STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 16 AP 2170

CITY OF WEST BEND,
Plaintiff-Respondent,
vs.

REBECCA L. SMITH
Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON SEPTEMBER 27, 2016 IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH 4, THE HONORABLE ANDREW GONRING PRESIDING.

Respectfully submitted,

REBECCA L. SMITH,
Defendant-Appellant

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: SHAUN W. O'CONNELL
State Bar No. 1090459

TRACEY A. WOOD
State Bar No. 1020766

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STATEMENT OF THE ISSUES

I. Did the trial court error by allowing the CAD report into evidence over defense counsel's objection?

II. Did the trial court commit plain error by allowing an expert to testify to Ms. Smith's BAC at the time of driving through hypothetical questions?

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

On February 1, 2015, Rebecca Smith was arrested and cited for operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration. (R. 2.) Ms. Smith entered not guilty pleas to both citations. (R. 14.) On February 23, 2016, following a court trial in the Mid-Moraine Municipal Court, Ms. Smith was found guilty of both counts. (R. 3.) Ms. Smith appealed the municipal court's judgment and requested a jury trial in circuit court. (R. 17.)

A jury trial was held in Washington County Circuit Court on September 27, 2016 before the Honorable Andrew Gonring. (R. 62-64.) At trial, the City of West Bend (the City) called four witnesses in its case in chief. The first witness was David Renkas. (R. 62:47.) Mr. Renkas testified that on February 1, 2015, he was working at Marco's Pizza in the City of West Bend until 2:00 a.m. (62:48.) It had been snowing for a couple of hours prior. (62:49.) Mr. Renkas testified that after he left work he was involved in an automobile accident. (62:52-53.) As he entered an intersection, another vehicle entered the intersection from the cross street and struck the rear left side of his vehicle. (62:53.) Mr. Renkas was not able to see the driver. (62:57.) Mr. Renkas testified the vehicle that struck him then

left the scene. (62:54.) However, he wrote down the license plate number of the vehicle prior to it leaving. (62:54) The accident was reported as occurring at 2:27 a.m. (R. 5.)

The City prosecutor then called Lieutenant Robert Lloyd of the City of West Bend Police Department. (62:69.) Lt. Lloyd testified he was on duty during the early morning hours of February 1, 2015. (62:70.) Lt. Lloyd was in the same area as Mr. Renkas and observed Mr. Renkas' vehicle after the accident. (62:74-75.) He did not observe any vehicle other than Mr. Renkas'. (62:76.) After making contact with Mr. Renkas, Lt. Lloyd was given the license plate of the vehicle involved. (62:76-77.) Lt. Lloyd testified that he later made contact with the registered owner, Ms. Smith, at her sister's residence. (62:81.) Lt. Lloyd testified he stood by, while Officer Scott Dopke was the primary officer who investigated whether Ms. Smith was impaired. (62:82.)

During his testimony, Lt. Lloyd had difficulty remembering the timeline of the evening. To assist Lt. Lloyd's testimony, the City prosecutor showed him Exhibit 1, a copy of the computer-aided dispatch activity (CAD) report related to this incident. (62:77-78.) Lt. Lloyd then testified from the report, prior to it being moved into evidence, about the time of various events. (62:78.) Defense counsel

objected, but the Court held there was "no need to rule on the objection." (62:79.) Lt. Lloyd continued to testify directly from reading the CAD report. (62:80-81.) After the conclusion of Lt. Lloyd's direct examination, the City prosecutor moved for Exhibit 1 to be entered into evidence. (62:85.) Defense counsel again objected, and the Court declined to rule on the CAD report's admissibility. (62:85)

Next, the City called Officer Dopke. (62:93.) Officer Dopke testified he made contact with Ms. Smith at her sister's residence at 2:46 a.m. (R. 63:102.) After making contact with Ms. Smith, Officer Dopke asked her to perform field sobriety tests. (63:108.) Officer Dopke subsequently arrested Ms. Smith for operating while under the influence of an intoxicant. (63:123.)

