

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017AP307-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JAMIE M. SRB,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE FINAL ORDER
ENTERED ON FEBRUARY 2, 2017,
IN THE CIRCUIT COURT FOR DANE COUNTY,
BRANCH II, THE HON. JOSANN REYNOLDS, PRESIDING

Respectfully submitted,

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Defendant-Appellant

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STATEMENT OF THE ISSUES

- I. Did the trial court error by admitting testimony from the State's expert witness without proper notification.

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 issue on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's denial of defendant's objection to the State's expert testimony.

The State charged the Defendant-Appellant, Jamie M. Srb, with Operating a Motor Vehicle While Under the Influence of an Intoxicant (OWI) and Operating a Motor Vehicle with a Prohibited Alcohol Concentration, both as second offenses. (R. 1-3.) According to the complaint, Mr. Srb was arrested on March 6, 2016, after he was found sleeping in his vehicle by Sun Prairie Police Department Officer Jamison Davis. (R. 3: 2.) An individual reported a vehicle had been idling in front of his house for at least three hours. (R. 3:2.) Officer Davis responded and located Mr. Srb's vehicle running at approximately 2:31 a.m. (R. 3:2.) Officer Davis awoke Mr. Srb and questioned him about his activity. (R. 3:2.) He then directed Mr. Srb to turn off his vehicle and administered field sobriety tests to Mr. Srb. (R. 3:2-3.) After observing clues of intoxication, Officer Davis arrested Mr. Srb for OWI. (R. 3:3.) A blood sample was obtained from Mr. Srb at 3:42 a.m. (R. 3:4.) Theodore Savage of the Wisconsin State Laboratory of Hygiene (Hygiene Lab) analyzed this blood sample and reported a blood alcohol concentration (BAC) of 0.158 g/100 mL. (R. 3:4.)

Mr. Srb filed Motions *in Limine* on January 24, 2017. (R. 30.)

One of the motions, #5, requested:

That the State be prohibited from offering any expert testimony unless proper notice has been provided to the defense under Wis. Stat. § 971.23(1)(e), and the Court has determined prior to trial that the proffered testimony meets the standard set forth in Wis. Stat. § 907.02(1) and *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993). (R. 30: 2.)

On January 25, 2017, the State submitted a witness list that included Analyst Savage from the Hygiene Lab. (R. 33.) A Notice of Intent To Use Expert Witness Testimony, signed on January 24, 2017, had previously been filed. (R. 32.) The notice indicated the State expected the following expert testimony:

Theodore Savage, an analyst with the Wisconsin State Crime Laboratory, will testify about his analysis of blood sample 16FX003449 belonging to Jamie M SRB and tested on 3/11/16. His opinions will be consistent with the Crime Lab¹ report that has previously been provided to defense counsel as discovery. (R. 32.)

The only report Analyst Savage had previously completed was a Laboratory Report attached to the complaint. (R. 3:4.)

On January 30, 2017, the Honorable Josann Reynolds presided over jury selection and motions in limine. (R. 76.) Prior to calling the jury panel into the courtroom, the State moved the court for a finding that “the turning off of the vehicle” was “automatically

¹ The State’s notice incorrectly referred to an analyst from the Crime Lab. Mr. Srb’s blood was actually tested at the Wisconsin Laboratory of Hygiene.

admissible as proof of operation.” (R. 76:2.) The court found this was a factual question for the jury and an element of the offense. (R. 76:2-5.) The court denied the State’s motion. (R. 76:5.)

Later, the court turned to the matter of the State’s expert witness. (R. 76:9-10.) Defense counsel acknowledged the “boiler plate” notice for a blood analyst. (R. 76:10.) Counsel further indicated no objection to the expert as long as the expert was not going to testify to anything further than what was contained in the notice. (R. 76:10.) The State did not argue its expert would testify beyond what had been disclosed. Jury selection commenced and a jury was selected. (R. 13-47.)

