RECEIVED
04-24-2017
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP001774CR

STATE OF WISCONSIN,
Plaintiff – Respondent,

v.

Scott F. Ufferman,
Defendant – Appellant,

ON APPEAL FROM A JURY TRIAL CONVICTION AND THE TRIAL COURT RULINGS DURING TRIAL IN THE CIRCUIT COURT OF FOREST COUNTY, CASE NUMBER 2015-CM-146
THE HONORABLE WILLIAM F. KUSSEL, JR., PRESIDING

RESPONSE BRIEF OF PLAINTIFF – RESPONDENT

CHARLES J. SIMONO
Forest County District Attorney
State Bar No. 1030774

Forest County Courthouse
200 E. Madison Ave
Crandon, Wisconsin 54520
Office: (715) 478 – 3511
Fax: (715) 478-3490
Charles.Simono@da.wi.gov

Attorney for the Plaintiff-Respondent

TABLE OF CONTENTS

Page

STATEMENT ON ORAL ARGUMENT AND PUBLICATION……...…… 1

STATEMENT OF THE CASE …… 1

STATEMENT OF FACTS…… 3

ARGUMENT……...……. 7

I. THE DEFENDANT WAS NOT DENIED ENTRY OF THE RESCUE SQUAD RECORD CONCERNING PUPIL SIZE. …….…… 7

II. IMPEACHMENT OF AN EXPERT WITNESS CAN BE LIMITED TO THEIR RELIANCE UPON OTHER REPORTS OF EXPERTS NOT IN EVIDENCE AND SUCH REPORTS MAY BE INTRODUCED FOR PURPOSES OF IMPEACHMENT AND VERBAL COMPLETENESS. …. 8

III.. THE DEFENDANT FAILED TO ESTABLISH THAT IAIN MCGREGOR SHOULD BE RECOGNIZED AS AN EXPERT AND THAT ANY OF HIS OPINIONS WOULD BE RELEVANT TO ASSISTING IN THE DEFENDANT'S THEORY…… 12

IV. THE DEFENDANT WAS NOT ENTITLED TO USE OF IAIN MCGREGOR'S FINDINGS WITHIN A HYPOTHETICAL QUESTION OF THE STATE'S WITNESS AND THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL. ……. 13

CONCLUSION……. 15

CASES CITED

State v. Rundle,
166 Wis.2d 715, 480 N.W.2d 518 (Ct. App. 1992)……..… 7, 8

Karl v. Employers Ins.,
78 Wis.2d 284, 254 N.W.2d 255 (1977……..…… 9

State v. Berg,
116 Wis.2d 360, 342 N.W.2d 258 (Ct. App 1983)…….……. 13, 14

State v. Rice,
38 Wis.2d 344, 156 N.W.2d 409 (1968)……... 14

SATUTES CITED

Wis. Stat. § 346.63(1)(am)..……..……... 1

Wis. Stat. § 904.03 ..……..…….....3

Wis. Stat. § 904.03(24) …….. 3

Wis. Stat. § 904.03(6) …….. 4

Wis. Stat. § 904.03(8) …….. 4

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP001774CR

STATE OF WISCONSIN,
Plaintiff – Respondent,

v.

Scott F. Ufferman,
Defendant – Appellant,

ON APPEAL FROM A JURY TRIAL CONVICTION AND THE TRIAL COURT RULINGS DURING TRIAL IN THE CIRCUIT COURT OF FOREST COUNTY, CASE NUMBER 2015-CM-146
THE HONORABLE WILLIAM F. KUSSEL, JR., PRESIDING

RESPONSE BRIEF OF PLAINTIFF – RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established principles to undisputed facts.

STATEMENT OF THE CASE

The Defendant was originally charged in Forest County Case 2015-CM-146 for the offense of Operating a Motor Vehicle With a Restricted Controlled Substance 3rd Offense contrary to Wisconsin Statute § 346.63(1)(am).

An initial appearance was held on September 2, 2015 at which time the defendant appeared without an attorney, he was given a $2000.00 signature bond and an adjourned initial appearance was scheduled for October 7, 2015.