The City prosecutor again used the CAD report in its direct examination of Officer Dopke. (62:96.) Defense counsel again objected based on the lack of foundation. (62:98.) Sua sponte, the Court took over questioning of Officer Dopke. (62:98-100.) The Court laid foundation for the admittance of the CAD report as a record of regularly conducted activity with the West Bend Police Department. (62:98-100) The Court, without prompting from the City, then received the CAD report into evidence. (62:100.)

The City and the defense agreed to a stipulation that Ms. Smith's blood was drawn at 4:23 a.m. at St. Joseph's Hospital. (R. 23.)

The City's final witness in its case in chief was Analyst Kimberle Glowacki from the Wisconsin State Laboratory of Hygiene. (63:152.) Analyst Glowacki testified that the blood drawn from Ms. Smith at 4:23 a.m. was tested for the presence of alcohol. (63:165.) It was determined her blood alcohol concentration (BAC) was 0.142 grams per 100 milliliters. (63:152)

After Analyst Glowacki testified to Ms. Smith's BAC at the time of the blood draw, the City elicited information about what Ms. Smith's BAC would have been at the time of driving. (63:171.) Analyst Glowacki indicated she would "not be comfortable just saying… a person had this much to drink and then calculate what their blood alcohol would have been at some other time." (63:169-170.) Analyst Glowacki indicated she would need to know some assumed facts such as the person's gender, weight, and drinking history. (63:170.) She then testified, assuming Ms. Smith did not consume or absorb any alcohol between 2:27 a.m. and 4:23 a.m., that Ms. Smith's BAC would have been between 0.16 and 0.19 at 2:27 a.m. (63:171-172.)

The City next proposed a hypothetical to Analyst Glowacki in which Ms. Smith did consume alcohol after 2:27 a.m. (63:173-174.) The City presented Analyst Glowacki with a scenario in which Ms. Smith consumed two shots of Bacardi Limon Rum. (63:174.) Before she could provide an answer, Analyst Glowacki inquired as to Ms. Smith's height and weight in order to make a calculation regarding potential drinking after driving. (63:174.) The City then provided Analyst Glowacki with, theoretically, Ms. Smith's height and weight. (63:174.) Ms. Smith's height and weight were not put into evidence at any point other than the hypothetical information the City provided in response to Analyst Glowacki. Given the hypothetical presented, Analyst Glowacki estimated that Ms. Smiths' BAC at the time of driving would have been between 0.09 and 0.12. (63:174.)

After the City rested, Ms. Smith testified in her defense. (R. 64, 204.) Ms. Smith acknowledged being at the same intersection to which Mr. Renkas testified. (R. 64:209-210.) However, she denied being involved in an accident. (64:210.) Ms. Smith testified that Mr. Renkas' vehicle spun out in front of her, but there was no contact with the vehicle. (64:210.) Ms. Smith testified she drove home and then to her sister's residence. (64:210-211.) Ms. Smith testified after arriving at her sister's residence, she consumed several glasses of

Bicardi Limon. (64:213.) Law enforcement officers arrived about ten minutes later. (64:214.)

During closing arguments, the City prosecutor emphasized to the jury testimony received about the CAD reports (64:279.) and Ms. Glowski's retrograde extrapolation (64:285, 297.). After both sides rested, the six-person jury returned verdicts of guilty as to both citations. (R. 37,38.) Ms. Smith now appeals to this Court. (R. 47.)

ARGUMENT

Ms. Smith was convicted of operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration after the jury heard evidence that was improperly admitted. First, the jury heard evidence from the CAD report over defense counsel's objections. Second, the jury heard improper testimony related to Ms. Smith's BAC and retrograde extrapolation.

The Court allowed officers to testify directly off the CAD report and received the report into evidence. Neither officer created the CAD report, and it clearly contained hearsay statements. However, the Court held the CAD report was a regularly conducted activity record and, therefore, an exception to the prohibition against hearsay statements. This holding was erroneous as neither officer who testified was the custodian of the record or an otherwise qualified witness. Furthermore, the CAD report was made in contemplation of future litigation. Therefore, the report constituted inadmissible hearsay. The CAD report was instrumental in Ms. Smith's prosecution, as the prosecutor relied on statements contained within it to argue a specific timeline to the jury. There is a reasonable possibility the admission of the CAD report contributed to Ms. Smith's conviction.