Mr. Srb’s jury trial occurred on February 2, 2017. (R. 77².) Prior to the State’s first witness, the court read the jury a stipulation between the parties. (R. 39, 78:21-22.) The court read:

One, at approximately 2:31 a.m. on March 6, 2016, a person living at 3217 Rebel Drive in the City of Sun Prairie called 911. Two, that person told the 911 operator that a truck had been parked across the street from his house, with the engine and lights on, for at least three hours. (R. 77:22.)

The State then called its first witness, Officer Davis. (R. 77:22.) Officer Davis testified that on March 6, 2016 at approximately 2:30 a.m., he received a report of a suspicious vehicle

at the intersection of Rebel Drive and Normandin Court in Sun Prairie. (R. 77:23-24.) He responded to that location and observed a black pickup truck that was parked, but running with its lights on. (R. 77:25.) Officer Davis testified that he identified Mr. Srb as the sole occupant of the vehicle. (R. 77:30-31.) Mr. Srb was sleeping in the driver's seat. (R. 77: 30.) After several attempts of knocking on the window, Officer Davis was able to wake Mr. Srb. (77:32.) Officer Davis testified that Mr. Srb was non-responsive to questioning. (R. 77:32.) Mr. Srb made nonsensical statements such as he was coming from Florida (R. 77:33) but also that he was ice fishing (R. 77:37.). Mr. Srb told Officer Davis he did not know how long he had been at his location or how he got there. (R. 77:58.) Officer Davis testified Mr. Srb admitted to having 4 to 5 beers between 2:30 p.m. and 4:00 p.m. the previous day. (R. 77:40.)

After observing signs that Mr. Srb was intoxicated, Officer Davis asked Mr. Srb to perform standardized field sobriety tests. (R. 77:37.) After Mr. Srb completed the field sobriety tests, Officer Davis placed him under arrest. (R. 77:46.) Officer Davis then transported Mr. Srb to a hospital to have his blood drawn. (R. 77:48.)

² The amended appeal record dated April 3, 2017 indicates Record 77 contains 198 pages and is "Transcript – 01/30/17 Jury selection." This should actually be "Transcript – 02/02/17 Jury trial." Record 77 is the trial transcript.

After the blood draw was completed, Officer Davis placed Mr. Srb's blood sample into an evidence locker. (R. 77:82.)

Deb Turgeon testified after Officer Davis' testimony was concluded. (R. 77:82.) Ms. Turgeon testified she was a registered nurse who worked at St. Mary's Hospital. (R. 77:83.) Ms. Turgeon testified she was working on March 6, 2016 and drew Mr. Srb's blood at 3:42 a.m. (R. 77:83-86.)

The State next called Officer Nicole Vedik from the Sun Prairie Police Department. (R. 77:88.) Officer Vedik testified she transported Mr. Srb's blood sample from the Sun Prairie Police Department to the Hygiene Lab. (R. 77:91.)

Prior to the State calling its final witness, Analyst Savage, defense counsel raised the issue of the blood test's admissibility. (R. 77: 93.) Counsel, citing Wis. Stat. § 343.305, argued the blood test is only automatically admissible if the blood draw was done within three hours of the time of driving. (R. 77:93-94.) The State had not presented evidence thus far that the blood was taken within three hours of operation. (R. 77:94.) Therefore, for the blood test to be admissible, the State was required to prove it was relevant through an analyst performing retrograde extrapolation. (R. 77:94.) However, the State's Notice of Expert did not contain any information about

the analyst testifying to such information as absorption, elimination, or extrapolation. (R. 77:94, 98.) Therefore, counsel moved for the exclusion of testimony on retrograde extrapolation due to a discovery violation and exclusion of the blood test based on relevance. (R. 77:94-95.)

The State responded that it expected Analyst Savage to testify about the blood test result, as well as the effects of the consumption of alcohol. (R. 77:96-97.) The State further stated it did not expect the defendant to make a curve defense, so did not plan to ask the analyst about extrapolation. (R. 77:99.) The State further argued defense counsel should have expected the analyst would testify about absorption and elimination even without notice from the State. (R. 77:100.) The State later argued that “the defense is automatically on notice that when the blood draw is outside the three hours of operation, the State is required to bring an expert to do essentially a retrograde in order to get the test in a trial.” (R. 77:107.)

