STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

City of West Bend,
Plaintiff-Respondent,

v.

Appeal No. 16-AP-2170

Rebecca L. Smith,
Defendant-Appellant.

ON APPEAL FROM JUDGMENT ENTERED BY THE WASHINGTON COUNTY CIRCUIT COURT THE HONORABLE ANDREW T. GONRING, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON PUBLICATION

Absent a *sua sponte* motion by this Court to the contrary, this will be a one-judge opinion which will not qualify for publication under Wis. Stats. §§ 809.23(1)(b)(4), 752.31(2)(c).

STATEMENT ON ORAL ARGUMENT

The City of West Bend ("City") does not request oral argument.

STATEMENT OF FACTS

The Crash

Shortly before 2:30 a.m. on February 1, 2015, D.R.[1], heading home from work, was driving eastbound on Washington Street in the City of West Bend. (R. 62:50.) A short distance in front of D.R. was Lieutenant Robert Lloyd of the West Bend Police Department, driving a marked patrol SUV. (R. 62:50, 70.) At the same time, the defendant Rebecca Smith ("Smith") was driving home from a tavern where she had been drinking with her sister, Rachel. (R. 64:6-9.)

[1] In addition to these OWI and PAC citations prosecuted by the City in municipal court and circuit court, this Court can take judicial notice that the Washington County District Attorney charged Smith criminally with Hit and Run of an Attended Vehicle, contrary to Wis. Stat. § 346.67(1). (*See* Washington County Case No. 15-CM-386). According to the online case record, that case was resolved with a no contest plea to a non-criminal traffic charge of Falsifying an Accident Report, contrary to Wis. Stat. § 346.70(5). (*Id.*) Although the citations before this Court are not of the type enumerated in Wis. Stat. § 809.86(2), because D.R. is "a natural person against whom a crime…has been committed or alleged to have been committed in the…proceeding," the City believes it is appropriate to use his initials as opposed to his full name.

During her drive home, Smith was southbound on Main Street, stopped at a flashing red light at Washington Street. (R. 64:9.)

D.R. had a flashing yellow light on Washington Street at Main Street. (R. 62:52.) As D.R. continued straight east through the intersection of Washington and Main, the car which had been stopped southbound on Main Street turned left, and struck the rear driver's side of D.R.'s car, spinning D.R.'s car around. (R. 62:52.) D.R. got out of his car and yelled at the other driver to pull over, but the car drove away. D.R. wrote down the license plate number. (R. 62:54.)

Lieutenant Lloyd looked in his side-view mirror after going through the intersection in question, and saw the southbound car begin to turn into the intersection. (R. 62:74.) Moments later, when Lt. Lloyd looked in his mirror again, he saw in the one set of headlights and one set of taillights in the eastbound lanes behind him, meaning one car was facing the wrong direction. (*Id.*)

Smith, however, claimed that her car never collided with D.R.'s car. (R. 64:32-33.) She testified that D.R.'s car simply "spun out" in the snowy conditions. (R. 64:10, 33.) She then testified that she began to have a "panic attack," and "just wanted to get home" because "[i]t was late and I was tired." (R. 64:10.) Smith testified she drove home, pulled into her alley parking spot, called her sister Rachel and "told her that a car had spun out in front of me." (R. 64:11.) Smith says Rachel invited Smith to come over to Rachel's

house a few blocks away, which Smith did. (R. 64:11-12.) Smith testified that immediately upon going into Rachel's house, Smith "quickly" poured herself and drank two shots of Bacardi Limon. (R. 64:13.) However, Rachel testified that while Smith was enroute to Rachel's house, Rachel "made a couple drinks [and] left them on the counter." (R. 64:58.)

The Investigation

After seeing one car facing the wrong way in his side-view mirror, Lieutenant Lloyd turned around at the next possible opportunity and went back to the intersection of Washington and Main. (R. 62:75.) When he got there, only one car—D.R.'s—was still there. (R. 62:76.) D.R. gave Lt. Lloyd the license plate number of the car that hit him and drove off. (R. 62:76-77.) The license plate registered to Smith, who lived just a few blocks away. (R. 62:79-80.) Officer Scott Dopke went to Smith's house and found no one home and no car—only fresh tire tracks in the snow. (R. 62:100, 63:1.) A few minutes later, police called Smith on her cell phone; Smith told officers she was at Rachel's house, a few blocks away. (R. 63:1-2.)

