STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP319-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY E. DOBBS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE CLAYTON KAWSKI, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUES 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 3

STANDARD OF REVIEW 10

ARGUMENT 11

I. The circuit court properly exercised its discretion when it excluded expert testimony from a witness expected to testify generally about false confessions. 11

A. Applicable legal principles 11

B. The circuit court properly exercised its discretion in excluding Dr. White's testimony because, as the court concluded, Dr. White's testimony did not comply with Wis. Stat. § 907.02(1) and would not have assisted the trier of fact. 12

II. The circuit court properly exercised its discretion in denying Dobbs' motion to suppress his statements to police. 15

A. The circuit court correctly concluded that Dobbs was properly detained by police, and not arrested, when he made his initial statements to police. 16

B. The circuit court correctly concluded that Dobbs' statements to police were voluntary. 21

Page

1. Applicable legal principles 21

2. Dobbs' statements to police were voluntary. 22

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Colorado v. Connelly,
479 U.S. 157 (1986) 22

Daubert v. Merrell Dow Pharm., Inc.,
509 U.S. 579 (1993) 11, 12

Krik v. Exxon Mobil Corp.,
870 F.3d 669 (7th Cir. 2017) 12

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999) 11

Miranda v. Arizona,
384 U.S. 436 (1966) 1, 16

Seifert ex rel. Scuptur v. Balink,
2015 WI App 59, 364 Wis. 2d 692,
869 N.W.2d 493 15

State v. Bartelt,
2018 WI 16, 379 Wis. 2d 588,
906 N.W.2d 684 ..... 16, 17

State v. Blatterman,
2015 WI 46, 362 Wis. 2d 138,
864 N.W.2d 26 .....16, *passim*

State v. Giese,
2014 WI App 92, 356 Wis. 2d 796,
854 N.W.2d 687 ..... 10, 11

State v. Hoppe,
2003 WI 43, 261 Wis. 2d 294, 661 N.W.2d 407..... 21, 22

Page

State v. Jenkins,
168 Wis. 2d 175, 483 N.W.2d 262 (Ct. App. 1992)..... 11

State v. Jerrell C.J.,
2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110..... 22

State v. Lonkoski,
2013 WI 30, 346 Wis. 2d 523, 828 N.W.2d 552..... 17

State v. Pickens,
2010 WI App 5, 323 Wis. 2d 226, 779 N.W.2d 1..... 20

State v. Popp,
2014 WI App 100, 357 Wis. 2d 696,
855 N.W.2d 471 10

State v. Smith,
2016 WI App 8, 366 Wis. 2d 613,
874 N.W.2d 610 ..... 10, 14, 15

State v. Swanson,
164 Wis. 2d 437, 475 N.W.2d 148 (1991) 16

Statutes

Wis. Stat. § 907.02(1).....1, *passim*

Wis. Stat. § 968.24 19

STATEMENT OF THE ISSUES

1. Before his trial, Dobbs disclosed that he intended to present expert testimony about false confessions. But the expert acknowledged that he had not reviewed any reports or documents, and that he would not prepare a report or offer an opinion about Dobbs' confessions. Was Dobbs entitled to present the expert testimony at trial?

The circuit court answered "no." The court granted the State's motion to exclude the evidence because it concluded that the expert testimony did not satisfy the standards for admission under Wis. Stat. § 907.02(1) and would not assist the trier of fact.

This Court should answer "no," and affirm.

2. Dobbs made multiple statements to police officers confessing to striking a pedestrian with his truck after he inhaled an intoxicant. Were Dobbs' statements involuntary and given in violation of *Miranda v. Arizona*, entitling him to suppression of the statements?

The circuit court answered "no." It denied Dobbs' suppression motion because it concluded that the officers complied with *Miranda* and that Dobbs' statements were voluntary.

This Court should answer "no," and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, does not request oral argument or publication.

INTRODUCTION

Timothy Dobbs inhaled an intoxicant while he was driving, lost control of his truck, and struck a man who was walking on the sidewalk, killing him. Dobbs then drove away.