The court overruled defense counsel’s objection to the testimony. (R. 77:101.) The court allowed Analyst Savage to testify to matters of common knowledge regarding absorption and elimination, but did limit the State from eliciting any specific retrograde calculations. (R. 77:101.) The analyst was also allowed to

testify whether Mr. Srb's statements about his consumption of alcohol were consistent with the test result. (R. 77:102.)

After a brief *Daubert* hearing with Analyst Savage, defense counsel renewed the objection to the analyst's testimony. (R. 77:110-111.) Counsel argued that, without retrograde calculation, the blood test results were not relevant to whether Mr. Srb was under the influence at the time he operated a motor vehicle. (R. 77:111.) There was no testimony that established, or even suggested, when Mr. Srb had last operated his vehicle. (R. 77:113.) The court maintained that Analyst Savage could testify as previously ruled. (R. 77:114.)

The trial resumed with Analyst Savages's testimony. (R. 77:115.) Analyst Savage testified he worked at the Hygiene Lab for approximately three years as a chemist in the toxicology unit. (R. 77:116.) He testified that on March 11, 2016, he tested Mr. Srb's blood sample and determined his BAC to be 0.158 grams per 100 milliliters of blood. (R. 77:118-122.)

The State went on to question Analyst Savage about the test result compared to Mr. Srb's testimony that he drank four to five beers approximately 12 hours prior. (R. 77:123.) Analyst Savage impeached the defendant by then testifying that Mr. Srb's purported drinking history was not consistent with the test result. (R. 77:123.)

Analyst Savage further testified that if a person were to drink four to five beers, there would be no alcohol in his system after 12 hours. (R. 77:124.) The State elicited additional testimony from the analyst that Mr. Srb's BAC would have been higher than 0.158 prior to falling asleep in his vehicle because Mr. Srb would have been eliminating alcohol from his body. (R. 77:124-125.) Analyst Savage did a retrograde extrapolation to testify it would take at least eight to ten beers for Mr. Srb to have the BAC he did. (R. 77:125.) On redirect, Analyst Savage provided further testimony about factors that affect how an individual absorbs alcohol. (R. 77:129.) The State later argued in closings that Mr. Srb's statements of drinking were not credible because they were inconsistent with the blood test result, as noted by the analyst. (R. 77:166.)

After deliberations, the jury returned verdicts of guilty as to both counts. (R. 77:192-193.) Mr. Srb now appeals to this Court. (R. 71.)

ARGUMENT

The result of a blood test taken within three hours of driving in an OWI case is entitled to certain admissibility benefits under Wis. Stat. § 885.235(1g). When that test is taken more than three hours after driving, the result is admissible only if an expert witness can establish its probative value. In order to do so, an expert would be required to conduct a retrograde extrapolation to the time of driving. Without such testimony, the blood result test has no probative value.

Here, the State failed to introduce any evidence of the time Mr. Srb last operated his vehicle. Furthermore, it did not provide proper notice that the expert from the Hygiene Lab would offer any testimony other than what was specifically in the Hygiene Lab report: That blood drawn from Mr. Srb at 3:42 a.m. had a blood alcohol concentration of .158.

I. Standard of Review

“Appellate courts review a circuit court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard.” *State v. Giese*, 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 854 N.W.2d 687. A circuit court's discretionary decision will not be reversed if it has a rational basis and was made in accordance with

the accepted legal standards in view of the facts in the record. *Id.* (citing *State v. Shomberg*, 2006 WI 9, ¶ 11, 288 Wis. 2d 1, 709 N.W.2d 370). Construing and interpreting Wis. Stat. § 885.235, is a question of law that this Court should review de novo. *State v. Bentsdahl (In re Bentsdahl)*, 2013 WI 106, ¶ 17, 351 Wis.2d 739, 840 N.W.2d 704 (Wis., 2013).

II. The Circuit Court Erred When It Received Mr. Srb's Blood Alcohol Concentration at Trial.

A. Mr. Srb's blood test result was only admissible if it was taken within three hours of driving or if expert testimony established its probative value.