On or about October 7, 2015 an adjourned initial appearance was held at which time the defendant again appeared without an attorney. The matter was adjourned until October 21, 2015.

On or about October 21, an adjourned initial appearance was scheduled at which time the defendant appeared with attorney Robert Kennedy. The defendant filed a request for substitution of judge.

On or about November 13, 2015 the Honorable William F. Kussel Jr., received the Judicial appointment to preside over the case.

On or about January 15, 2016 another adjourned initial appearance was held whereby a not-guilty plea was entered and the matter was scheduled for a final pretrial on March 31, 2016.

On March 31, 2016 the final pretrial was conducted at which time no resolution was presented to the Court and the matter was scheduled for a Jury Trial to commence on June 30, 2016.

On June 30, 2016 a Jury Trial was conducted and the defendant, Scott Ufferman was found guilty as to the one count of Operating a Motor Vehicle with a Restricted Controlled Substance.

On June 30, 2016, the Honorable William F. Kussel, Jr., entered a judgment consistent with the Jury verdict and sentenced the defendant to 190 days of incarceration, fined the defendant $3264.00, ordered a 30 month driver's license revocation and a 12 month ignition interlock requirement.

On June 30, 2016 the defendant was immediately remanded to the Forest County Jail to commence his 190 day incarceration period.

STATEMENT OF FACTS

On June 30, 2016 at approximately 8:25 a.m. the parties, being the State of Wisconsin and the defendant, Scott Ufferman and his attorney assembled before the court for pretrial motions.

Defense Attorney, Robert Kennedy, advised during the pretrial motions that his witness, Wanda Cheney [referred to as Melinda Cheney in the Defendant's appellate brief] was on the rescue squad and that she did not want to attend the trial due to a personal issue. (8: 23-25). Attorney Kennedy further indicated that he told Ms. Cheney that she was not necessary. (8:23-25; and 9: 1).

Defense attorney Kennedy confirmed that he wished to use his proposed treatises to question the State's witnesses and that the defense did not have any witnesses available to testify to the same to which the State objected throughout the pretrial motions citing 904.03 (11: 11-19). Attorney Kennedy later noted that the defense did not have any witnesses present to testify as he [the defendant] can't afford anything like that. (40: 8-11). The trial court stated that, under such circumstances, the expert witness is asked if they consider the treatise to be an authoritative document or authoritative author and document. (11: 20-23). Defense attorney Kennedy stated that he was uncertain as to whether the State's witness would agree that Iain McGregor (Defendant's exhibit 27) is authoritative. (11:24-25; and 12:1).

Defense Attorney Kennedy opined that his exhibit 27 author was in fact an expert, in part, because the author, Iain McGregor was a presenter at an IBM conference. (13:6-8). Kennedy continued by stating that McGregor had to be an expert as IBM is a national organization and McGregor could not be a presenter if he was not an expert. (13:11-13). Kennedy later argued that his exhibit 27 and associated materials may get in through a hearsay exception under 908.03(24) as a catch all exception. Kennedy continues by stating none of our exceptions apply as

the materials are not private under 908.03(6) and the organization and materials are not totally government controlled under 908.03(8). (25: 6-11).

The trial court, through a series of questions and answers from attorney Kennedy, attempted to understand the intended use of the defendant's exhibit 27 and related Iain McGregor materials. The trial court stated that, as they understood the argument, there would be a State expert witness and that Kennedy would like to get the expert to agree that the author of his exhibit 27 and related materials is an expert. The trial court continued by stating that should the State's expert agree then Kennedy wants to ask if the levels of tetrahydrocannabinols can go up in the system due to different reasons. The trial court concluded their understanding by stating that if the State expert says they can then the final question will be if it is possible that there would be no tetrahydrocannabinols in the system at the time of the crash. (22:13-24). Kennedy agreed with the court as to the line of questioning and understanding by the court.