When police arrived at Rachel's house, they asked Smith what happened at the intersection of Main and Washington. (R. 63:4.) Officer Dopke recalled Smith initially claiming that Smith "did not know where that intersection was." (R. 63:4.) Smith testified she falsely told the officers that she had not seen anything—including a "spin out"—at the intersection of Main and Washington. (R. 64:46.)

Smith testified she falsely told the officers that she had not been drinking that evening. (R. 64:44.) Smith testified that when officers asked where she had been coming from before being at her sister's residence, she falsely told officers she had only been at "home" without mentioning the tavern she had been at beforehand. (R. 64:45.)

At one point, while Smith was talking to police, Rachel told Smith to "just tell the truth." (R. 64:45.) However, prior to police arriving, Rachel testified she told Smith she should lie to police about being at a tavern "because I'm a bartender" and "why get somebody else in trouble?" (R. 64:63.)

Police found Smith's car parked on the street outside Rachel's house, and saw that her front passenger side bumper had separated from the passenger side headlamp, and there was a crack on the bumper running the length of the bumper below the passenger side headlamp. (R. 63:31-32.) Photographs of the damage are in the record. (R. 31, 32.) Smith maintained at trial that the damage to Smith's car was not from any collision with D.R.'s car, but from an incident in either 2010 or 2011. (R. 64:47-49.)

Smith showed signs of impairment on field sobriety tests and was arrested on suspicion of OWI. (R. 63:11-23.) A sample of Smith's blood collected at 4:23 a.m. had an alcohol concentration of .142 grams per 100 milliliters. (R. 33.) The jury returned unanimous guilty verdicts on both the OWI and PAC citations. (R. 37, 38.)

ARGUMENT

I. THE TIME LOG FROM THE COMPUTER-AIDED DISPATCH SYSTEM WAS PROPERLY ADMITTED AS EVIDENCE

Because the computer-aided dispatch ("CAD") Activity Report was not hearsay, it was properly admitted as evidence. In the alternative, the circuit court properly determined that the CAD Activity Report was an admissible record of regularly conducted activity.

Circuit courts have "broad discretion to admit or exclude evidence," and this Court may only reverse the circuit court if the circuit court erroneously exercised its discretion. *State v. Giacomantonio*, 2016 WI App 62 ¶ 17, 371 Wis. 2d 452, 885 N.W.2d 394, *citing State v. Kandutsch*, 2011 WI 78 ¶ 23, 336 Wis. 2d 478, 799 N.W.2d 865. An appellate court should uphold a trial court's decision to admit evidence "if the [trial] court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." *Giacomantonio* at ¶ 17, *quoting Martindale v. Ripp*, 2001 WI 113 ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698. If the circuit court reaches the correct result in admitting evidence but for the wrong reason, the appellate court must affirm the circuit court. *State v. Adams*, 223 Wis. 2d 60, 74, 588 N.W.2d 536 (Ct. App. 1998), *citing State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985.)

The CAD Activity Report is a nonhearsay computer generated record

The CAD Activity Report is a computer-generated document showing the exact time stamp when the dispatchers made computer entries pertaining to the call. (R. 28.) For example, the CAD Activity Report shows that the incident was first reported at 2:27:03 a.m., that officers called themselves on-scene at Smith's sister's residence at 2:45:01 a.m., and that the officers reported leaving Smith's residence to return to the police station for further questioning at 3:00:49 a.m. (R. 28.)

Only a "person" can make a "statement" under the hearsay rule. Wis. Stat. § 908.01(1)-(2). The record indicates that the times in the CAD Activity Report are computer-generated entries as opposed to human declarations. While the officers and dispatchers made declarations—such as officers calling in their locations and dispatchers making shorthand notes or entries in the computer system—the time-stamping is an automatic function of the dispatching software:

> Officer Dopke: When [officers] go to a location, when they are routed, that time is logged, when they are on scene that time is logged, and every other place they go, that time is stamped, so every step we take is documented on the CAD activity log.
>
> …

Prosecutor:	So say you are [enroute] to a particular location. What does the dispatcher do then?
Officer Dopke:	All she does is enter that location and either press en route or on scene and it automatically does it.

(R. 62:97-98.)

