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

REPLY BRIEF 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,

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Defendant-Appellant

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ARGUMENT

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

A. The CAD report was inadmissible as evidence.

The City's brief does not address the argument in Smith's original brief that no witness properly laid the foundation or authenticated the computerized dispatch activity report (CAD). Issues not responded to on appeal are deemed conceded. ***Charolais Breeding Ranches, Ltd., v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979) citing ***State ex. rel. Blank v. Gramling***, 219 Wis. 196, 262 N.W. 614, 615 (1935). The fact that an officer said times are "logged" and "documented on the CAD activity log" does not show a machine issued a report free from human input. (62:97-8) Both Lt. Lloyd and Officer Dopke testified that they called in the data to be imputed into the computer by the dispatcher. (62:78;63:97) The officers who testified had no independent recollection of the times in that report and relied upon the CAD to establish time of driving and the time of contact with Smith at her sister's house. (62:78:63:97).

Although the City's brief cites the case of ***Kandutsch***[1]**,** the holding of that case supports Smith's argument on appeal. The Wisconsin Supreme Court held in ***Kandutsch*** at 336 Wis. 2d 504:

> This court has not previously had an opportunity to directly address the hearsay implications in the distinction between computer-stored and computer-generated records. We find it appropriate at this time to distinguish between computer-stored records, which memorialize the assertions of human declarants, and computer-generated records, which are the result of a process free of human intervention.

Although the report from the defendant's electronic monitoring device was not found to be hearsay in ***Kandutsch***, that was solely due to the fact there was no human input into the making of that report. The Supreme Court stated at 336 Wis. 2d at 483:

> A computer-generated report is not hearsay when it is the result of an automated process free from human input or intervention. Although the EMD report was not hearsay, it was subject to the authentication requirements of Wis. Stat. § 909.015(9). The report was properly authenticated through the testimony of the two DOC agents.

Thus, even if the City had a witness to lay the proper foundation and properly authenticate the CAD Activity Report, it was still hearsay because the information it reported was the result of input from a person. The computer report is what the dispatcher is told by police to put into the computer. The mere fact the dispatcher used a computer to make a report does not protect this report from a

[1] ***State v. Kandutsch***, 336 Wis.2d 478, 799 N.W.2d 865 (2011).

review under the hearsay statute. Similarly, police reports are also inputted into and printed from a computer, but they are still hearsay and therefore inadmissible.

While some courts have found computerized documents to be nonhearsay if there is no human input, other jurisdictions consider this hearsay even if no human involvement occurs. As the ***Kandutsch*** Court stated:

> ¶ 56 In contrast, the majority of federal courts interpreting the Federal Rules of Evidence governing hearsay have considered computer reports as hearsay. *See* Adam Wolfson, Note, "*Electronic Fingerprints* ": *Doing Away with the Conception of* Computer–*Generated Records as* Hearsay, 104 Mich. L.Rev. 151 (Oct.2005). When a computer record is admitted, it is typically justified by the business records exception. *See, e.g.*, *United States v. Salgado*, 250 F.3d 438, 452 (6th Cir.2001); *Hardison v. Balboa Ins. Co.*, 4 Fed.Appx. 663, 669 (10th Cir.2001); *United States v. Moore*, 923 F.2d 910, 914 (1st Cir.1991); *United States v. Miller*, 771 F.2d 1219, 1237 (9th Cir.1985).

The City does not argue the CAD was free from any human input. That ends the inquiry—it contains hearsay.

Furthermore, the CAD Activity Report is clearly a report made in anticipation of litigation under both the facts of this case and caselaw surrounding this issue. Thus, it could not be received under the business records hearsay exception.

In ***State v. Williams***[2], the Wisconsin Supreme Court noted crime lab reports do not fall under the business records exception because they are prepared by the State and used to prosecute defendants. The Supreme Court noted that the fact that prosecutors request these reports in prosecuting defendants shows they are made in anticipation of litigation. A report made by the police agency and requested to assist in prosecution of an individual is considered prepared in anticipation of litigation even though the data is unlikely to be falsified. ***Williams, supra*** at 121.

Because the CAD Activity Report was not authenticated by an actual witness, and it contained inadmissible hearsay, the trial court erred in receiving it.

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

The City concedes a failure to object does not always lead to a forfeiture of the right to appellate review. (Br.P.11) ***State v. Ndina***[3]**.** Reviewing courts are invested with a great deal of discretion in determining what to review on appeal and whether review should be undertaken in the interests of justice. ***Bradley v. State***, 36 Wis.2d

[2] 253 Wis. 2d 99, 644 N.W.2d 919 (2002).

345, 153 N.W.2d 38, (1967); ***Harvest Sav. Bank v. ROI Investments***, 209 Wis.2d 586, 595 563 N.W.2d 579 (Ct. App. 1997).

