCB Litigation 35 F3d 717, 749 (3rd Cir. 1994).

The facts of record indicate Iain McGregor is recognized as an expert by IBNS. The Wikipedia description of IBNS is reliable. Godoy v. E.I. duPont de Nemours and

Co., 306 Wis. 2d 226, 233, 743 N.W.2d 159, 2007 WI App. 239 ¶7 (Ct. App. 2007). Eight years prior to the September 11, 2013 press release Iain McGregor had been elected a Fellow by IBNS colleagues. A Fellow is someone who is recognized as a top scientist in the field of behavioral neuroscience and has made substantial contributions to the field of behavioral neuroscience. (A-Ap. 195) The IBNS publication for which McGregor is an author, Neuroscience and Biobehavioral Reviews, has been recognized in U.S. District Court. U.S. v. Hendrickson, 25 F. Supp. 3d. 1166, 1179, n13 (ND-Iowa 2014).

The information provided by the defendant at (A-Ap. 188-197) does not also have to be generally known within the jurisdiction. As long as the information provided by the defendant is reliable, it must be considered on the question of judicial notice. Fringer v. Venema, 26 Wis.2d 366, 371, 133 NW2d 809 (1965).

The Circuit Court would not take judicial notice Iain McGregor is recognized among experts as also being an expert. (71-12:16-13:5) The reason given (71-13:20-14:19) **"I don't believe I have enough at this point to take judicial notice of the expertise of --of—this individual."** was placed in context with the degree of recognition the Court expected.

The Court expected an author to be so well known the State's expert would already be familiar with that person. (71-14:16-19). This standard is so high it requires the defendant to rely on what the State's witnesses know.

An error of law occurred during the process of deciding judicial notice if to great a burden was placed upon the proponent. **"In making this evaluation, trial judges need not be draconian." Since the object of Rule 803(18) is to make valuable information available to the trier of fact, trial judges should not insist on a quantum of proof. . .that the proponent cannot meet."** Constantino v. David M. Herzog, M.D. P.C. 203 F3d 164, 171-72 (2nd Cir. 2000).

The original intent behind Rule 908.03(18) should be upheld. Broadhead v. State Farm Mutual Ins. Co. 217 Wis. 2d 231, 247, 579 MW2d 761 (Ct. App. 1998). The purpose behind the rule is to prevent the opposing expert from blocking use of the treatise. Wis. Rules of Evidence, 59 Wis. 2d R 294 (1974).

The burden imposed upon Ufferman was to high. The option of judicial notice is surplusage if limited by the domain of the opposing expert.

The Circuit Court did not further explain what would

have been sufficient for judicial notice to be taken. Since the reasoning of record is unpersuasive, there is an erroneous exercise of discretion. State v. Hydrite Chemical Co. 220 Wis. 2d 51, 64-65, 582 N.W.2d 411 (Ct. App. 1998).

An independent review of the record would find judicial notice of McGregor as being recognized as an expert should have been taken.

A reasonable standard is set forth by Attorney Gerald Bloch in his article (41-10-12), Learned Treatises: Medical Writings, An exception to the Hearsay Rule 40 Wis.B.Bul.33 (October 1967). Attorney Bloch describes the test as **". . . the particular author is considered to an authority. . . All it takes to qualify any one of the thousands of articles is to have a single doctor testify that the author if that particular article is an authority, no matter how discredited he and his writing may actually be in the profession."** Time magazine endorsed McGregor's article (41-13,14).

The information provided (A-Ap 188-197) is the equivalent of the single witness testimony by one expert Broadhead v. State Farm Mutual Ins. Co. 217 Wis. 2d 231,

247, 579 MW2d 761 (Ct. App. 1998). An independent review of the record would, as Time magazine did, find the author sufficiently recognized (41-13, 14).