A citizen who witnessed the crime called 9-1-1. A police officer responding to a dispatch encountered Dobbs nearby and suspected that the truck Dobbs was driving was involved in the crime. The officer ordered Dobbs out of the vehicle, handcuffed him, and placed him in the back of the squad car. The officer told Dobbs he was being detained for accident investigation. Dobbs denied being involved in an accident.

The officer observed an aerosol can of Ultra Duster in the front console of Dobbs' truck, and he suspected that Dobbs had been huffing from the can. Dobbs agreed to perform field sobriety tests, and then to a request for a blood sample. The officer took Dobbs to the hospital where his blood was drawn. A drug recognition officer read the *Miranda* warnings to Dobbs, and Dobbs said he would answer questions. He did not ask for an attorney. After questioning, the officer who initially encountered Dobbs read him the *Miranda* warnings again and arrested him. Dobbs again agreed to answer questions from law enforcement officers.

Over the course of that day, Dobbs made numerous statements to police officers, to medical personnel, and to his father on the phone, admitting that he had huffed from a can of air duster, passed out, lost control of his truck, and killed a man. He never asked for an attorney or declined to answer questions. Dobbs had a hand injury–unrelated to his hitting and killing the pedestrian–that required surgery the next day. But he never complained of serious pain or sought medical treatment, and every officer who spoke to him said he was coherent and able to understand the questions.

The State charged Dobbs with homicide by intoxicated use of a vehicle, and hit-and-run resulting in death. Before trial, Dobbs moved to suppress his statements to police on the day of and the day after the crime. The circuit court denied his motion after a hearing, concluding that Dobbs' statements were voluntary. The court also denied Dobbs' motion for reconsideration.

Dobbs sought to present expert testimony from a witness who would testify generally about false confessions. The circuit court granted the State's motion excluding the testimony, concluding that the witness had no familiarity with the case and had not applied his conclusions about false confessions to the facts of this case. Therefore, the testimony did not satisfy the requirements under Wis. Stat. § 907.02(1), and would not assist the jury.

A jury found Dobbs guilty of homicide by intoxicated use of a motor vehicle, but not guilty of hit-and-run. On appeal, Dobbs challenges only the circuit court's orders granting the State's motion to exclude the expert testimony and denying Dobbs' motion to suppress his statements. Because the circuit court correctly excluded the expert testimony, and correctly denied the suppression motion, this Court should affirm Dobbs' conviction.

STATEMENT OF THE CASE AND FACTS

On the morning of September 5, 2015, Timothy Dobbs struck Anthony Minardi with his truck, killing him. (R. 266:212–15, 261–63, 265.) Dobbs then drove away. (R. 266:224, 245–46.)

Rochelle Sanders was walking down the street when she saw a truck coming the wrong way and moving faster than cars normally travel on that street. (R. 266:212, 214.) Sanders saw the truck drive onto the sidewalk, hit a man who was walking on the sidewalk, run the man over, and then back up and run him over again. (R. 266:212, 216.) She said the truck then stopped and the driver waited there. (R. 266:216.) Sanders called 9-1-1 to report the incident. (R. 266:217.) She then saw the truck leave the scene. (R. 226.)

Jeffrey Kauffeldt was driving down the same street shortly after Dobbs' truck struck Minardi. (R. 266:240–41.) He saw a body in the street next to the curb, so he stopped to

render aid. (R. 266:238, 241–43.) Kauffeldt checked on the body and told Sanders that it appeared that the person was dead. (R. 266:243.) Kauffeldt observed that the driver was still in the truck, so he got the license plate number and relayed it to Sanders. (R. 266:244.) Kauffeldt heard the driver attempting to start the truck, so he quickly got more information about the vehicle, including the color, make and model, and that it had a topper, and also relayed that information to Sanders. (R. 266:245.) Kauffeldt then saw the truck back up and head down the street. (R. 266:245.)