The trial court further questioned Kennedy as to whether he knew what the answer would by the State's expert to which **Kennedy replied that the State's expert is not going to know. Kennedy continued by stating that the State's expert won't know the answer because the testing by the federal government has a weakness which is another exhibit he has from NHTSA as the testing flaw is that no one can tell when the substance was ingested.** (23: 2-9). **Kennedy later went on to state that Iain McGregor is the only guy that has ever tested for the presence of tetrahydrocannabinols after physical activity and other means. Kennedy exclaimed that nobody has ever tested that but McGregor. (41: 5-25).**

The trial court explained its concern by reminding Kennedy that normally a party, such as the defense, would bring in people and scientists. The people that are conducting the tests and can explain the technology and further explain how they are achieving their results. (42:1-6). The trial court, during the pre-trial motions denied the use of exhibit 27 due to the fact that the defendant was not able

to provide a foundation that is agreed upon that follows some type of known scientific policy and procedure as to the way the testing is done. The trial court continued by stating that the defense is telling the court that the testing is a new procedure and the defendant has no one present to testify as to how the procedure is done. (43: 9-21).

During the trial, the court held that the State's expert, William Johnson, would be considered an expert in the areas of the biological and the physical response that the body has to some of the common controlled substances, including but not limited to the active ingredients in tetrahydrocannabinol. (25: 20-25). Kennedy, with the holding of the court regarding William Johnson, proceeded to cross-examine him regarding the effects that tetrahydrocannabinol has in regards to pupil size. (254 – 257). William Johnson did testify that the use of cannabis is expected to dilate the pupils. (255: 11-15). William Johnson, upon his own recollection did not know the normal range of pupil sizes. The State objected several times to the defense attempts to ask questions about pupil size due to the lack of foundation and the court sustained said objections. (256: 2-25; and 257: 1- 4) The trial court elected to have a voir dire done of the witness outside the presence of the jury. (pages 257 – 280).

The trial court first asked if there was any document that showed the size of the defendant's pupil size to which Mr. Kennedy advised that he has an exhibit in record. (258: 9-25). The trial court asks Mr. Kennedy two questions, the first being now that you have a document that can be admitted outside the hearsay rule, but with that how are you going to introduce the document? The second question being a follow up in regards to the State's expert, William Johnson, asking how the defense can cross examine him on pupil size when he does not recall normal pupil size ranges. (259: 4-25). The trial court agreed with Mr. Kennedy that the emergency report showing the pupil size of the defendant does in fact fit a hearsay exception but Mr. Kennedy did not have anyone, aside from his client to present the document. The trial court asked Mr. Kennedy if he wanted to introduce the

document concerning pupil size of the defendant through the defendant himself to which Mr. Kennedy responded that “it wouldn’t do him any good”. (264: 1-12).

During the voir dire of William Johnson, he indicated that the exhibit given to him by Mr. Kennedy was not sufficient to allow him to provide an expert opinion and that more information would be needed. (271: 14-25; - 275: 1-9).

The trial court, through later voir dire of William Johnson, held that he does not have an expertise to answer questions regarding how drugs are incorporated into the fat of the body and how they are released back into the body or otherwise is outside of his expertise and therefore will not allow him to give an opinion on that. (297: 2-17).

Mr. Kennedy proceeded to cross examine William Johnson regarding ingestion of drugs and the ability to later determine, if at all possible, the time the ingestion took place based on lab results. (304: 1-25). William Johnson, again while on cross examination, indicated that he estimated that the defendant ingested the marijuana roughly a half an hour to five or six hours prior to the testing but that just under two hours was the targeted time of the most recent use. (305: 1-6). William Johnson further stated that he is not testifying to any degree of scientific certainty that he [the defendant] ingested marijuana within that range as it is an estimate but the testimony regarding the test results showing the presence of the delta 9 he is testifying to a reasonable degree of scientific certainty. (305: 24-25; - 306; 1-6).