IV. THE SCIENTIFIC CONTENT OF EXHIBIT 27 WAS NOT PREJUDICIAL FOR PURPOSES OF RULE §904.03.

The Circuit Court was concerned Iain McGregor's discussion with Will Akenton was more prejudicial than probative. (71- 35:20-21) (71-39:10-19) (71-46:19-21) As applied to an expert, Rule 904.03 requires something particularly confusing about the scientific evidence. In re Paoli Railroad Yard PCB Litigation 35 F3d 717, 747 (3rd Cir. 1994) **". . .there must be something *particularly* confusing about the scientific evidence at issue. . ."** (*emphasis in original)*. Consideration on matters of construction can be given to Federal counterpart rules. Wilson v. Continental Insurance Cos. 87 Wis. 2d 310, 316, 274 NW 2d 679 (1978).

The probative value was considered by the Court (71-51:12-15) to be **"very small**." The probative value in the type of case where a medical opinion is being offered on the issue of causation is discussed in the October 1967 Wisconsin Bar Bulletin Article by Gerald J. Bloch. (41-8-12).

Attorney Bloch commented on the consideration of what is now Rule 908.03(18) in his article "Learned Treatises: Medical Writings, An exception to the Hearsay Rule". A reason for this rule is to provide greater access to courts for people who cannot afford to hire a doctor. Lewandowski v. Preferred Risk Mut. Ins. Co. 33 Wis.(2d) 69, 76, 146 NW2d 505 (1966).

Attorney Bloch describes a group of cases which involved the question of whether trauma, or a certain degree of trauma can lead to a specified medical result. (41-10) In this case it is trauma, from the accident that leads to the release of THC from fat cells. An audio tape can qualify as a treatise similar to the written version Constantino v. David M. Herzog, M.D. P.C. 203 F3d 164, 171 (2nd Cir. 2000).

Rule §904.03 cannot apply when the probative value of the evidence is close or equal in value to its prejudicial effect. State v. Brewer 195 Wis. 2d 295, 310, 536 NW2d 406 (Ct. App. 1995). Prejudice must fit within certain categories. State v. Patricia A.M. 176 Wis. 2d 542, 554, 500 NW2d 289 (1994).

Attributing prejudice to Exhibit 27 for purposes of Rule 904.03 was an erroneous exercise of discretion for the

reason there is no complexity. State v. Hinz 121 Wis. 2d 282, 286, 360 NW2d 56 (Ct. App. 1984). The reason given for the prejudice, use in a television broadcast, actually supports the claim of simplicity.

Australian Broadcasting Company is not going to air an episode viewers would not understand. The only reason given for prejudice cannot apply, as there is nothing "particularly confusing."

There being zero prejudice of the type within Rule 904.03, the very small probative value found by the Court by definition requires admissibility. Brewer, supra.

V. MCGREGOR'S OPINION IS RELIABLE TO THE EXTENT OF SUPPORTING AN OPPOSING THEORY.

The Circuit Court found Iain McGregor's research was not scientifically reliable.

The Court required McGregor's testing procedures to have been proven reliable by a witness (71-52:6-8) (71-43:16-18); or previously recognized in the scientific community as valid (71-41:17-20). The Court required a ruling on whether the scientific community would normally find McGregor's procedures appropriate (71-42:1-6).

To be reliable, the Court ruled McGregor's treatise must be more than a theory, and **"generally accepted by the**

scientific community” (71-32:7-10). The Circuit Court erred by requiring the scientific community already generally accept McGregor’s procedures. State v. Peters 192 Wis.2d 674, 690, 534 NW2d 867 (Ct. App. 1995).

Once McGregor is qualified as an expert, his underlying theory need not be separately proven reliable. State v. Walstad 119 Wis.2d 483, 528-19, 351 NW2d 469 (1984). It was an erroneous exercise of discretion to require the treatise to have been generally accepted scientifically. Brain v. Mann 129 Wis. 2d 447, 462-63, 385 NW2d 227 (Ct. App. 1986).

The Circuit Court misapplied §908.03(18) by requiring the opinion in the treatise already be recognized in the scientific community. All that is required is McGregor, not his opinions, be recognized in the scientific community.

The focus is not on the conclusion reached by the scientist. State v. Giese 356 Wis. 2d 796, 806, 854 NW 2d 687, 2014 WI App 92 ¶18 (Ct. App. 2014). The methods used by McGregor are so basic there is no reason to require proof of preapproval of McGregor’s test procedures by the scientific community.