Although there was no objection by counsel to the admission of the retrograde extrapolation, Smith requests this Court review this issue in its discretion. Such a review promotes judicial fairness in drunk driving trials. Such a review can also give guidance as to when such evidence should be received and what foundation should be established before courts receive this evidence. The evidence should not have been received in this case because no ***Daubert***[4] hearing as to whether such a calculation could be made in this case was held, the defense was surprised by the admission of this evidence, the calculation was made based upon hypothetical facts not clearly established in evidence, and the analyst was not in possession of all the facts needed to conduct a scientifically sound retrograde extrapolation at the time it was conducted.

The City's brief fails to address the plain error argument advanced in Smith's original brief. A finding of plain error may be made by a reviewing court even if there was no objection at trial.

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[3] 315 Wis.2d 653, 670, 761 N.W.2d 612 (2009).

[4] ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993).

The failure to respond to this argument should be deemed a concession. ***Charlois, supra***.

The City argues that because Smith's attorney cross-examined the analyst, this Court should not review the issue (Br.P.12). The City further argues the defense attorney made a strategic choice to allow the retrograde analysis into evidence (Br.P.17). However, once the analyst was given all the facts to make a retrograde calculation by the prosecutor in the form of a hypothetical question and opined Smith's BAC at the time of driving would have been higher than the legal limit, the attorney had no choice but to cross-examine to try and undo the damage. The City cites no case holding an error in receiving evidence is cured by a defense attorney trying to minimize the damage through cross-examination. Furthermore, the City's attempt to characterize this as a strategic decision is not supported by any citation to the record. The defense attorney did not intimate he chose to allow this evidence in, he merely cross-examined the analyst after the court received the evidence. The fact the attorney did not reference any retrograde extrapolation calculation in opening statements (62:45-7) shows this was a surprise to the defense. This information was imperative to the City's case, and the City does not argue otherwise. Cross-examination was not enough to undo the

gravity of the error in it being admitted in the first place. Furthermore, the City argues that because the jury was instructed to presume the test taken in the case was the defendant's alcohol concentration at the time of driving (Br.P.16) that somehow excuses the faulty retrograde. It was the prosecution that gave the time of driving to the analyst, and the police who told a dispatcher to input that time into the CAD Activity Report, so the extrapolation result was based upon theories designed by the prosecution.

Although ***State v. Giese***, 2014 WI App 92, 356 Wis.2d 796, 854 N.W.2d 687 permits a retrograde calculation to be performed if certain foundational requirements are met, those were not met here. Even the analyst herself was uncomfortable testifying in this way, stating 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). Every single fact used in the calculation was provided by the prosecutor in a hypothetical. He even minimized Smith's testimony and statements about the size of her drinks. She called them glasses at times and said they were bigger than shots. (64:213;241). The prosecutor told the analyst to assume two shots, and she did. (63:174). A party asking an expert a hypothetical question must include all the facts necessary and cannot

just select helpful ones or omit material ones to help its case. ***Rausch v. Buisse***, 33 Wis.2d 154, 146 N.W.2d 801 (1966).

The City also argues that because the jury could view the defendant, it could have figured out if the calculation of her size was wrong. Simply viewing a person would not lead a lay person to know whether that person's size and weight has been incorrectly estimated by a prosecutor. The jury is more likely to rely upon those facts suggested by the prosecutor and relied upon by the analyst.

Courts in Wisconsin may admit an analyst's retrograde extrapolation calculations if, after a ***Daubert*** hearing, the court determines that extrapolation to be reliable and relevant. ***Giese, supra***. Importantly, the Court of Appeals in ***Giese*** stressed the prohibited alcohol level of .02 in that case made any possible error in calculations less important. In the instant case, the retrograde extrapolation based on the prosecutor's hypothetical was the only evidence the jury considered in determining the level of alcohol at the time of driving, and there was no ***Daubert*** hearing. The analyst was simply asked, without notice, to conduct the calculations. Despite her stated concerns in court, her result was admitted into evidence.

Retrograde extrapolation evidence is not without its faults and must be admitted only when certain foundational requirements are met. A preeminent forensic scientist, Dr. Kurt M. Dubowski, summarized the problems with "retrograde extrapolation" in his frequently cited article, "Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects", first published in the *Journal of Studies on Alcohol*. Dr. Dubowski concluded "[N]o forensically valid forward or backward extrapolation of blood or breath alcohol concentrations is ordinarily possible in a given subject and occasion solely on the basis of time and individual analysis results." It is Dr. Dubowski's research that led to caselaw establishing the strict requirements for the receipt of such evidence.

The Criminal Appeals Court of Texas in ***Mata v. State***, 46 S.W.3d 902 (Tex.Crim.App.2001), addressed this issue and the scientific technique of "retrograde extrapolation" in excruciating detail. The ***Mata*** Court took judicial notice of scientific literature in the area and cited in its opinion numerous publications. The cited authority included that of Richard Watkins, Assistant Director of the Phoenix Crime Lab, and Eugene Adler, a toxicologist for the Arizona Department of Public Safety. ***Id.*** at 910. (*The Effect of Food on Alcohol Absorption and Elimination Patterns,* 38J. of Forensic

Science 285-291(1993). The ***Mata*** Court, citing from Watkins and Adler, stated that:

> The limitations and pitfalls associated with retrograde extrapolations are often not appreciated by laymen and the courts. The authors concluded that "any attempt at retrograde extrapolation should be made with caution, and performed by persons able to assess and discuss the applicability of a retrograde extrapolation to a particular situation." *Id*. at 910.