The defendant waived his constitutional rights to remain silent and testified at his the jury trial. (311: 20-25 to 315: 1-13). The defendant, while on direct examination, admitted that he has used marijuana throughout his life. (324: 9-11). The State asked the defendant to be more specific as to his marijuana use based on the defense counsel opening statement remark that the defendant smokes marijuana all the time. (326: 23-25). The defendant indicated that in the course of a year he probably smokes marijuana two-thirds of the year. (327: 1-2). The defendant further agreed that he was driving a motor vehicle on a road prior to

having an accident on the day in question associated with the trial. (327: 5-7). The defendant further acknowledged that he did not have any information to refute the expert testimony given by the State witness as to the level of delta-9 in the defendant's body as reported by the lab results. (327: 8-25).

ARGUMENT

I. THE DEFENDANT WAS NOT DENIED ENTRY OF THE RESCUE SQUAD RECORD CONCERNING PUPIL SIZE.

The defendant's first argument is that the trial court used an erroneous standard of review regarding the process in which rescue squad sheets associated the defendant's pupil size should be admitted. All parties agreed that the document met an exception to the hearsay preclusion but opinions differed as to how the document could be presented. The defense counsel, Mr. Kennedy had released the author of the document from her subpoena prior to trial. The trial court attempted to alleviate the problem by suggesting that Mr. Kennedy have the defendant testify to the document to which Mr. Kennedy indicated such testimony would do him no good. (264: 1-12).

The State objects to the defendants use and reference to any pupilometer being used on the defendant to determine his pupil size and also objects to who, if anyone used said device as neither are part of the record nor of the exhibit seven (7) in which the defendant is referencing on page 19 of his brief.

Based on the case law cited and relied upon by the defendant, it appears that he failed to complete the analysis of the State v. Rundle court 166 Wis. 2d 715, 728-729, 480 N.W.2d 518 (Ct. App. 1992). The Rundle court clearly noted that a document to which, as the defense relies, is clinical and non-diagnostic evidence that is any information that would not be disputed by trained medical personnel. Id. The Rundle court highlighted that such clinical evidence is based on objective findings such as temperature, x-ray results, and lab test results and

evidence that is not part of this would be impressions, conclusions and diagnoses of medical staff. Id. The Rundle court noted that any such error by the court in the admission of such a non-diagnostic document may be a constitutional error but that such an error would be considered harmless if the court can declare the belief that it was harmless beyond a reasonable doubt because there is no reasonable possibility that the error contributed to the conviction. Id. at 729-730.

The State does not concede that the document is non-diagnostic evidence that would have been created by a trained medical person as no evidence is in the record as to establish the credentials and/or role that Ms. Cheney has and is capable of performing. Moreover, the defendant did testify and was afforded the trial court the opportunity to testify to the document. The defense attorney refused that opportunity as noted above despite the fact that the defendant did testify later in the day. Additionally, The State believes that they are entitled to cross-examine Ms. Cheney as to the process in which she conducted her evaluation of the defendant and was opposed to the entry of the document without a witness with personal knowledge as to the information in the exhibit.

The State respectfully requests the Court to find against the defendant and in doing so hold that the document in question was properly excluded by the trial court absent the opportunities intentionally avoided by the defendant that were available. Alternatively, should the Court determine that the document was non-diagnostic and part of a clinical non-diagnostic finding, the State respectfully requests that a finding against the defendant still be made as any potential constitutional error was harmless in nature beyond a reasonable doubt because there is no reasonable possibility that the error contributed to the conviction.

II. IMPEACHMENT OF AN EXPERT WITNESS CAN BE LIMITED TO THEIR RELIANCE UPON OTHER REPORTS OF EXPERTS NOT IN EVIDENCE AND SUCH REPORTS MAY BE INTRODUCED FOR PURPOSES OF IMPEACHMENT AND VERBAL COMPLETENESS.

Under Wisconsin case law it has been held that whenever an expert relies on the reports of other experts to which said reports are not in evidence, those reports in their relevant and competent portions may be introduced in evidence, by the party adverse to the expert, for purposes of impeachment and verbal completeness. Karl v. Employers Ins., 78 Wis.2d 284, 300, 254 N.W.2d 255 (1977).