City of Madison Police Officer Jimmy Milton responded to a call from dispatch at 7:23 a.m. (R. 267:64.) The dispatch described the vehicle involved in the crash as a black or dark colored van, and it described the direction the vehicle was travelling away from the crash. (R. 267:65–66.) Dispatch then reported that the victim was deceased. (R. 267:66.) As he neared the crash scene, Officer Milton observed a dark colored pickup truck with a topper stopped at an intersection. (R. 267:67.) The truck had a completely deflated front driver's side tire with an exposed rim. (R. 267:73.)

Officer Milton suspected that the truck may have been the vehicle involved in the hit-and-run, so he stopped his squad car in front of the truck. (R. 267:74–75.) Officer Milton approached the vehicle and asked the driver to show his hands. (R. 267:77.) Officer Milton observed that the driver, later identified as Dobbs, was removing a splint from his arm and hand. (R. 267:77.) After Dobbs removed the splint, Officer Milton ordered Dobbs out of the truck. (R. 267:77.) Officer Milton handcuffed Dobbs and seated him in the rear of the squad car. (R. 267:79–81.) He observed that Dobbs had an obvious injury to his hand, but Dobbs did not complain about being handcuffed. (R. 267:81.) Officer Milton testified that he detained Dobbs because he was the only officer present and he suspected the driver to have been involved in a serious crash and to have fled the scene. (R. 267:80–81.)

After Dobbs identified himself and Officer Milton verified Dobbs' identity (R. 267:78, 82–83), Officer Milton asked Dobbs some general questions. Dobbs told the officer that he had gone to Menards and was on his way home. (R. 267:83.) He said the damage to his truck was the result of his truck hitting the curb. (R. 267:83.) Officer Milton observed that Dobbs had several scratches or bruises on his face. (R. 267:99.) Dobbs said that those injuries did not happen during the crash, and that he did not further injure his hand when his truck struck the curb. (R. 267:99–100.) Dobbs said he had consumed a few beers the night before but had no alcohol that morning. (R. 267:84.) Dobbs said he had anxiety and depression and was taking medication for those conditions, and painkillers for his arm. (R. 267:84–85.)

Officer Milton testified that Dobbs repeatedly asked if he had hit a person. Officer Milton said he initially told Dobbs that he had hit a person, but when Dobbs asked the same thing again and again, he told Dobbs that an investigation was underway. (R. 267:85–86.) Thereafter, Officer Milton did not tell Dobbs he had hit a person because he did not want Dobbs to become more emotional. (R. 267:86.)

Officer Milton examined Dobbs' truck and observed damage to the front end and hood. (R. 267:89–90.) He looked into the truck from the outside and observed a can of air duster in the front center console within the driver's reach (R. 267:91.) He testified that the can appeared to be ready for use. (R. 267:93.) Officer Milton knew from his training and experience that air duster can be inhaled for getting high. (R. 267:94.) He suspected that Dobbs was under the influence of some intoxicant, and that he may have inhaled from the can. (R. 267:94–95.)

Officer Milton asked Dobbs if he would perform field sobriety tests. (R. 267:101, 103.) After Dobbs performed the tests, Officer Milton did not arrest him. (R. 267:145.) He still suspected that Dobbs might be under the influence of an

inhalant, prescription drugs, or alcohol, so he asked him if he would submit to a blood test. (R. 267:145–46.) Dobbs agreed to a blood test, so Officer Milton put him back into the squad car, without handcuffs. (R. 267:147.)

Officer Milton drove Dobbs to Meriter Hospital. (R. 267:148.) He read the Informing the Accused form to Dobbs, and asked if he would give a blood sample. (R. 267:148.) Dobbs said he had anxiety about needles, and wanted to take a breath test. (R. 267:149.) After Officer Milton explained the blood draw procedure, Dobbs agreed to a blood draw on the condition that he could take a breath test as well. (R. 267:149.) Officer Milton agreed. (R. 267:149.)

After the blood draw, a drug recognition expert, Officer Nicholas Pine, evaluated Dobbs. (R. 267:157; 269:37.) Officer Pine began the evaluation at 9:47 a.m. (R. 269:39.) Before he began questioning Dobbs, Officer Pine read the *Miranda* warnings to him at 10:19 a.m. (R. 253:83–84.)