Analyst Glowacki testified to not only what Ms. Smith's BAC was at the time her blood was taken, but also what Ms. Smith's BAC was at the time of driving nearly two hours prior. This testimony was based on a hypothetical scenario with assumed facts. The assumed facts were never testified to or entered into evidence. Therefore, Analyst Glowacki's testimony regarding Ms. Smith's BAC at the time of driving was improperly admitted. Analyst Glowacki's testimony regarding Ms. Smith's BAC was crucial for the City to obtain a conviction. The ultimate issue was Ms. Smith's impairment and BAC *at the time of driving*, not at the time the blood was drawn.

Despite trial counsel's failure to object to Analyst Glowacki's testimony at trial, it was plain error for the court to receive such testimony. When a defendant is convicted in a way inconsistent with the fairness and integrity of judicial proceedings, reviewing courts should invoke the plain-error rule in order to protect their own public reputation. ***Virgil v. State***, 84 Wis. 2d 166, 267 N.W.2d 852, 865 (1978) (citing ***United States v. Vaughan***, 443 F.2d 92, 95 (2d Cir. 1971)).

I. THE CAD REPORT SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE BECAUSE IT CONTAINED HEARSAY STATEMENTS AND WAS MADE IN CONTEMPLATION OF FUTURE LITIGATION

A. Standard of Review

A circuit court's decision to admit or exclude evidence is reviewed for an erroneous exercise of discretion. ***State v. Hunt***, 2014 WI 102, ¶ 20, 360 Wis. 2d 576, 851 N.W.2d 434. A circuit court erroneously exercises its discretion "if it applies an improper legal standard or makes a decision not reasonably supported by the facts of the record." ***Id.***

Upon a finding that the circuit court erroneously exercised its discretion, this Court must conduct a harmless error analysis to determine whether the error affected the defendant's substantial rights. ***State v. Echols***, 348 Wis. 2d 81, 92-93, 831 N.W.2d 768 (Ct. App. 2013). This Court must determine whether "there is a reasonable possibility that the error contributed to the outcome of the case." ***Id.*** at 93 (internal citation omitted). An error is not harmless "if it undermines [the Court's] confidence in the outcome of these proceeding." ***Id.*** Whether a circuit court's erroneous admission or exclusion of evidence was harmless "presents a question of law that this court reviews de novo." ***Id.***

B. The CAD report was inadmissible as evidence.

The City prosecutor used the CAD report as substantive evidence. The Court avoided making a ruling on defense counsel's objection to the CAD report when the City first used it. (62:78,85.) When the City continued to use the report, defense counsel objected again. (62:98.) The Court then attempted to lay foundation for the City to be able to use the report as evidence and received the CAD report into evidence sua sponte. (62:98-100.) Although it is not explicit, it appears the Court overruled defense counsel's hearsay objection on the grounds that the CAD report is a record of regularly conducted business activity, as the Court asked Officer Dopke if the CAD report was "made and kept in the regular course of the West Bend Police Department business." (62:99-100.)

The CAD report cannot fall under the hearsay exception as the Court implicitly ruled. Hearsay is generally not admissible at trial. Wis. Stat. § 908.02. However, there are exceptions for when hearsay can be admitted. Wis. Stat. § 908.03(6) provides, in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness… A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness…

It is undisputed that the declarant – the person who completed the CAD report - did not testify. Therefore, any statements in the CAD report were inadmissible under the hearsay rule unless they fell within an exception to the hearsay rule.