The hearsay rule is "designed to protect against the four testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory. A record created as a result of a computerized or mechanical process cannot lie, forget, or misunderstand and is not hearsay." *Kandutsch*, *supra*, at ¶ 61. Rather, such a record is subject only to the statutory authentication requirements. *Id.* at ¶ 64. Here, both Lieutenant Lloyd and Officer Dopke authenticated the CAD Activity Report as being that maintained by the West Bend Police Department pertaining to this case.

The time stamps on the CAD Activity Report were created as the result of a computerized process, and are therefore not hearsay. The Court did not err by admitting the CAD Activity Report.

Even if viewed as a hearsay statement, the CAD Activity Report was admissible

Even if the CAD Activity Report were viewed as containing "statements," it is not a document "prepared in anticipation of litigation," and is therefore admissible under the hearsay exception

for records of regularly conducted activity under Wis. Stat. § 908.03(6).

A computer-aided dispatch system exists to ensure that public safety personnel are accurately accounted for, even in cases that have nothing to do with potential civil or criminal prosecution, such as fire alarms, ambulance calls, road hazards, lost pets, and any number of scenarios in which a 911 center dispatches and tracks first responders. In interpreting the business records exception to the hearsay rule, courts have noted that "[l]itigation generally is not a regularly conducted business activity" and "documents prepared with an eye toward litigation raise serious trustworthiness concerns because there is a strong incentive to deceive." *Jordan v. Binns*, 712 F.3d 1123, 1135 (7th Cir. 2013) (internal quotations and citations omitted.) The Advisory Committee to the Federal Rules of Evidence notes, in its comment to corollary Fed. R. Evid. 803(6), that the "[a]bsence of routineness raises lack of motivation to be accurate."

Unlike police reports written by an officer after an arrest or other incident, dispatchers are not concerned with litigation—they are concerned with tracking the movement and activities of the first responders under their control. Thus, the CAD Activity Report, like other dispatch-related records, falls under the exception to the hearsay rule for records of regularly conducted activity to the extent it is not viewed as a computer generated record.

The time stamps on the CAD Activity Report were admissible evidence. Therefore, this Court should affirm the circuit court.

II. EVEN IF THE COMPUTER-AIDED DISPATCH ACTIVITY REPORT WAS INADMISSIBLE, ITS ADMISSION WAS HARMLESS ERROR

Smith never disputed the timing of events as set forth in the CAD Activity Report. Indeed, Smith's own testimony, along with that of the police officers, was consistent with the times in the CAD Activity Report. Therefore, the admission of the CAD Activity Report was harmless even if this Court determines it was inadmissible.

An error is harmless when there is no reasonable possibility that the error contributed to the result of the case. *See, e.g., State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985), *see also Town of Geneva v. Tills*, 129 Wis. 2d 167, 184-85 384 N.W.2d 701 (1986) (holding *Dyess* rule applies to civil forfeiture prosecutions.)

Here, there is no reasonable possibility that the CAD Activity Report contributed to the result of the case, because Smith did not testify to or advocate a different timeline from that set forth in the CAD Activity Report. When asked by her attorney, Smith stated that the initial incident between her vehicle and D.R.'s vehicle took place at "I would have guessed about 2:20." (R. 64:11.) When asked about being questioned by police at her sister Rachel's residence, Smith stated that "[i]t was now approaching 3:00 in the morning."

(R. 64:18.) These times closely correlate to the times in the CAD Activity Report of the incident occurring at 2:27, officers arriving to Rachel's residence at 2:45, and officers taking Smith to the police station for further questioning at 3:00. (R. 28.)

Likewise, the testimony of the officers from their memory was in line with the CAD Activity Report. For example, Lieutenant Lloyd testified that he arrived at Rachel's house "right around 2:40, 2:45 a.m." (R. 62:80.) The City further offered into evidence the transmittal form which accompanied Smith's blood sample to the Wisconsin State Laboratory of Hygiene, which listed the "violation time" as 2:27 a.m. (R. 30.) Smith raised no objection to the admission of this document. (R. 63:58.)

Finally, Smith's attorney referenced with approval the specific time of the incident from the CAD Activity Report in his closing argument to the jury:

> …[I]t 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. Was she driving under the influence at 2:27? Did she have a prohibited alcohol concentration at 2:27?

(R. 64:89.)