After the drug recognition evaluation was completed, Officer Milton escorted Dobbs to his squad car. Dobbs was not handcuffed. (R. 267:163.) Officer Milton placed Dobbs under arrest. (R. 267:164–66.) He informed Dobbs that the person he struck was deceased. (R. 267:164–65.) Dobbs started crying. (R. 267:166.) Officer Milton read the *Miranda* warnings to Dobbs, and began questioning him. (R. 267:168.) Dobbs answered the officer's questions. (R. 267:168.)

Dobbs told Officer Milton that he had gone to Menards that morning and had purchased ten cans of air duster. (R. 267:179.) Dobbs said he tested one of the cans while he was driving. (R. 267:180.) Dobbs said his truck hit the curb when he was trying to take the splint off of his arm, not when he tested the can of air duster. (R. 267:182.) Dobbs said the right front tire hit the curb and may have gone over the curb. (R. 267:182.) He said he had not seen any pedestrians. (R. 267:183.)

Officer Milton asked Dobbs if he knew about huffing air duster. Dobbs said he knew about it, but that he had not been huffing. (R. 267:196–97.) Officer Milton told Dobbs that if he had been huffing from the can of air duster, his DNA might be on the can's nozzle. (R. 267:198.) Dobbs told the officer that he licks the nozzle every time he sprays air duster from a can. (R. 267:199.) Officer Milton told Dobbs that he noticed that Dobbs had paused before denying huffing the air duster, and he offered Dobbs the opportunity to tell the truth. (R. 267:200–01.) Dobbs then told Officer Milton that he took a puff from the air duster while he was driving, passed out, swerved, and then left the scene. (R. 267:201.) Dobbs admitted that he had been huffing air duster for a couple weeks. (R. 267:203.)

After Dobbs confessed, Officer Milton drove him to the City County Building where they met Officer Paul Fleischauer. (R. 208:14; 267:205.)[1] Officer Fleischauer testified that Dobbs told him that he had purchased air duster that morning, and that he huffed from a can, and lost consciousness. (R. 208:15–16.) Dobbs said he believed that he struck the pedestrian after he lost consciousness. (R. 208:16.) Officer Fleischauer observed that Dobbs had a visible injury to his hand but testified that Dobbs did not complain of pain. (R. 208:16, 21–23.)

After the conversation with Officer Fleischauer, Officer Milton drove Dobbs to the Public Safety Building to complete the post-arrest booking process. (R. 267:205.) The jail required that Dobbs be medically cleared before he was booked, so Officer Christopher Van Hove drove Dobbs back to Meriter Hospital. (R. 268:171.) On the way to the hospital, Officer Van Hove asked Dobbs when he had had surgery on

---

[1] Officer Fleischauer was deposed before trial (R. 208), and the video recording of his deposition was presented at trial. (R. 268:143–44.)

his arm. (R. 268:174.) Dobbs responded that he had just killed a man and could not talk at that time. (R. 268:174.) Officer Van Hove asked no further questions. (R. 268:174.)

While at the Hospital, Officer Van Hove overheard Dobbs twice tell a medical professional that he had "taken a puff of Dust Off and had killed a man" by striking him with his vehicle. (R. 268:178.)[2] Officer Van Hove later took Dobbs to St. Mary's Hospital, where Dobbs was admitted. (R. 268:179–80.)

While at St. Mary's Hospital, Dobbs asked if he could make a telephone call to his parents. (R. 268:181.) Officer Van Hove overheard Dobbs say that he had gone to Menards, bought Dust Off, and was traveling home when he took a puff of the Dust Off, went over the curb, and killed a man. (R. 268:182.)

Officer Bryan Dyer was assigned to guard Dobbs' room at St. Mary's Hospital. (R. 268:199.) Dobbs asked Officer Dyer to come into the room to turn up the heat. (R. 268:200.) While Officer Dyer was in the room, Dobbs stated, "I killed someone." (R. 268:200.) Dobbs went on to say that he had gone to Menards and purchased some duster to huff, and that he had been huffing for two weeks. (R. 268:201.) Dobbs said he had taken one puff and passed out. (R. 268:201–02.) The officer testified that he did not ask Dobbs any questions. (R. 268:202.)