To fall under the records of regularly conducted activity exception, the City was required to provide testimony from either the custodian of the CAD report or an otherwise qualified person. Neither Lt. Lloyd or Officer Dopke testified that they were the custodian of the CAD report. Nor did they testify that they were an otherwise qualified witness who would know specifically how the CAD report in this case was amassed. Officer Dopke testified, at the court's prompting, that CAD reports were kept in the regular course of police business. Officer Dopke also testified that he had periodically printed out reports concerning time periods or certain activities that are made and kept in the regular course of business. Neither the City prosecutor, or the court for that matter, elicited any other evidence that Officer Dopke was otherwise qualified to testify about the CAD report as an exception to the hearsay rule.

The fact that the police rely upon the records, though, is no guarantee of their accuracy- especially when one considers the nature of the record and the reason the record was being offered in this

case. Without having the custodian or otherwise qualified witness testify, the City failed to lay the required foundation under Wis. Stat. § 908.03(6) for the CAD report to be admitted under the records of regularly conducted activity exception to the prohibition against hearsay statements. The CAD report should not have been received into evidence or used as the basis for testimony received.

Furthermore, the CAD report cannot fall under the regularly conducted activity exception, or any other exception to the hearsay rule, because it is a document made for the purpose of future litigation. Records prepared in anticipation of litigation do not fall within the regularly conducted activity exception. ***Palmer v. Hoffman***, 318 U.S. 109, 113–14, 63 S.Ct. 477 (1943); *see also* ***United States v. Blackburn***, 992 F.2d 666, 670 (7th Cir.1993) (adhering to "well-established rule" that documents made in anticipation of litigation are not admissible under the business records exception).

The CAD report is no different than any other section of a police report. Both the officer on the scene of an incident and the dispatcher listening to calls document their experiences so the information is available later. This information is put in writing so it can be used for the future prosecution of defendants. An officer

writes a narrative report. The dispatcher creates a CAD report. Functionally, these two documents are the same: reports made for the purpose of future litigation. Consequently, the CAD report was not admissible at trial, and the Court should have sustained defense counsel's objection to the report's admission into evidence.

C. There is a reasonable possibility that the admission of the CAD report contributed to the outcome of the case.

For this Court to reverse the judgment, it must find not only that the circuit court committed error, but also that the error was not harmless. "An error is harmless and does not justify reversal if we can be sure that the error did not contribute to the guilty verdict." ***State v. Weber***, 174 Wis. 2d 98, 496 N.W.2d 762, 767 (Ct .App. 1993) (internal citation omitted). The Supreme Court articulated the test for harmless error as whether there is a reasonable possibility that the error contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

The admission of the CAD report was not harmless. The City relied heavily upon the information in the CAD report. It was argued that not only was Ms. Smith impaired at the time police had contact with her at her sister's residence, but she was impaired at the time she was driving. (64:297.) The time of driving was established by

testimony that came directly from the CAD report. (62:78.) Evidence from the CAD report established the precise time that the City prosecutor later used as a reference point to elicit testimony from Analyst Glowacki to perform a retrograde analysis of Ms. Smith's BAC. (63:171-174.) Without the admission of the CAD report, the City would have been unable to establish a comprehensive timeline, and that was critical to proving its case.

The admission of the CAD report as a record of regularly conducted business activity was improper, and it undermines the confidence in the result of the trial as there is a reasonable possibility the jury would not have convicted Ms. Smith without the usage of that report.

II. TESTIMONY ON RETROGRADE EXTRAPOLATION SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

A. Plain error standard of review

Wis. Stat. § 901.03(4) recognizes the doctrine of plain error. The rule is substantially identical to Rule 103(d) of the Federal Rules of Evidence, and Wisconsin courts have relied on federal case law in applying plain error doctrine. ***Virgil***, 84 Wis. 2d 190; ***State v. Jorgenson***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77 (citing treatise). In essence, a "plain error" represents an appellate court's decision to review error that was otherwise waived by a party's failure to properly object or to preserve the error for review as a matter of right.

