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.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Wisconsin Cases

Other Jurisdictions

Other Authorities

Wisconsin Statutes

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ARGUMENT

I. THE STATE HAS FAILED TO DEPRECIATE THE ACCURACY OF EXHIBITS 8 AND 7 OR IAN MCGREGOR'S CREDENTIALS.

The position taken by Ufferman the record must contain a reason not to accept the pupil size measurement has not been refuted. Neither the trial court nor the State's brief provides a basis in the record not to accept the measurement of Melinda Chaney.

Contrary to the State's position at page 7 of its brief there is a record reference to a pupilometer. (84—Ex5-8). Should this Court construe the pupil size as a routine finding, there is no reason to deny admissibility. State v. Ellington, 288 Wis.2d 264, 280, 707 NW2d 907, 2005 WI App 243, ¶16(Ct. App. 2005).

Similarly, there is no basis of record to question the reliability of Exhibit 7. The twelve step DRE process had been determined reliable as of June 10, 2016 State v. Chitwood, 369 Wis.2d 132, 155, 879 NW2d 786, 2016 WI App 36 ¶34 (Ct. App. 2016). The criticism in page 11 of the State's brief the entire NHTSA manual marked at Exhibit 4 was never offered is misleading. As explained of pages 11 and 14 of Ufferman's brief, the entire original was offered

as Exhibit 4 before and during testimony. The defense satisfied its obligation pursuant to Rule 901.07.

The position of page 9 of the State's brief Ufferman does not intend to impeach William Johnson on his opinion as to time of last use is incorrect. See pages 21, 24 of Brief of Appellant.

The State's position at page 11 of its brief William Johnson is only giving a lay opinion as to normal pupil size is incorrect. Johnson had been qualified as an expert to the extent he could be cross examined as an expert concerning normal pupil size, Brief of Appellant page 21. The contention at page 11 of the State's brief "I don't know" blocks impeachment is incorrect. Experts can be impeached with contrary facts, and asked if that changes their opinion.

Exhibit 7 should have been admitted as substantive evidence pursuant to Chitwood.

At page 13 the State alleges no finding was made Iain McGregor was an expert. The alleged requirement of a live witness to provide credentials is not consistent with corresponding Federal case law. Constantino v. David M. Herzog, M.D. P.C. 203 F3d 164, 173 (2nd Cir. 2000).

The State does not challenge credentials filed with the Court. James v. Heintz, 165 Wis.2d 572, 579, 478 NW2d 31 (Ct. App. 1991) compels a finding McGregor is an expert. The State fails to challenge accuracy or transferability of these credentials to being judicially noticed as an expert.

Ufferman has satisfied the foundation requirement for the Australian press release. The next issue is relevancy through Daubert.

II. DAUBERT IS SATISFIED, TO THE EXTENT OF HYPOTHETICAL QUESTIONS BASED UPON EXHIBIT 27.

The Wisconsin Supreme Court clarified Daubert three days after Ufferman served his brief. Seifert by Scoptur v. Balink, 372 Wis.2d 525, 888 NW2d 816, 2017 WI 2 (2017). Given the developing case law Ufferman relates this case to Scoptur and the foundation concerns raised by the State.

At page 12 of its brief the State alleges foundation for McGregor's opinion must follow some type of known scientific policy and procedure to the way the testing is done. Here, McGregor is the first scientist to use this test. Ufferman has the burden by the preponderance of the evidence to show McGregor's methods were reliable ¶58.

Reliability involves a preliminary determination

whether the reasoning or methodology is scientifically valid. The final conclusion is not a material factor ¶61. General acceptance is only one factor ¶62. When a scientist's personal experiences are the basis for the test, the preliminary inquiry is more narrowly focused ¶66.

Iain McGregor performed the testing and developed an opinion from the experiment. This is an example of experience – based testimony ¶73. Expert opinion based on experience alone may constitute a reliable basis ¶77.

The State's requirement of McGregor having to follow an existing procedure is to restrictive. Novel theories can qualify under Daubert: **"(abuse of discretion to exclude doctor's testimony in products liability case based on his experience alone, but noting that medical procedure had not addressed a similar situation)"** ¶80 n36. Expert testimony does not have to be subject to peer review ¶83.

The position of the State and Circuit Court Ufferman was required to **"provide a foundation that was agreed upon follows some type of known scientific policy and procedure"** was overruled on January 6, 2017.

The Scoptur Court held at ¶84 **"Requiring an expert to demonstrate a familiarity with accepted medical literature or published standards in order for the testimony to be**

reliable in the sense contemplated by Federal Rule of Evidence 702 is an erroneous statement of the law." The Circuit Court required McGregor follow pre-existing science. (71-32:9-10)(71-42:5-6)(71-43:14-15)(71-52:7-8) This ruilng is based upon an error of law and therefore an erroneous exercise of discretion ¶93.

Defense counsel is not required to ask a witness subsequent to the pretrial ruling if McGregor is authoritative. That would be tantamount to allowing the opposing expert to control admissibility contrary to Wis. Rules of Evidence, 59 Wis. 2d R 294 (1974).

The State's opposition to the hypothetical question if this accident could cause THC stored in fat cells to be released is highly relevant. Contrary to the position at page 15 of the State's brief, the severity of the accident is in evidence.

Defendants can apply scientific research such as Iain McGregor to traumatic events. State v. Owen, 202 Wis.2d 620, 638, 551 NW2d 50 (Ct. App. 1996). William Johnson also opined the THC was used the day of the accident. This opinion is overlooked at page 14 of the State's brief. McGregor's opinion is proper impeachment of William Johnson's opinion as to the last day of use.

Defendant concludes by emphasizing McGregor need only meet the standard of scientific possibilities. Pfiel v. Kohnke 50 Wis. 2d 168, 183, 184 NW2d 433 (1971).

CONCLUSION

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

Respectfully submitted this 18th day of April 2017.

/s/ Robert A. Kennedy, Jr.

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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 seven (7) pages.

Dated: April 18, 2017

/s/ Robert A.Kennedy, Jr.

Robert A. Kennedy, Jr.
Attorney For Appellant

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

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: April 18, 2017.

Kennedy Law Office

/s/ Robert A. Kennedy, Jr.
Robert A. Kennedy, Jr.
Attorney For Appellant

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 18th day of April, 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: April 18, 2017.

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