Even if the CAD Activity Report had not been admitted, there would have been no difference in the timeline of events as set forth by the City or by Smith. Thus, even if this Court were to find that the CAD Activity Report was inadmissible, its admission was

harmless error, because it did not contribute to the result of the case. Therefore, this Court should affirm the circuit court judgment.

III. SMITH'S FAILURE TO OBJECT TO RETROGRADE ANALYSIS OF HER BLOOD CONSTITUTES FORFEITURE

Smith never objected to the City's witness presenting retrograde analysis of Smith's blood alcohol concentration. In fact, Smith's attorney spent a significant portion of cross examination going into various hypothetical questions in an attempt to show either that Smith's blood alcohol concentration could have been below the legal limit, or that the retrograde analysis was so uncertain as to not be meaningful. Therefore, Smith has forfeited her right to claim that this line of questioning was admitted in error.

A failure to object at trial often, but not always, constitutes a forfeiture of the right to appellate review. *State v. Ndina*, 2009 WI 21 ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612. Whether a particular right can be forfeited depends on "the constitutional or statutory importance of the right, balanced against the procedural efficiency in requiring immediate final determination of the right." *State v. Pinno*, 2014 WI 74 ¶ 57, 356 Wis. 2d 106, 850 N.W.2d 207 (internal quotations omitted.) Failure to object to evidence offered forfeits a claim of error. Wis. Stat. § 901.03(1)(a). "An objection must be made to the introduction of evidence as soon as the adversary party is aware of the objectionable nature of the testimony. Failure to object

results in a [forfeiture] of any contest to that evidence." *Caccitolo v. State*, 69 Wis. 2d 102, 113, 230 N.W.2d 139 (1975) (quotations omitted.)

Here, it is undisputed that Smith did not object to the City's witness testifying to retrograde analysis of Smith's blood. (A. Br. at 30.) Indeed, Smith's trial counsel engaged in lengthy cross-examination of the City's expert, attempting to show that a retrograde analysis using other hypothetical data could result in Smith having a blood-alcohol concentration below the legal limit at the time she drove. (R. 63:91-92.)

Because Smith failed to object to the retrograde analysis, and in fact participated in her own retrograde analysis on cross examination, Smith forfeited any claim of error on appeal. This Court should affirm the judgment of conviction.

IV. THE REAL CONTROVERSY WAS FULLY TRIED AND THERE WAS NO MISCARRIAGE OF JUSTICE

Because the expert's opinion on retrograde blood alcohol concentration analysis was admissible, the real controversy was fully tried, and there was no "miscarriage of justice." Even if this Court were to find a defect in the admissibility of the retrograde analysis, the real controversy was still fully tried. Moreover, this is not an exceptional case warranting a new trial in the interest of

justice, and there is not a substantial probability of a different result upon retrial.

Smith raises two arguments in support of her argument that this Court should order a new trial in its discretionary power. First, Smith argues that the testimony regarding the retrograde analysis was improperly received, and, as a result, "the real controversy was not fully tried." (A. Br. at 26.) Second, Smith argues that even if the real controversy was fully tried, Smith's trial counsel's failure to object to the retrograde analysis constitutes a "miscarriage of justice." (A. Br. at 29-30.)

The general rule is, of course, that only those issues raised at trial can be raised on appeal. *Vollmer v. Luety*, 156 Wis. 2d 1, 10, 456 N.W.2d 797 (1990). However, this Court has the discretionary power to order a new trial "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." Wis. Stat. § 752.35. Wisconsin courts "have consistently held that the discretionary reversal statute should be used only in exceptional cases." *State v. McKellips*, 2016 WI 51 ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258. It is a power to be exercised "infrequently and judiciously." *State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992.) The request to order a new trial should be "approach[ed]…with great caution." *Morden v. Continental AG*, 2000 WI 51 ¶ 87, 235 Wis. 2d 325, 611 N.W.2d 659.

Before exercising discretionary reversal, this Court "must engage in an analysis setting forth the reasons that the case may be characterized as exceptional." *McKellips*, *supra*, at ¶ 52, *quoting State v. Kucharski*, 2015 WI 64 ¶ 42, 363 Wis. 2d 658, 866 N.W.2d 697 (internal quotations omitted.)

The real controversy was fully tried

In an "exceptional case," this Court may order a new trial without analyzing the probability of a different result on retrial, if the Court finds that "the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985) (emphasis added.)