The Wisconsin Supreme Court has explained the role of plain error in preventing prosecutorial excess and a malfunctioning of the adversary system as follows:

> It is apparent in this case that prosecutorial excess went hand-in-hand with unsatisfactory representation by trial defense counsel. The application of the plain-error doctrine is particularly appropriate in this context, in order to prevent the prosecutor from taking unfair advantage. This aspect of the plain-error rule is recognized in 8B Moore's Federal Practice, para. 52.02[2] (2d ed. 1977): 'The plain error doctrine recognizes the need to mitigate in criminal cases the harsh effects of rigid application of the adversary method of trial, whereby the attorney's conduct binds his client. Particularly is such mitigation required if in fact, as is generally assumed, the competence of counsel in criminal cases does not meet the standards in other areas. Indirectly, the plain error doctrine has a salutary effect on the prosecution's conduct of the trial. If the intelligent prosecutor

> wishes to guard against the possibility of reversible error, he cannot rely on the incompetence or inexperience of his adversary but, on the contrary, must often intervene to protect the defendant from the mistakes of counsel.'

Virgil, 84 Wis. 2d at 193 n.4.

The plain error doctrine is functionally allied with the power invested in Wisconsin appellate courts to grant new trials in the interest of justice. Wis. Stat. § 751.06, provides:

> In an appeal in the supreme court, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record, and may direct the entry of the proper judgment or remit the case to the trial court for the entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

This rule is identical to Wis. Stat. § 752.35, which extends the same grant of authority to the Court of Appeals. The Supreme Court has explained the reach and purpose of these rules on several occasions:

> In reviewing the cases in which we have interpreted the scope of our discretionary power to reverse under sec. 751.06, Stats., we conclude that the court of appeals, like this court, has broad power of discretionary reversal. This broad statutory authority provides the court of appeals with power to achieve justice in its discretion in the individual case. The first category of cases arises when the real controversy has not been fully tried. Under this first category, it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial. The second class of cases is where for any reason the court concludes that there has been a miscarriage of justice. Under this category of the statutes, an appellate court must first make a finding of substantial probability of a different result on retrial.

Vollmer v. Luety, 156 Wis. 2d 1, 17, 456 N.W.2d 797, 805 (1990); ***State v. Thomas***, 161 Wis. 2d 616, 468 N.W.2d 729, 732 (Ct. App. 1991).

Plain error may be tied to the discretionary reversal standard through either of the two categories described above by the Supreme Court. In particular, the Court has concluded that the real controversy was not fully tried where "important evidence" was erroneously kept from the jury or where improper evidence was put before the jury. ***State v. Romero***, 147 Wis. 2d 264, 276, 432 N.W.2d 899, 904 (1988).

B. Expert testimony and hypothetical questions

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise. Wis. Stat. § 907.02. The proper mode of examining an expert witness where the facts are in dispute is by means of hypothetical questions. ***Benson v. Superior Mfg. Co.***, 147 Wis. 20, 132 N.W. 633 (1911). These hypothetical questions must be confined on direct examination to facts in the record. ***Kamp v.***

Curtis, 46 Wis. 2d 423, 175 N.W.2d 267 (1970); ***Delap v. Liebenson***, 190 Wis. 73, 208 N.W. 937 (1926).

> The purpose of a hypothetical question is to give the jury the benefit of an expert opinion upon one or another of several situations which may be found to exist in the evidence. The key point in a hypothetical question is the facts that are assumed and form the premises. If these facts fail in any important particular then necessarily the answer or conclusion that assumes the facts must fail.

Kreyer v. Farmers' Cooperative Lumber Co., 18 Wis. 2d 67, 77, 117 N.W.2d 646, 652 (1962).

All the facts in evidence in the case need not be stated in the hypothetical question, but only those needed to allow the expert to provide a correct answer on the theory advocated by the questioner's side of the case. ***Sharp v. Milwaukee & Suburban Transport Corp.*** 18 Wis. 2d 467, 477, 118 N.W.2d 905 (1963).

Retrograde extrapolation of a person's blood alcohol concentration is admissible under certain circumstances. ***State v. Giese***, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687. However, there must be a number of facts known to the expert to make the expert's testimony plausible. ***Id.***, ¶ 25. If the necessary facts are not known, then the expert's testimony becomes implausible and is no longer admissible at trial. In the case of retrograde extrapolation, an analyst must have certain basic

information about a person in order for testimony on the issue to be admissible.