The defendant, through his brief mentions opinions made by the State expert as to both an approximate time frame as to when the tetrahydrocannabinol was ingested and to pupil size. However, it appears through the subsequent argument following the mention of both opinions that the defendant is focused on and challenging their right to impeach the expert as to pupil size only and thus the State shall address this issue only.

The defendant, through his attorney Mr. Kennedy, cross examined the investigating deputy, Jason Novak, in regards to his training and expertise in determining if someone is impaired and what he looks for if someone is in an accident. (190:10-25, - 193: 1-15). During the cross examination of Deputy Novak, he testified that it was his belief that the defendant's pupils were equal size at the time he arrived at the scene of the accident. (193: 13-15). Mr. Kennedy attempted to solicit testimony from Deputy Novak regarding the defendant's exhibit (7) seven to which the State objected. The trial court asked Mr. Kennedy as to what his purpose was for attempting to question the deputy in regards to the exhibit and specifically asked if it was for impeachment purposes to which Mr. Kennedy responded "Well…..it could be." (193: 13-25, and 194: 1-20). The court upheld the State's objection. The defendant, through cross examination of deputy Novak established that the defendant's pupil sizes were of equal size.

The defendant also cross examined the State's expert, William Johnson, regarding pupil sizes. The defendant was handed defendant's exhibit 10 which was a three (3) page excerpt from the National Highway Traffic Safety Administration (NHTSA) manual. (253: 10-21). William Johnson noted that he was holding a three page exhibit and that the third page is numbered as page ten

(10). (253: 10-21). Mr. Kennedy questioned William Johnson regarding the findings within the four corners of exhibit ten (10). Mr. Kennedy specifically asked "if someone has unequal pupil size, is that an indication that they are under the influence of THC?" (253: 25, and 254: 1-2). William Johnson responded by noting that exhibit 10 does not agree with the question posed by Mr. Kennedy. William Johnson read aloud a portion of the three page exhibit (10) stating that The document indicates that a person is to look at the subjects eyes to determine whether the pupils appear to be equal. If the pupils appear to be unequal, a further check will be necessary. (254: 1-8). William Johnson, up to this point, was not giving his own opinion but was reciting from the defense exhibit (10). William Johnson did agree, based on his own experiences, that if pupils are of equal size that such is a normal finding. (254: 12-14). William Johnson, in testifying to his own experiences, was not asked to give an expert opinion nor was he questioned as to what sources comprised his own personal experiences.

William Johnson did not give any testimony, expert opinion or otherwise, as to the what the normal range of pupil size would be other than he stated that he does not remember them (256: 2-5). The trial court, in determining that William Johnson was an expert regarding the biological and physical response the body has to some common controlled substances, including marijuana, discussions and admissions were made by William Johnson that his training in the area of physical responses is from quite some time ago and that he has a lot of minute details that his brain would never remember completely. (251: and 252: 1-9). The trial court confirmed with William Johnson that he was aware that the response of "I don't know is an acceptable answer" to which he responded in the affirmative. (252: 1 -13).

The trial court held a voir dire of William Johnson outside the presence of the jury whereby he questioned defense counsel as to how Mr. Johnson can be cross-examined on the matter of pupil size when he has clearly stated that he does not recall. (259: 21-25).

William Johnson was shown exhibit (7) and asked if he has ever seen it before to which he responded that he has not seen those exact three pages that comprised exhibit (7) but has seen similar title pages. (271: 19-24). William Johnson acknowledged that his training regarding pupil size would have been from similar documents that the three page excerpt comprising exhibit (7) appears to be but that there are many different versions. William Johnson continued by stating that he is hesitant to just receive a few pages stapled together which does not represent the entirety. (272: 1-8). William Johnson further testified that if he is so careful to read every notation because he is afraid of being misrepresented in what he says. (272: 8-13).

William Johnson went on to state that at 50 years of age he does not remember things like he used to and that he refuses to answer questions when being asked specific ranges that were used in his training in such a manner to just spit them out. (273: 6-12). William Johnson, upon inquiry by the trial court, noted that if he were in his lab and asked to find the normal pupil ranges that he would look at manuals that existed in the laboratory, printed versions of it, that he would go online, confer with colleagues in the business and coworkers across the country. (273:19-25, and 274: 1-2). The court asked if exhibit (7) in itself was sufficient for William Johnson to provide an opinion today to which he responded "No". (274: 3-5).