The retrograde analysis was properly admitted. As Smith concedes, retrograde extrapolation of blood alcohol levels is, "despite certain doubts and disagreements…a widely accepted methodology in the forensic toxicology field." *State v. Giese*, 2014 WI App 92 ¶ 23, 356 Wis. 2d 796, 854 N.W.2d 687. "The accuracy of the facts upon which the expert relies and the ultimate determinations of credibility and accuracy are for the jury, not the court." *Id.*

Smith's only argument appears to be that Smith's height and weight were never offered as sworn testimony in the record; rather, the City's attorney asked a hypothetical question based off of the height and weight listed on Smith's driver's license. (A. Br. at 25, R. 63:74.)

What Smith ignores is that Smith was physically in the courtroom for the entire proceeding, and also testified. The jury was specifically instructed to consider "the witness' conduct, appearance, and demeanor on the witness stand" and "all other facts and circumstances during the trial which tend either to support or to discredit the testimony." (R. 64:105-06, *see also* WIS. JI-CRIMINAL 300.) The jury was able to determine with its own eyes whether the hypothetical height and weight offered by the City matched Smith's physical appearance, and weigh that evidence accordingly.

Disputes regarding the facts an expert uses in a hypothetical do not alter the fundamental science behind the hypothetical. As the Court noted in *Giese*, "concerns about the reliability of retrograde extrapolation relate to the proper weight to be afforded the evidence, not whether the evidence is admissible in the first place." *Giese*, *supra*, at ¶ 28. Smith had every opportunity "to undermine the assumptions that support the expert's opinion by introducing evidence or arguing in favor of competing inferences from the known facts." *Id.* In fact, Smith's trial counsel spent a considerable amount of time attacking the expert's opinion on cross examination, by a line of questions regarding how the result of the retrograde analysis would differ based on:

- A margin of error on either side of the reported value of .142 g/100 mL (R. 63:79);

- Whether the person's weight was greater or lesser than the estimate provided (R. 63:81);
- Whether the person was shorter or taller than the estimate provided (R. 63:81);
- Whether each drink contained a measured amount of alcohol as opposed to a "free pour" (R. 63:83-86);
- Whether there may have been unabsorbed alcohol in Smith's system at 2:27 a.m. (R: 63:93);
- The lack of certainty as to the rate at which Smith's body eliminated alcohol from the bloodstream (R: 63:94);
- Whether Smith drank more alcohol and/or stronger alcohol after driving than in the City's hypothetical (R. 63:91-93.)

Smith's cross examination was geared at making two points: one, the result of the extrapolation varies based on the underlying data, and two, the extrapolation could result in an estimated blood alcohol concentration as low as .01g/100 mL under certain assumed conditions.

Additionally, the jury was properly instructed as to the evidentiary presumption in Wisconsin that a blood sample taken up to three hours after driving is presumptively evidence of the defendant's alcohol concentration at the time of driving. (R. 64:101, *see also* Wis. Stat. § 885.235(1g)(c)).

The City and Smith had every opportunity to present to the jury the attributes and limitations of retrograde blood alcohol analysis. In

conjunction with the jury instruction concerning the statutory presumption in favor of blood drawn within three hours of driving, the jury was free to give the retrograde analysis evidence the weight the jury determined the evidence was entitled to receive. Accordingly, the controversy was "fully tried," and reversal is not warranted.

There Was No Miscarriage of Justice

Assuming, for argument's sake, that the retrograde analysis was improperly admitted, this Court should not find that the admission was a "miscarriage of justice."

Smith's trial counsel made a deliberate strategic choice to allow the retrograde analysis into evidence. When a defendant makes such a strategic choice, the strategy "is binding on a defendant," and an appellate claim of error will not be considered, even if the strategy "backfires." *State v. Hyndman*, 170 Wis. 2d 198, 209, 488 N.W.2d 111 (Ct. App. 1992), *citing State v. McDonald*, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971).

Here, Smith's trial counsel made the strategic choice to allow the jury to hear the City's retrograde analysis, but to also cross-examine the analyst with hypothetical scenarios that could lead to a lower blood alcohol concentration, as well as highlighting all of the different variables that go into a retrograde analysis, as described *supra*.

