STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP307-CR

STATE OF WISCONSIN,

Plaintiff-Respondent.

vs.

JAMIE M. SRB,

Defendant-Appellant.

REPLY BRIEF OF PLAINTIFF- RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 2, THE HONORABLE JOSANN M. REYNOLDS, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State believes that the issues addressed can be decided by applying existing law to these facts, therefore publication is not necessary. As the State believes it has adequately addressed the issues in its brief, oral argument is not necessary.

STATEMENT OF THE ISSUES

I. Did the trial Court err in admitting testimony from the State's expert witness without proper notice?

The trial court ruled, within its discretion, that State's expert witness could testify based on circumstantial evidence of operation relying on Milwaukee Cty. v. Proegler, 95 Wis. 2d 614, 631, 291 N.W.2d 608, at 626(Ct. App. 1980)and State v. Mertes, 2008 WI App 179,315 Wis. 2d 756, 767, 762 N.W.2d 813.

ARGUMENT

A. Standard of Review

A mixed question is one that requires the court to determine (1) what happened, and (2) whether those facts fulfill a particular legal standard. State v. Gollon, 115 Wis. 2d 592, 600, 340 N.W.2d 912 (Ct. App. 1983). The standard of review of mixed questions is to apply great weight/clearly erroneous standard to the factual portion, while independently reviewing the conclusions of law. Department of Revenue v. Exxon Corp., 90 Wis. 2d 94 (1979), *aff'd*, 447 U.S. 207 (1980). When the circuit court's legal conclusions are intertwined with factual findings, an

appellate court may give weight to the circuit court's conclusion. See Leasefirst v. Hartford Rexall Drugs, Inc., 168 Wis. 2d 83, 89, 483 N.W.2d 585 (Ct. App. 1992).

B. The Court did not err when it received Mr. Srb's blood alcohol Concentration at trial because leaving the engine running is considered operation and the blood draw was within three hours of observed operation

The time at which the Appellant's vehicle was running is undisputedly at 2:31 a.m., at which point officer Davis asked Mr. Srb to turn his vehicle off. (Appellant Brief at 5). It is also undisputed that a blood sample was taken from Mr. Srb at 3:42 a.m. and that said sample was analyzed by Analyst Theodore Savage of the Wisconsin State Laboratory of Hygiene and found to have a reported Blood Alcohol Concentration ("BAC") of 0.158 g/100 mL. (Id.)

Operating while under the Influence ("OWI") and Operate w/ prohibited alcohol Content ("PAC") both have "operate" (to manipulate a motor vehicle) in their statutory definitions, therefore not requiring the need for a defendant to have "driven" (or controlled the speed/direction of a car). See Wis. Stat. § 346.63(3)(a) and (b).

The event in question is when did Mr. Srb operated a motor vehicle. Wis. Stat. § 346.63(3)(a) and (b)Prohibits the activation of any of the controls of a motor vehicle while under the influence of intoxicants. Operation covers both: turning on the ignition and leaving the motor running while the vehicle is in "park." See Milwaukee Cty. v. Proegler, 95 Wis. 2d 614, 631, 291 N.W.2d 608, 626(Ct. App. 1980). The Court summarizes that "'Operation' of a vehicle occurs either when a defendant starts the motor and/or leaves it running." Id, at 628-29.

In the instant case, operation last occurred at 2:31 a.m. when the officer made contact with Mr. Srb and observed the vehicle running. The blood sample was taken at 3:40 a.m., or so, which is less than the statutory three hour time limit. Wis. Stat. 885.235(1g). The analyst's expert testimony was therefore automatically admissible in accordance with the Statute. Id.

The State argued that "… circumstantial evidence is evidence…" in relation to the time of operation (R. 77:96). The trial court explained "[I]f you look at State [v.] Mertes at 315 Wis. 2d 756 and it cites Milwaukee County [v.] Proegler and Commonwealth {v.] Kloch, the circumstantial evidence is sufficient to get it to a jury.