The Court also noted that Watkins and Adler were cautious about the reliability of "retrograde extrapolation." ***Id.*** The Court, relying on other experts in the field, wrote the following:

> [That retrograde extrapolation is a "dubious practice" and that expert testimony on the issue "requires careful consideration of the absorption kinetics of ethanol and the factors influencing this process." They explain that "the absorption profile of ethanol differs widely among individuals, and the peak [BAC] and the time of its occurrence depend on numerous factors. **Among other factors, the drinking pattern, the type of beverage consumed, the fed or fasted state, the nature and composition of foodstuff in the stomach**, **the anatomy of the gastrointestinal canal, and the mental state of the subject** are considered to play a role. (emphasis supplied).

Id. at 911.

Even the ***Mata*** Court noted retrograde extrapolation can be reliable in some cases if the person doing the calculation is in possession of the required factors to do so. In the instant case, however, the factors needed for conducting the extrapolation, such as the food in the stomach and the anatomy of Smith, were not considered. Moreover, every single factor used to conduct the extrapolation was given to the analyst by the prosecutor in the form

of a hypothetical question. The prosecutor minimized the amount of drinking Smith said she did in providing the amount to the analyst. Smith said she had two glasses of Bacardi Limon (glasses that were somewhat bigger than shots). (64:213;241-2). Two glasses versus two shots would make a big difference in the calculations. Glasses would have certainly placed the alcohol level at the time of driving below the legal limit, while mere shots were testified to by the analyst as leading to a .09 BAC at the time of driving. Because this case was very close, given the legal limit of .08, an improper extrapolation was quite prejudicial. This was improperly received evidence which almost certainly assured a guilty verdict on the charges.

III. THESE ERRORS WERE NOT HARMLESS.

Once the trial court received the evidence of the CAD Activity Report, that was strong evidence as to the time of driving. The defense was then left with having to disagree with the report or having to use that and still argue Smith was not intoxicated at the time of driving. It should be noted that Smith's own statements differed from the CAD Activity Report, so to the extent the jury believed this was a document that was factually correct, her testimony the car issue happened about 2:20 (R.64:11) and she was

questioned by police at her sister's at 3:00 (64:18) were likely assumed incredible by the jury. Thus, the CAD Activity Report was used as a basis for analyst Glowacki to opine that Smith could not have been under the legal limit at the time of driving, and enabled the prosecutor to argue Smith's testimony was incredible. The City's reference to the fact the time on the lab report was the same as in the CAD does not make it more likely the time was correct—that is the time given to the lab by police in anticipation of litigation. The attorney was left with having to explain a possibility for Smith to not have been intoxicated at the time in the CAD report, because it was admitted it into evidence.

The errors in permitting the introduction of the CAD Activity Report and the retrograde extrapolation of the analyst individually were not harmless. They were even more prejudicial when they are looked at in the totality of circumstances in this case. In order to find these errors harmless, this Court would need to find "no reasonable possibility that the error(s) contributed to the guilty verdicts." ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985). Given the reliance on the time of driving in that report by the prosecution in this case and the reliance placed upon the analyst's testimony that even the drinking after driving, Smith's alcohol level would have

been over the prohibited level at the time of driving, the errors cannot be harmless.

In a case such as this, where the parties agree the jury had to determine credibility (Br.P.19), and both of these errors served to allow the prosecution to argue Smith was lying about the events surrounding the driving as well as about drinking to excess only after driving establish the errors cannot be deemed to be harmless. Had the CAD Activity Report not been received as evidence and the analyst's testimony about Smith's alcohol level at the time of driving not been received as evidence, Smith would not have been convicted of either charge.

IV. THIS CASE IS EXCEPTIONAL.

Smith argued in her original brief this case should be reversed because of both abuse of discretion and plain error. She argued this Court can use its power to reverse, in the interest of justice, for all the reasons stated in that original brief and this reply. Although the City failed to address this argument as raised in Smith's original brief**,** 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).

This case is "exceptional"[5] and subject to discretionary reversal because a citizen was convicted of drunk driving charges based upon only hearsay evidence and a prosecutor's hypothetical leading an analyst to improperly opine a blood alcohol level that guaranteed guilt. Wisconsin courts demand a ***Daubert*** hearing be held before such a calculation is made. Wisconsin courts have also historically demanded fairness and convictions not based upon improperly admitted and unreliable evidence.

CONCLUSION

For the reasons stated in this and Smith's original brief, this Court should reverse and order a new trial on both counts.

[5]***State v. McKellips***, 369 Wis. 2d 437, 881 N.W.2d 258 (2016), quoting ***State v. Kucharski,*** 363 Wis. 2d. 658, 866 N.W.2d 697 (2015).

Dated at Madison, Wisconsin, August 23, 2017.

Respectfully submitted,

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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-point 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 2998 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: August 23, 2017.

Signed,

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