In the present case, Analyst Glowacki was asked about retrograde analysis. (63:167.) Analyst Glowacki indicated she could estimate a person's BAC at a certain point in time based on when their blood was drawn and "other assumptions and information." (63:169.) She testified she would need information about the person's gender, weight, and drinking history. (63:170.)

The City presented Analyst Glowacki with a hypothetical scenario surrounding Ms. Smith's reported drinking history. (63:174.) The City asked her to estimate Ms. Smith's BAC at 2:27 a.m. based on the blood draw at 4:23 a.m. and the consumption of alcohol between the two times. (63:174.) Before Analyst Glowacki could provide an answer, she indicated she would need the height and weight of the subject, Ms. Smith, in order to make such an estimate. (63:174.) The City then provided a height and weight, hypothetically those of Ms. Smith. (63:174.) However, there was no evidence from a witness, exhibit, or stipulation from the parties as to Ms. Smith's actual height or weight.

It is undeniable that a prosecutor's question to a witness is not evidence. Evidence is *only* sworn testimony from witnesses, exhibits

the court received, and stipulated facts. *See* Criminal Jury Instruction 103. Remarks of attorneys are not evidence. *See* Criminal Jury Instruction 157. Even when an attorney's remarks suggest certain facts that are not in evidence, the jury must disregard the suggestions. (Id.) Other than the City Attorney's own statements, the jury was not presented with any evidence of the assumed facts Analyst Glowacki relied upon.

Since the assumed facts Analyst Glowacki's testimony relied upon were not in evidence, her testimony about Ms. Smith's hypothetical BAC should not have been admitted. Therefore, it was plain error for the trial court to allow improper evidence to be put before the jury. This Court should find that because "important evidence" was improperly received, the real controversy was not fully tried and therefore reverse Ms. Smith's convictions.

C. There is a substantial probability of a different result.

Under the plain error doctrine, cases can be divided into two categories: First, when the real controversy has not been fully tried and, second, when there has been a miscarriage of justice. ***Vollmer***, 156 Wis. 2d 17. If this Court finds the real controversy has not been fully tried, there is no need to determine whether the outcome would be different, and the analysis ends. ***Id***. Under this first category, this

Court should reverse Ms. Smith's conviction if it finds the real controversy has not been fully tried because important evidence was improperly put before the jury. ***Romero***, 147 Wis. 2d at 276.

However, if this Court finds the real controversy has been fully tried, the next step in the analysis is to determine if there is a substantial probability of a different result if Analyst Glowacki's testimony was excluded. ***Vollmer***, 156 Wis. 2d 17. Without the testimony about retrograde extrapolation, there is a substantial probability of a different result because Analyst Glowacki's testimony went to the very heart of the issue at trial. It was undisputed that Ms. Smith was intoxicated and had a prohibited alcohol concentration at 4:23 a.m. when her blood was drawn. As trial counsel argued in closing, "It is because it is at 4:23 you have a blood test result of .142. We don't dispute that. Your job is to determine what happened at 2:27." (64:289.) The real question the jury had to answer was what Ms. Smith's BAC was at the time of driving, two hours before the blood test.

Ms. Smith testified that after driving to her sister's residence, she consumed two glasses of Bacardi Limon. She did not drive after consuming this alcohol. Police arrived after Ms. Smith consumed alcohol and arrested her based on her present impairment. There was

no evidence that contradicted Ms. Smith's account of consuming alcohol after driving.

Analyst Glowacki's testimony presented evidence that went directly to the issue at trial: Was Ms. Smith intoxicated *at the time of driving*? Analyst Glowacki's testimony suggested that even though Ms. Smith consumed alcohol after driving, she still would have been impaired at the time of driving. If Analyst Glowacki's testimony about Ms. Smith's BAC at the time of driving was properly objected to and prohibited, the jury would have been presented with a significantly different scenario. The evidence would have shown that Ms. Smith operated a vehicle, drove to her sister's house, consumed alcohol there, and was intoxicated when officers later made contact with her. The jury would not have had evidence that Ms. Smith was impaired prior to driving.