The admissibility of a chemical test for an intoxicant in OWI cases is governed by Wis. Stat. § 885.235(1g). The statute reads, in relevant part:

In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration...evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood... is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved.

The statute further reads that if the analysis shows the person has a blood alcohol concentration of 0.08 or more, the jury should take this as prima facie evidence that the person was under the influence of an intoxicant and that he or she had a prohibited alcohol

concentration. Wis. Stat. § 885.235(1g)(c). However, if the blood is taken more than 3 hours after the event to be proved, the chemical analysis is only admissible if its probative value is established by expert testimony. Wis. Stat. § 885.235(3).

In this case, the event to be proved is the operation of the vehicle. For the State to take advantage of the automatic admissibility provided by Wis. Stat. § 885.235, it would need to show Mr. Srb's blood test was taken within three hours of operating a vehicle. There was no evidence as to the last time Mr. Srb operated his vehicle. A call into the 911 dispatch center at 2:31 a.m. indicated Mr. Srb's vehicle had been stationary for at least three hours. Despite the State's attempt to have the circuit court rule that shutting off the vehicle constituted operation, there was no evidence, direct or circumstantial, as to a time of driving. Therefore, the State could not rely upon Wis. Stat. § 885.235(1g) for the chemical test of Mr. Srb's blood to be admissible evidence to submit to the jury.

Because the State could not prove Mr. Srb had operated his vehicle within three hours of the blood draw, it had to rely upon Wis. Stat. § 885.235(3): The chemical analysis is admissible *only* if the State can establish its probative value through expert testimony.

The Wisconsin expert witness statute adopted the expert testimony admissibility standards established by the United States Supreme Court in *Daubert v. Merrell Dow. Pharm., Inc.*, 509 U.S. 579 (1993). The statute reads:

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 thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Wis Stat. § 907.02.

State v. Giese held testimony about retrograde extrapolation is admissible as expert testimony because it was the product of reliable principles and methods and based upon sufficient facts and data. *Id.* at ¶ 2. *Giese* applied both Wis. Stat. §§ 907.02 and 885.235 together to address whether “reverse extrapolation” met *Daubert* standards to support admitting the results of a blood sample taken more than three hours after a person was driving. Because the expert had “more than just a single test to work with,” the *Giese* court held that the expert’s testimony on reverse extrapolation was admissible under the *Daubert* standard. *Id.* at ¶ 27. The expert had an approximate time of driving, *Id.* at ¶¶ 4, 15, and relied on assumptions about the absence of intervening drinking and absorption of alcohol. *Id.* at ¶ 27. In

summary, *Giese* held that retrograde extrapolation is permissible to establish the probative value of a blood test result that was taken more than three hours after driving.

The State is normally permitted, as would be the case here, to notice expert testimony as to retrograde extrapolation to show the probative value of a defendant's blood test result. However, any such notice of expert testimony must be done properly, and that was not done here.

B. The State had a duty to disclose its expert's testimony.

Discovery is designed to facilitate the adversary process by ensuring that the parties have the information needed to fully present their cases. *State v. Schaefer*, 2008 WI 25, ¶¶ 29–31, 308 Wis. 2d 279, 296–97, 746 N.W.2d 457, 466–67. Pretrial discovery requirements are designed primarily to provide notice of the particular evidence that will be introduced by the other side at trial.

Wis. Stat. § 971.23(1) governs what the State must disclose to the defendant. In regard to an expert witness, the State must disclose:

[A]ny reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

Wis. Stat. § 971.23(1)(e). This requirement for disclosure certainly applies to an analysis from the Hygiene Lab testifying about a blood analysis. Thus, Analyst Savage's testimony is limited to that which the State has provided notification of in its pretrial disclosure. Because a defense is prepared based upon what is disclosed to the defendant in discovery, the failure to properly disclose expert testimony serves to deprive defendants of fair trials.

In the State's Notice of Expert Testimony, the State simply indicated that Analyst Savage would testify consistently with his report. (R. 32.) The report provided to Mr. Srb simply indicated that his blood was tested for the presence of alcohol and the result of the test. (R. 3:4.) Notably, the report did not indicate anything about how a person absorbs or eliminates alcohol, the quantity of drinks it would take to reach a certain blood alcohol concentration, or retrograde extrapolation.

