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 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,

JAMIE M. SRB,
Defendant-Appellant

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I. Standard of Review

The State argues that where the trial court's legal conclusions are intertwined with factual findings, the reviewing Court may give weight to the circuit court's conclusions. However, the State makes no argument that the legal conclusions in this case are intertwined with factual findings. Construing and interpreting statutes involves questions of law that this Court reviews *de novo*. ***State v. Bentdahl (In re: Bentdahl)***, 2013 WI 106, ¶ 17, 351 Wis.2d 739, 840 N.W.2d 704. In this case, the trial court's legal conclusions are not so intertwined with factual findings that a different standard should apply. The interpretation and application of Wis. Stat. § 885.235 should be reviewed *de novo*.

II. The expert testimony should have been excluded.

A. The vehicle engine being on is not the same as operation, and expert testimony would have been required to show the relevance of the blood test taken over three hours after operation.

In the trial court, the State sought a legal ruling that Srb operated his vehicle either because the vehicle was running or because Srb turned the vehicle off in the officer's presence. (76:2–3.) The trial court declined to make that ruling, and the prosecutor did not challenge the trial court's decision. (76:5.) Further, after all of the

evidence had been received, the trial court specifically held, "[w]e don't have a test [administered] within three hours." (77:133.) The State conceded that point. (77:95, 107, 133–134.) Thus, because the State could not prove that Srb had operated his vehicle within three hours of the blood draw, the chemical analysis was admissible *only* if the State could establish its probative value through expert testimony. Wis. Stat. § 885.235(3). That is why the State noticed the defense and the court as to the expected expert testimony of Analyst Savage in the first place.

Now the State is attempting to resurrect an argument it conceded and abandoned in the trial court. The State argues in its brief Srb operated his vehicle at 2:31 a.m., the time at which the officer confronted Srb and made him shut off the vehicle. (State's brief, p. 4.) The State argues that leaving the vehicle running and turning it off at the officer's insistence is proof of operation, an argument it conceded in the trial court. The State's trial theory was that Srb drove to where the car was found and then fell asleep behind the wheel. The prosecutor stated that "the defendant was asleep for a minimum of three hours" prior to the police arriving. (77:124.) The State did not advance any argument before the jury that the running car or Srb turning off the vehicle could be considered operation.

In addition, the State was on notice that the defense would request an entrapment instruction if the State pursued the theory that Srb's obedience in turning off the vehicle could be considered operation. (41.) The State, therefore, chose to pursue the theory that any alleged operation occurred over three hours prior to police arrival, and called an expert to try to establish the relevance of the test result to that earlier operation.

Because the State conceded that the time of operation was not within the three-hour window, it cannot raise that issue again on appeal. This would have been a very different trial if the State argued that obeying the officer in turning off the car established operation because Srb would have been able to argue entrapment. (41.) Instead, the State argued that operation occurred at an earlier time and had the analyst do a retrograde extrapolation to try to show Srb's alcohol level would have been higher at the time of driving than it was when the blood was taken.

In citing to ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980) and ***State v. Mertes***, 2008 WI App 179, 315 Wis. 2d 756, 762 N.W.2d 813, the State leaves out important distinctions in those cases. First, ***Mertes*** was a challenge to the sufficiency of the evidence of operation. There, the Court held that sufficient circumstantial evidence had been presented to allow the

finding of guilt even though there was no direct evidence of operation. The evidence presented was that the person asleep in the driver's seat said he had driven the vehicle within the last ten minutes of being woken up by the officer. ***Mertes***, 2008 WI App 179, ¶ 4. Similarly, in ***Proegler***, the driver told law enforcement he had driven the vehicle, parked it, and gone to sleep. ***Proegler***, 95 Wis. 2d at 628. However, in ***Village of Cross Plains v. Haanstad,*** 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447, the Court distinguished ***Proegler*** and limited its broad holding that operation of a vehicle includes merely leaving the vehicle running. The ***Haanstad*** Court held there was no evidence of operating introduced, even where the person was found behind the wheel of a running vehicle. A running vehicle is not enough. ***Id***, ¶ 16. Similarly, the Court of Appeals has also found that the mere touching of the controls of a vehicle does not constitute "operation." ***City of Beloit v. Herbst***, No. 2010AP2197 (Wis. Ct. App. Jan. 12, 2012) (Unpublished but citable pursuant to Wis. Stat. § 809.23(3)).