Smith's decision to not object to the retrograde analysis, and instead pursue a line of questioning designed to position the retrograde analysis as unreliable or uncertain was a strategic choice. The fact that this strategic decision did not carry the day with the jury is a result Smith must live with. Smith's trial counsel was not negligent, and this Court should not find that there was a "miscarriage of justice."

There Is No Substantial Probability Of A Different Result On Retrial

Because there is no substantial probability of a different result on retrial, this Court should not exercise its discretionary power of reversal even if this Court were to find that there was a "miscarriage of justice."

If an appellate court finds it is "probable that justice has for whatever reason miscarried," the court may only exercise its power of discretionary reversal upon finding a "substantial probability of a different result on retrial." *Vollmer*, *supra*, at 16.

Smith argues that there is a substantial probability of a different result because "[t]he evidence would have shown that Ms. Smith…drove to her sister's house, consumed alcohol there, and was intoxicated when officers later made contact with her." (A. Br. at 28.) That scenario is contingent on the jury *actually finding Smith's version of events credible*.

The City emphasized to the jury in both opening statement and closing argument that this case largely boiled down to the jury making credibility determinations:

> [Opening Statement]
> [T]he six of you get to decide what is credible and what isn't; what is believable and what isn't; what is the truth of what happened and what isn't the truth of what happened. That is going to be very important for the six of you to keep in mind because you are going to hear very different accounts of what happened…
>
> [Closing Argument]
> And that gets to the issue of believability and credibility. Do you buy the story that she was so overcome by seeing a vehicle just spin out in front of her that she felt the need to call her sister, go over to the sister's house when they had already said their good-byes for the night, and calm her nerves by quickly downing two shots of rum? Do you buy it? Because that's what you have to do as the fact-finders in this case…

(R. 62:38, 64:82.) Accordingly, the City argued to the jury in closing argument that the retrograde analysis was relevant only if the jury found Smith's version of events credible as a threshold determination. "Even if you buy Ms. Smith's story that she went home and slammed a couple shots of Limon, two shots of Limon by themselves aren't enough to get her all the way up to .143." (R. 64:85-86.)

Although this Court cannot read the jury's mind, a reasonable jury could have found that Smith's credibility was significantly damaged by:

- Smith's admissions to lying to police the night of the incident;
- Smith's sister's admission that she encouraged Smith to lie to police;
- Smith's continued insistence that she was not involved in a crash, despite D.R's testimony and the photographs of damage to the front of Smith's car;
- Discrepancies between Smith's testimony and her sister's testimony concerning Smith's claimed post-driving drinking;
- Impeachment of Smith and her sister on discrepancies between their testimony in circuit court and their previous testimony in municipal court.

Even assuming the retrograde analysis had been excluded, a reasonable jury would be well within its rights to find Smith's version of events incredible.

There is not a "substantial probability" of a different result on retrial. This Court should affirm the judgment.

This Was Not An Exceptional Case

Before exercising discretionary reversal, this Court "must engage in an analysis setting forth the reasons that the case may be

characterized as exceptional." *McKellips*, *supra*, at ¶ 52, *quoting* *Kucharski*, *supra*, at ¶ 42 (internal quotations omitted.) Smith does not argue in her brief that this was an "exceptional case." Indeed, this was not an exceptional case. The jury was called upon, in large part, to weigh the credibility of D.R., the police officers, and the hygiene lab analyst against that of Smith and her sister. The jury did so, and returned unanimous guilty verdicts. This Court should not disturb the jury's credibility determinations, and should affirm the judgment of conviction.

CONCLUSION

The circuit court properly admitted the CAD Activity Report into evidence. Even if its admission was improper, any error was harmless.

The retrograde analysis was admissible; even if there was an evidentiary defect, the analysis did not so cloud the issues as to prevent the real controversy from being fully tried, nor did it constitute a miscarriage of justice. This is not an exceptional case, and there is not a substantial probability of a different result on retrial.

Therefore, this Court should affirm the judgment of conviction in all respects.

Respectfully submitted July 21, 2017.

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FORM AND LENGTH CERTIFICATION
Wis. Stat. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b)-(c) for a brief produced with a proportional serif font. The length of this brief is 4,753 words.

ELECTRONIC BRIEF CERTIFICATION
Wis. Stat. § 809.19(12)(f)

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

Dated July 21, 2017.

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