Defense counsel never offered to provide William Johnson with the entirety of the publication in which the stapled three page exhibit (7) was purported to come from in an effort to possibly alleviate certain concerns of the State's expert. Additionally, defense counsel never inquired as to whether William Johnson was comfortable offering a lay opinion based on his experiences as they had done in regards to pupil dilation as referenced above. (254: 12-14).

William Johnson never gave an opinion as to pupil size and subsequently did not rely on any documents to give his answer being that he did not recall such size range. The defense wishes to impeach an answer of "I don't know" contrary

to what the Wisconsin case law provides. The remedy at trial would have been for the defense to present their own witness that was familiar with the information in which they wished to present to the jury.

The State respectfully requests that the Court find against the defendant and in doing so hold that under the current facts that he was not entitled to impeach the State's Expert witness.

III. THE DEFENDANT FAILED TO ESTABLISH THAT IAIN MCGREGOR SHOULD BE RECOGNIZED AS AN EXPERT AND THAT ANY OF HIS OPINIONS WOULD BE RELEVANT TO ASSISTING IN THE DEFENDANT'S THEORY.

Based on review of the defendant's brief, his third, fourth and fifth arguments appear to be inter-related to the same or similar principles and will therefore all be responded to at this time.

As referenced above in the Statement of the facts and incorporate herein, the trial court, during the pre-trial motions denied the use of exhibit 27, which is Iain McGregor's related materials along with all other documents and recordings associated with Iain McGregor due to the fact that the defendant was not able to provide a foundation that is agreed upon that follows some type of known scientific policy and procedure as to the way the testing is done. The trial court continued by stating that the defense is telling the court that the testing is a new procedure and the defendant has no one present to testify as to how the procedure is done. (43: 9-21).

Defense attorney Kennedy stated that he was uncertain as to whether the State's witness would agree that Iain McGregor (Defendant's exhibit 27) is authoritative. (11:24-25; and 12:1). Moreover, Defense attorney Kennedy never asked the State's Expert if he ever heard of Iain McGregor to see if he could have possibly recognized him as an expert.

Defense attorney Kennedy stated during pretrial motions that Iain McGregor is the only guy that has ever tested for the presence of

tetrahydrocannabinols after physical activity and other means. Kennedy exclaimed that nobody has ever tested that but McGregor. (41: 5-25).

The trial court explained its concern by reminding Kennedy that normally a party, such as the defense, would bring in people and scientists. The people that are conducting the tests and can explain the technology and further explain how they are achieving their results. (42:1-6). Defense attorney Kennedy did not have Iain McGregor available to testify nor anyone that understood his testing in order for the court to find McGregor to be an expert. In the event that such a witness would have been available to testify, the Court would have still needed to find that the testing was relevant under the Daubert test. However, the State is of the opinion that due to the lack of any finding as to McGregor's expertise and the lack of any other witnesses such a test was not necessary.

The defendant also argues that McGregor's scientific findings were not prejudicial as presented in a radio broadcast under exhibit 27. Once again, we first need to have McGregor's testing recognized which has been addressed above. Moreover, the trial court held that the radio broadcast which comprised exhibit 27, carries with it a real risk of undue prejudice and is substantially more than it probative value. The trial court further noted that once we deal with radio or television broadcasts, they are made for popular consumption. (39: 1-22).

The State respectfully requests that the Court find against the defendant and in doing so hold that trial court properly exercised its discretion in determining whether to recognize McGregor as an expert along with excluding the collateral exhibits and opinions associated with McGregor.

IV. THE DEFENDANT WAS NOT ENTITLED TO USE OF IAIN MCGREGOR'S FINDINGS WITHIN A HYPOTHETICAL QUESTION OF THE STATE'S WITNESS AND THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL.