Wis. Stat. § 971.23 also advises a court on the appropriate remedy for the State's failure to disclose required information. The court *shall* exclude any evidence not disclosed as required by statute. Wis. Stat. § 971.23(7) (emphasis added). Based upon the State's limited disclosure of what its analyst would testify to, Analyst Savage should have been prohibited from testifying to anything

outside his lab report. Analyst Savage's testimony should have been limited to only Mr. Srb's blood alcohol concentration at the time his blood sample was taken.

Despite the State's argument that Mr. Srb was somehow *automatically* on notice of the analyst's testimony (R. 77:107), the discovery statute clearly outlines that the State must provide a *written* summary of an expert's testimony. Analyst Savage's testimony went well beyond the written summary. He testified as to what Mr. Srb's BAC would have been twelve hours after consuming four to five beers (R. 77:124). He testified that Mr. Srb would have had a higher BAC prior to going to sleep in his vehicle (R. 77:124-125). He testified as to the number of beers Mr. Srb would have had to ingest to reach his reported BAC (R. 77:125) and what effect alcohol has on a person's body (R. 77:129.). None of this testimony was contained or summarized in the lab report of Mr. Srb's blood analysis, nor was it in a separate report. Although it seemed the court originally would limit the testimony, it was all permitted at trial. The court erred in receiving this unlimited testimony from Analyst Savage that was not properly noticed to Mr. Srb prior to trial and was objected to at trial.

C. Without testimony beyond Mr. Srb's reported BAC, the State could not establish the probative value of the chemical analysis.

Had the circuit court properly limited Analyst Savage's testimony to only Mr. Srb's reported blood alcohol concentration at the time the blood draw was completed, the State would not have been able to establish the test result's probative value. Therefore, the test result was inadmissible.

Whether Mr. Srb was intoxicated at the time Officer Davis contacted him is immaterial. Whether Mr. Srb was intoxicated *at the time he operated his vehicle* is what is material to the charges. Although Analyst Savage was qualified to testify to the blood test result, this testimony by itself was insufficient to show any probative value. Testimony of a person's test result at a given point in time, without evidence relating that result to the time of operating a vehicle does not by itself hold any probative value.

In *Giese*, the expert had both a scenario of when Giese last operated his vehicle as well as the benefit of reverse extrapolation to show the requisite probative value Giese's blood alcohol concentration. *Id.* at ¶¶ 8, 27. There were no issues as to improper notice in that case. Here, Analyst Savage did not have any evidence in the record to establish a time of driving. Even if he had such

evidence, Analyst Savage should not have been allowed to conduct a reverse extrapolation because of the lack of notice from the State. As *Giese* recognized, “[t]he goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion.” *Id.* at ¶ 19 (citations omitted).

The analyst’s testimony about Mr. Srb’s blood alcohol concentration without any knowledge of when Mr. Srb last operated his vehicle was purely speculative and had no probative value as to the issue of whether Mr. Srb was operating a vehicle while intoxicated or with a prohibited alcohol concentration. The error by the circuit court in receiving this testimony about Mr. Srb’s alcohol concentration prejudiced his defense at trial. Without that evidence, the jury would not have convicted of either charge.

CONCLUSION

The circuit court allowed the State's expert witness to testify to a subject matter that was not properly noticed to Mr. Srb. The court should have excluded any testimony from the expert beyond what was in his report. Furthermore, without expert testimony beyond his report, the State could not establish the probative value of Mr. Srb's blood test result that was obtained more than three hours after he last operated a vehicle. Therefore, the expert's testimony should have been excluded altogether.

For the reasons stated above, Mr. Srb's conviction should be reversed, and this action be remanded to that court for a new trial.

Dated at Madison, Wisconsin, June 14, 2017.

Respectfully submitted,

JAMIE M. SRB, Defendant

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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 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 3928 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: June 14, 2017.

Signed,

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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; and
- (3) 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 notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: June 14, 2017.

Signed,

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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: June 14, 2017.

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