The vehicle didn't magically appear on the side of the road… So the circumstantial evidence is sufficient to get them to the jury". (R. 77:113).

The trial court did not err in its exercise of discretion when it decided to admit the blood test results and let the jury consider the evidence without requiring a retrograde extrapolation as demanded by the defense. The court's ruling was correct both as an appropriate use of discretion, based on the circumstantial evidence of driving (i.e. the vehicle got there somehow) and by the operation of the vehicle as interpreted by Mertes and Proegler.

II. **There was no Violation of the Duty to Disclose Expert Testimony as notice was provided and the Appellant was not surprised by the Expert Testimony provided**

The State provided Notice of Expert Testimony on January 25th, 2017 informing the Appellant that Analyst Theodore Savage would testify in his capacity as an Analyst of the State Crime Laboratory. The Appellant was given notice that the Analyst opinions would be consistent with the Crime Lab Report, for sample 16FX3449, previously provided to the Appellant.

"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 Lab report that has previously been provided to defense counsel as discovery." (Appellant Brief, page 6)

The purpose of Expert Notice is to avoid surprises. In this case the Appellant wants to use the discovery statute as an offensive weapon. During the trial, and outside the presence of the jury, the State argued that "…[T]he defense well knows what their expertise are and what they do" (R77:100). The State then agreed to limit testimony from the expert to the BAC found, how it compared to Appellant's admissions and whether it would be higher or lower if someone slept for 3 hours. See Id. The Appellant continued to object at which point the State argued: "So you're telling me that an expert on blood alcohol levels, you didn't expect he was going to know that not drinking for a while means that your blood alcohol level will be tending down?" See Id. The reply of the Appellant is instructive: "[W]hat I expect has nothing to do with your obligations under the discovery statute." (Id.). The Court then allowed testimony to matters of

common knowledge and forbade the use of calculations as a remedy for lack of notice.

Before the State started to lay the foundation for the expert testimony, and still with the jury out, the Court reminded the Appellant that these sort of evidentiary hearings are better held when there is no jury waiting (R77:106). The Appellant again claimed lack of notice (Id.) The trial court's response is again instructive on the issue of Expert Notice and the purpose of Discovery: "You're not surprised by what this expert is coming to testify about…" (Id.)The purpose of the discovery statute was evaluated by the Wisconsin Supreme Court in Schaefer:

> "Traditionally, however, statutory discovery is designed to assure fairness at a criminal trial. Discovery anticipates a trial at which a fact-finder determines guilt. The court of appeals has stated that "[p]retrial discovery is nothing more than the right of the defendant to obtain access to evidence necessary to prepare his or her case *for trial." Maday,* 179 Wis.2d at 354, 507 N.W.2d 365 (citing *Britton v. State,* 44 Wis.2d 109, 117, 170 N.W.2d 785, 789 (1969)) (emphasis added). "Providing a defendant with meaningful pretrial discovery underwrites the interest of the state in guaranteeing that the quest for the truth will happen during a fair *trial." Maday,* 179 Wis.2d at 354–55, 507 N.W.2d 365 (emphasis added)."
> State v. Schaefer, 2008 WI 25, ¶ 23, 308 Wis. 2d 279, 293, 746 N.W.2d 457, 464

The purposes of discovery statutes are to eliminate surprise and unfairness at trial, and to ensure that the trial is a quest for the truth. See Id., at 464-65). Appellant's use of the discovery statute, while at the same time admitting that there was no surprise, does not further the quest for truth. (See R77:100 and R77:106).

CONCLUSION

For the reasons offered above, this Court should affirm the decision of the trial Court.

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CERTIFICATION

I certify that this reply brief conforms to the rules contained in sec. 809.19(8)(d) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 7 pages.

Dated: August 17th, 2017

Signed,

_____
Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

Dated this ____ of _____, 2017.

_____
Mauricio Cardona
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