Under Wisconsin law hypothetical questions in examining and cross-examining expert witnesses in a criminal case are permitted. State v. Berg, 116

Wis.2d 360, 368, 342 N.W.2d 258, 262 (Ct. App. 1983) (citing State v. Rice, 38 Wis.2d 344, 156 N.W.2d 409 (1968). The Berg and Rice courts held that the hypothetical questions must be based on facts which have been offered as evidence. Id.

The State's Expert, William Johnson, offered and opinion as to the testing of the defendant's blood and specifically that the results contained regarding the test results showing the presence of the delta 9 and that he was testifying to that finding with a reasonable degree of scientific certainty. (305: 24-25; - 306; 1-6). William Johnson also offered lay opinion, based on his own experiences, that if pupils are of equal size that such is a normal finding. (254: 12-14).

The above two opinions are the only ones given by William Johnson, the first being to the testing of the defendant's blood, the second being to pupil size. None of the facts within evidence had anything to do with effects of the testing as affected by an accident, the causation of delta-9 being generated in the defendant's blood and so forth.

William Johnson testified on cross examination that all of the testing he does is a detection of prior use and used that example that if a subject is stopped at 1:00 a.m. and their blood is tested at 1:01 a.m. even one minute later any drugs that we would be able to detect are there from prior use. (301: 17-22). William Johnson also testified further on cross-examination that a subjects blood test will not have anything to do with the Tetrahydrocannabinol stored in the subjects fat cells. (302: 22-25).

The defendant wished to pose hypothetical questions regarding the causation of the delta-9 in the defendant's body, and perhaps show that it was not there at the time he was driving based on the Iain McGregor studies and opinions addressed above.

Following the holdings in both Berg and Rice, the defendant was fully entitled to ask hypothetical questions associated with the laboratory process, blood results and prior use by the defendant. The facts as to causation of the delta-9 in

the blood stream are not facts that have been offered as evidence and thus the defendant is barred from using causation in a hypothetical.

The State respectfully requests that the Court find against the defendant and in doing so hold that trial court properly exercised its discretion in denying the use of hypothetical questions associated with Iain McGregor and the causation of delta-9 being placed in the body.

CONCLUSION

The State respectfully submits to the Court a request, based on the above document, that the holdings of the trial court were within its proper discretion and that the defendant was properly denied use of any reference to Iain McGregor, to include all findings, opinions, and recordings of Iain McGregor. The defendant, by his own choice, did not ready any witnesses that were familiar with the theory in which they wished to present and absent any such witnesses said theory was properly denied as facts were not in evidence as to the causation of delta-9 being located in the defendant's blood other than by way of the State's Expert stating he knows it to be detected based on prior use of the defendant.

Dated this 12th day of April, 2017

Respectfully submitted,

Charles J. Simono
District Attorney
State Bar No. 1030774

Forest County District Attorney
Forest County Courthouse
200 E. Madison Ave.
Crandon, Wisconsin 54520
Office: (715) 478 – 3511
Fax: (715) 478-3490
Charles.Simono@da.wi.gov

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that the 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 April, 2017.

Charles J. Simono
District Attorney
State Bar No. 1030774
Attorneys for Petitioner-Respondent

Forest County District Attorney
Forest County Courthouse
200 E. Madison Ave.
Crandon, Wisconsin 54520
(715) 478 – 3511
(715) 478 – 3490
Charles.Simono@da.wi.gov

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19 (8)(b) and (c) Stats. for a brief produced with proportional serif font, double spaced; 1.5 margin on the left side and 1 inch margins on the other three sides. The length of this brief is 4,874 words on fourteen (15) pages.

Dated this 12th day of April 2017

Charles J. Simono
District Attorney
State Bar No. 1030774

Certificate of Mailing

I certify that this brief was deposited in the United States Mail at Crandon, Wisconsin for delivery to Clerk of Court of Appeals by first class mail on this 13th day of April, 2017. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify that three copies of the brief were simultaneously served by mail as follows:

Robert A. Kennedy Jr.

209 East Madison Street

Crandon, Wisconsin 54520

Dated: April 13, 2017

_____

Charles J. Simono
Attorney for Respondent