Merely sitting in the driver's seat of a running car does not constitute proof of operation, and turning the car off at an officer's request would allow for an entrapment defense. The trial court's rulings were premised on the fact no evidence of operation existed within the three-hour window, and neither party presented evidence of operation during that time.

The trial court ruled that there was a sufficient inference that operation had occurred to allow the jury to reach the question. But the court did not find sufficient proof of operation within three hours of the test, as required for automatic admissibility under Wis. Stat. § 885.235. The State does not argue the trial court abused its discretion in finding that no operation occurred within the three-hour window on appeal. Because no evidence of operation during that window was presented in this case, the State seemed to agree with the trial court ruling below. Therefore, the blood test result would have been excluded as irrelevant to the time of driving absent expert testimony.

Where the blood is drawn three or more hours after the time of driving, expert testimony must be introduced to show that the test result is relevant to the blood alcohol concentration at the time of driving, not the time of the testing. ***State v. Giese*** held that testimony about retrograde extrapolation was admissible as expert testimony because it was the product of reliable principles and methods and was based upon sufficient facts and data. 2014 WI App 92, ¶ 2, 356 Wis. 2d 796, 8654 N.W.2d 687. However, when the ***Giese*** court held that the expert's testimony on reverse extrapolation was admissible under the ***Daubert*** standard, the expert had "more than just a single test to work with." ***Id***. ¶ 27. The expert also had an approximate time of driving and relied on assumptions about the absence of intervening

drinking and absorption of alcohol. ***Id***., ¶¶ 4, 15, 27. Thus, ***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, where other factors show the reverse technique can be properly applied. However, the only reference to time of driving here was that it had occurred more than three hours before the phone call which brought the police officer to the area. (39). Further, with no known time of driving, there is no point at which the test becomes relevant. There was no evidence to tie a retrograde extrapolation to a specific point in time. Thus, even if proper notice had been given, the testimony would have been irrelevant.

The argument in the State's brief that there was no retrograde extrapolation needed does not make sense in this context—the State called its analyst expressly for that purpose, and that testimony is the subject of this appeal. (State's brief p. 4). Furthermore, to establish that the test result had any relevance in this case, as noted above, a retrograde extrapolation had to be done. The State's brief concedes the court "forbade the use of calculations as a remedy for lack of notice" (Id., p. 6). The analyst had to do calculations, however, to establish that Srb's blood alcohol level must have been higher before he fell asleep than when the test was taken later. The analyst used many factors to conclude that Srb must have had a minimum of eight

to ten beers to have had his high blood alcohol concentration. (77:125). There is no way to reach the conclusions the analyst did without using calculations.

The State must provide notice of expert testimony about 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. There was also insufficient data from which the analyst could even conduct a valid retrograde extrapolation given that there was no known time of driving. Caselaw in Wisconsin does not permit such calculations unless they are shown to be probative of the event to be proved—the time of operation. Without expert testimony tying the test result to the alcohol concentration at the time of driving, the test result is not admissible.

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

The State does not dispute that it had a duty to disclose its expert witness and to summarize the expected testimony pursuant to Wis. Stat. § 971.23(1)(e). The State also concedes that the only notice provided was that "Analyst Savage would testify consistently with the blood analysis report." (32). The report provided to Srb indicated that his blood was tested for the presence of alcohol and reported an alcohol concentration per milliliter of blood. (53). It did not include

any data about absorption or elimination of alcohol, how many drinks it would take to reach a certain blood alcohol concentration, or changes in blood alcohol concentration over time. Analyst Savage's testimony should have been limited to that which the State has provided notification of in its pretrial disclosure.