Early the next morning, Officer Linda Baehmann was assigned to guard Dobbs' room at St. Mary's Hospital. (R. 268:187–88.) As she was standing guard, Dobbs became emotional, then said that he had taken one puff, and had

---

[2] At times in the record the can of compressed air found in Dobbs' struck is referred to as Dust-Off. But the brand name on the can was Ultra Duster.

struck a man, but he must have passed out because he did not remember it. (R. 268:189.)

Later that morning, Officer Dean Baldukas went to St. Mary's Hospital to deliver the Informing the Accused form to Dobbs. (R. 268:193.) Officer Baldukas went to Dobbs' hospital room, identified himself, and said that he was there to drop off the form. (R. 268:194.) Dobbs responded by saying that he blew "00.00 for a guy," and that he had taken "a puff from a duster." (R. 268:194.)

The State charged Dobbs with homicide by intoxicated use of a vehicle, and hit-and-run resulting in death. (R. 18.) Before trial, Dobbs moved to suppress his statements to police on the day of and the day after the crime. The circuit court, the Honorable David Flanagan presiding, denied Dobbs' motion after a hearing. (R. 67; 253; 254.) The court found that Dobbs was initially detained for an investigation but was not arrested. (R. 67:4–5.) It found that Dobbs was not interrogated until he had been read the *Miranda* warnings, and that he understood his rights and elected to answer questions. (R. 67:4–5.) The court found that Dobbs was properly arrested, and that all of his statements to police were voluntary and not coerced. (R. 67:4, 6.)

After the case was reassigned to the Honorable Clayton Kawski, Dobbs moved for reconsideration of the order denying his motion to suppress. (R. 68.) Judge Kawski denied the motion, concluding that that Judge Flanagan's decision was "well supported by controlling law," and that "[t]he court correctly applied the law to the facts." (R. 256:7.)

Before trial, Dobbs named a number of expert witnesses he intended to call at trial, including Dr. Lawrence White, who would testify generally about false confessions. (R. 80:1.) The State moved to exclude Dr. White's testimony. (R. 83.) Judge Kawski granted the State's motion, concluding that Dr. White's testimony did not satisfy the requirements in Wis.

Stat. § 907.02(1), and would not assist the jury. (R. 258:180–81.)

Dobbs was tried, and a jury found him guilty of homicide by intoxicated use of a vehicle but not guilty of hit-and-run. (R. 270:310.) The circuit court entered judgment of conviction (R. 241), and sentenced Dobbs to 20 years of imprisonment, consisting of 12 years of initial confinement and 8 years of extended supervison. (R. 271:123.)

Dobbs now appeals his conviction. He challenges only the circuit court's orders denying his motion to suppress evidence and granting the State's motion to exclude Dr. White's testimony.

STANDARD OF REVIEW

An appellate court reviews a circuit court's decision whether to admit or exclude expert testimony as a matter of circuit court discretion. *State v. Smith*, 2016 WI App 8, ¶ 4, 366 Wis. 2d 613, 874 N.W.2d 610 (citing *State v. Giese*, 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 854 N.W.2d 687). A reviewing court "will not reverse the court's decision 'if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record.'" *Id.* (citing *Giese*, 356 Wis. 2d 796, ¶ 16.)

An appellate court reviews a circuit court's order denying a motion to suppress evidence in a two-part process. The court reviews the circuit court's findings of evidentiary or historical fact under the clearly erroneous standard. *State v. Popp*, 2014 WI App 100, ¶ 13, 357 Wis. 2d 696, 855 N.W.2d 471. Whether the circuit court's application of the facts passes constitutional muster is a question of law reviewed de novo. *Id.*

ARGUMENT

I. The circuit court properly exercised its discretion when it excluded expert testimony from a witness expected to testify generally about false confessions.