VI. DENIAL OF THE CROSS EXAMINATION WITH THE DEFENSE HYPOTHETICAL REQUIRES A NEW TRIAL.

The defense theory related Exhibit 8 and 7 (normal pupils) to Exhibit 27 (McGregor). This theory was described pre-trial (31-2)(71-43:5-8)(71-48:16-49). A voir dire of William Johnson defined his expertise not to be within the scope of the defense theory. (71-296:2-17). The defense hypothetical was overruled (71-306:20-307:7). Had Exhibits 8, 7 and 27 been admitted the hypothetical would have been proper. The defense was allowed to put its case in through the State's expert through hypothetical questions. Shurpil v. Brah 30 Wis.2d 388, 389, 141 NW2d 266 (1966).

The hypothetical question comparing this case to the McGregor study was within the limits of transferability for the defense of a criminal case. State v. Rice 38 Wis. 2d 344, 356, 156 NW2d 409 (1968). McGregor's two hour time frame is only eight minutes less than this time frame. No marijuana was used that day. The accident totaled the vehicle and cracked the driver's sternum. The pain continued through the test. The stress of pain is a substitute for recovery from 35 minutes on the exercise bike.

Once an expert has raised an issue, the expert can be cross-examined as to any matter embraced in the issue. Boiler v. Cofrances 42 Wis. 2d 170, 182, 166 NW2d 129 (1969). This cross examination can be based upon possibilities. Pfiel v. Kohnke 50 Wis. 2d 168, 183, 184 NW2d 433 (1971). Among those theories can be the theory proposed by defendant. Zebrowski v. State 50 Wis. 2d 715, 728, 185 NW2d 545 (1971). Such a hypothetical can reduce the weight of the State expert's opinion. State v. Berg 116 Wis. 2d 360, 368, 342 NW2d 258 (Ct. App. 1983).

The Circuit Court's reason for excluding the hypothetical was the lack of qualification of William Johnson to answer that hypothetical. The hypothetical is allowed to help explain the significance of evidence that was admitted. State v. Owen 220 Wis. 2d 620, 638, 551 NW2d 50 (Ct.App. 1996). Ironically, the release of Delta-9 post accident could be consistent with Johnson's estimate the time of last use could be one-half hour before collection (71-242:4-7). Less than 1 ng of actual Delta-9 at the time of the accident is not reportable.

The hypothetical question was excluded due to an improper view of the law. Broad cross examination of the

State's sole witness favors admissibility. Rogers v. State 93 Wis.2d 682, 691, 287 NW2d 774 (1980). Hypothetical questions based upon the evidence can be posed to an opposing expert concerning an issue raised by the expert even if that expert lacks expertise to answer that hypothetical. Owen, supra.

The evidentiary rulings concerning cross examination excluding Exhibits 8, 7 and 27 and the hypothetical question deprived defendant of the ability to present a defense. State v. Williams 253 Wis. 2d 89, 129, 644 NW2d 919, 2002 WI 58 ¶24 (2011). This is a constitutional violation and defendant can be entitled to a new trial.

Defendant must satisfy two prongs. State v. St. George 252 Wis. 2d 499, 527, 643 NW 2d 777, 2002 WI 50 ¶53 (2002). The first prong, admissibility of the treatise which entirely sets forth the defense theory, is met.

There is no compelling state interest in excluding the treatise once the treatise is admissible. Id ¶71. Defendant has satisfied the second prong and is entitled to a new trial. Id ¶72-73.

CONCLUSION

The conviction must be vacated and the case remanded for a new trial.

Respectfully submitted this 3rd day of January 2017.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief produced using the Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other three sides. The length of this brief is thirty-eight (38) pages.

Dated: January 3, 2017

/s/ Robert A.Kennedy, Jr.

Robert A. Kennedy, Jr.
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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, which complies with the requirements of §809.19 (12). I further

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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: January 3, 2017.

Kennedy Law Office

/s/ Robert A. Kennedy, Jr.
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CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail at Crandon, Wisconsin for delivery to the Clerk of Court of Appeals by first-class mail on this 3rd day of January, 2017. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify three copies thereof were simultaneously served by mail as follows:

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Dated: January 3, 2017.

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