The State, however, argues that because the defendant was not surprised by the testimony being proffered by the expert, no violation should be found.[1] Under Wis. Stat. § 971.23(7), the court is required to exclude any evidence not properly disclosed. The first question is whether there was a discovery violation. The trial court found there was, and limited the analyst's testimony accordingly in its original ruling because it felt the prosecutor was not going to go into absorption or elimination or permit any calculations. (77:100–101). It was in the later ruling that the court permitted testimony on matters of common knowledge and how much the defendant likely had to drink. The analyst also opined that the defendant's alcohol concentration would have been higher prior to the three-hour window. (77:100–1, 114, 125). If there was a discovery violation, the noncomplying party has an opportunity to show that there was good

[1] There can be no greater surprise, however, than when the defense is told that the analyst would testify as to the test result only and then is allowed to do a retrograde extrapolation showing the defendant would have been even more drunk at the time of driving over three hours prior.

cause for the failure to comply. Absent good cause, exclusion of the evidence is mandatory. ***State v. DeLao***, 2001 WI App 132, ¶ 24, 246 Wis. 2d 304, 629 N.W.2d 825. Acting in good faith is not the same as showing good cause for the failure to provide discovery. ***Id.,*** ¶ 27.

The State relies on ***State v. Schaefer*** to argue that the purpose of the discovery statute is to provide notice and fairness at a trial. 2008 WI 25, 308 Wis. 2d 279, 746 N.W. 2d 457. However, ***Schaefer*** involved a request to obtain discovery outside of the purview of Wis. Stat. § 971.23 prior to a preliminary hearing. The general statements about the purpose of the discovery statute in that case do not apply to whether there is a violation of that statute.

While an expert disclosure and summary need not contain every detail or medical term to be used by the expert, it must put the defendant on notice of those issues and terminology that might come up at trial. ***State v. Schroeder,*** 2000 WI App 128, ¶ 1, 237 Wis. 2d 575, 613 N.W.2d 911. The purpose of turning over such information is to allow the defense to prepare for trial on the expected information. ***Id.*** ¶ 9. Here the summary and report provided did not provide reasonable notice that the expert was to opine about absorption and elimination of alcohol, how many drinks it would take to reach a certain blood alcohol concentration, or changes in blood alcohol concentration over time. Further, there was no indication that the

expert would talk about Srb's alcohol concentration at an unspecified time of driving rather than at the time the blood was drawn. The only notice given was that he would testify about Srb's alcohol concentration at the time that his blood was drawn. The defense, therefore, prepared its case with the assumption that the court would not permit testimony about retrograde extrapolation. This would have then been a trial without any evidence of blood alcohol content. Instead, the trial court disregarded the State's discovery violation and made a mid-trial ruling allowing the State to present this evidence. Srb was not put on notice of the expected testimony or given an opportunity to find his own expert to rebut that testimony. Thus, there was a violation of the discovery statute.

There was also no good cause shown for the violation. In fact, there was no explanation provided by the State as to why it failed to provide an adequate summary of the expected expert testimony. Without good cause, the mandatory sanctions of Wis. Stat. § 971.23(7) apply, and the testimony should have been excluded. This Court cannot even review to determine whether valid reasons existed for the trial court's exercise of discretion because no reason for its decision was given. An abuse of discretion finding may be based upon the court's failure to state on the record the relevant and material factors which influenced the court's decision. *See:* ***Ocanas v. State***,

70 Wis. 2d 179, 233 N.W.2d 457 (1975), citing ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). The trial court seemed to understand the defense's concerns but permitted the State to put on a full retrograde extrapolation; and the State was not limited in any real way.

C. Because the test was not within three hours of operation of the vehicle, it should have been excluded.

Using only the discovery properly provided to the defendant before trial, the State could not establish the probative value of the test result. The fact that Srb was intoxicated when contacted by police was not in dispute. The trial was about whether Srb was intoxicated at the time he operated his vehicle. Although Analyst Savage was qualified to testify to the blood test result, testimony of a test result more than three hours after driving does not by itself hold any probative value and is generally inadmissible.

In ***Giese***, the expert had both a scenario of when Giese last operated his vehicle as well as the benefit of retrograde extrapolation to show the requisite probative value of Giese's blood alcohol concentration. ***Id***., ¶¶ 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 either a time of driving or of drinking. The analyst's testimony about Srb's blood alcohol concentration, without

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

CONCLUSION

For the reasons stated in this and the original Brief, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that defendant be granted a new trial.

Dated at Madison, Wisconsin, September 25, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this reply 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 2,760 words.

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

Dated: September 25, 2017.

Signed,

_____

SARAH M. SCHMEISER
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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: September 25, 2017.

Signed,

BY: _____
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