Given the significance of Analyst Glowacki's testimony to the ultimate question put to the jury, there is a substantial probability that the jury would have reached a different verdict had that improper evidence been properly prohibited.

D. The admission of Analyst Glowacki's testimony as to Ms. Smith's BAC prior to the blood draw was a miscarriage of justice.

Trial counsel's inadequate representation of Ms. Smith was a miscarriage of justice. Counsel failed to make an important objection that went to the core of her defense. Had counsel properly objected to Analyst Glowacki's inadmissible testimony, it is probable that the jury would not have convicted Ms. Smith.

Generally, an allegation of ineffective counsel is reserved for criminal matters. However, forfeiture proceedings under Wis. Stat. ch. 346 are quasi criminal and have many aspects of criminal proceedings. *See* ***Village of Menomonee Falls v. Kunz***, 126 Wis.2d 143, 147, 376 N.W.2d 359, 361 (Ct.App.1985). The Supreme Court has noted many of the similarities in procedure between a forfeiture action and a criminal action, and the Court has cautioned that "it is an oversimplification to treat forfeiture actions as purely civil in nature." ***City of Milwaukee v. Wuky***, 26 Wis. 2d 555, 562, 133 N.W.2d 356 (1965). Forfeiture actions require the entry of criminal-type pleas and the taking of criminal-type verdicts and application of the middle burden of proof where the violation also constitutes a crime. ***State ex rel. Schaeve v. Van Lare***, 125 Wis. 2d 40, 44 n. 3, 370 N.W.2d 271 (Ct.App.1985). Even in purely civil cases, a

judgment may be set aside on account of a lawyer's negligent mistake in law or in the general interests of justice. ***Paschong v. Hollenbeck***, 13 Wis. 2d 415, 108 N.W.2d 668 (1961).

Here, trial counsel was negligent in failing to object to Analyst Glowacki's inadmissible testimony. The City's questions and proffered evidence about what Ms. Smith's BAC was at the time of driving should not have been put in front of the jury. Without such evidence, it is probable the jury would not have convicted Ms. Smith. If not for trial counsel's failure to properly object to inadmissible testimony, it is likely that Ms. Smith would not stand convicted of both operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration.

While a criminal defendant has more due process protection than a defendant in a civil case, the civil defendant must still be afforded the most basic due process rights. That must include having an attorney who will ensure the jury only hears evidence that is admissible. To allow a jury to decide a defendant's fate using improper evidence is a miscarriage of justice.

CONCLUSION

The circuit court improperly applied an exception to the prohibition on hearsay statements by admitting the CAD report. The City used the improper evidence to secure convictions against Ms. Smith. Without the admission of the CAD report, there is a reasonable possibility that the jury would not have convicted Ms. Smith.

The circuit court also committed plain error by allowing the jury to hear evidence that should not have been admitted from an expert using hypothetical questions and assumed facts. Assumed facts relied upon by the expert were never introduced into evidence. Without any evidence of those assumed facts, the Court should not have permitted the expert witness to testify to the ultimate issue in this case: Ms. Smith's impairment and BAC at the time of driving. Without such testimony, there is a substantial probability that the jury would not have convicted Ms. Smith.

For the reasons above, this Court should reverse Ms. Smith's convictions and remand to the circuit court with the instructions that she be granted a new trial.

Dated at Madison, Wisconsin, May 11, 2017.

Respectfully submitted,

REBECCA L. SMITH,
Defendant-Appellant

TRACEY WOOD & ASSOCIATES
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

_____
SHAUN W. O'CONNELL
State Bar No.: 1090459

_____
TRACEY A. WOOD
State Bar No.: 1020766

CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6370 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: May 11, 2017.

Signed,

BY: _____
TRACEY A. WOOD
State Bar No. 1020766

CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: May 11, 2017.

Signed,

BY: _____
TRACEY A. WOOD
State Bar No. 1020766

CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: May 11, 2017.

Signed,

_____

TRACEY A. WOOD
State Bar No. 1020766

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