A. Applicable legal principles

A witness may testify about his or her "scientific, technical, or other specialized knowledge" if (1) the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue"; (2) the witness is "qualified as an expert by knowledge, skill, experience, training, or education"; (3) "the testimony is based upon sufficient facts or data"; (4) "the testimony is the product of reliable principles and methods; and (5) "the witness has applied the principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1). The Legislature adopted this standard, set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), in 2011. *Giese,* 356 Wis. 2d 796, ¶ 17.

"The [*Daubert*] standard is flexible but has teeth. The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Id.* ¶ 19. "The court's gate-keeper function under the *Daubert* standard is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Id.* ¶ 18. "Relevant factors include whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community." *Id.* A trial court has discretion when determining which reliability factors are relevant in a given case and when applying them. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

The proponent of evidence has the burden of showing why it is admissible. *State v. Jenkins*, 168 Wis. 2d 175, 187–88, 483 N.W.2d 262 (Ct. App. 1992). "The party seeking to

introduce the expert witness testimony bears the burden of demonstrating that the expert witness testimony satisfies the [*Daubert*] standard by a preponderance of the evidence." *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 673 (7th Cir. 2017) (citation omitted); *see also Daubert*, 509 U.S. at 592 n.10.

B. The circuit court properly exercised its discretion in excluding Dr. White's testimony because, as the court concluded, Dr. White's testimony did not comply with Wis. Stat. § 907.02(1) and would not have assisted the trier of fact.

Dobbs listed Dr. Lawrence White as an expert witness at trial. (R. 80:1.) Dobbs asserted that Dr. White "is expected to testify generally about false confessions and situations in which false confessions are more likely to arise." (R. 80:1.) He added that Dr. White "has not prepared a report specific to this case." (R. 80:1.)

The State moved to exclude Dr. White's testimony (R. 83), asserting that the testimony "is not relevant because there is nothing linking his proffered testimony about 'false confessions and situations in which false confessions are more likely to arise' to the facts of this particular case." (R. 83:3.) The State added that "[b]ecause the proffered testimony is general and there is no link to the facts of this case, the proffered testimony will not assist the jury in any way, nor does it tend to make any fact more or less probable." (R. 83:3.)

The circuit court, the Honorable Clayton Kawski presiding, held a hearing on the State's motion to exclude Dr. White's testimony, and the parties and court questioned Dr. White. (R. 258.)[3] Dr. White testified about his research

[3] At the hearing the court also addressed the State's motion to exclude the testimony of Francis M. Gengo. The court denied the State's motion, and its decision is not at issue in this appeal.

on police interrogations and confessions. He acknowledged that he had not reviewed any reports or other documents specific to this case and could not offer an opinion as to the truthfulness or falseness of any confession in this case. (R. 258:28, 43–44, 63, 83–84.)

The circuit court granted the State's motion to exclude Dr. White's testimony because it found that the testimony "will not assist the trier of fact to determine a fact in issue." (R. 258:180.) The court concluded that there was no dispute that Dr. White is qualified as an expert in psychology, with "a particular scholarly interest in the area of false confessions." (R. 258:181.) But it explained that "[i]f there is one word from Dr. White's testimony today that summed up why his profferred expert testimony opinions do not satisfy the standard laid out in Wis. Stat. Section 907.02(1), it is the word none." (R. 258:180.) The court noted that when asked what facts of this case he had relied upon, Dr. White answered, "none." (R. 258:180.) The court concluded that Dr. White's proposed testimony did not meet the standards in section 907.02(1) because Dr. White had not "applied the principles and methods reliably to the facts of the case." (R. 258:181.)

The court stated that while it was skeptical whether Dr. White's methodology is scientifically reliable, it took "no definite position" on that issue. (R. 258:182.) The court concluded that it did not need to decide that issue because it concluded that section 907.02(1) "has not been met because the principles and methods were not in any way tied to the facts of this case." (R. 258:183.)

On appeal, Dobbs asserts that the circuit court erroneously exercised its discretion in excluding Dr. White's testimony. Dobbs argues that Dr. White's proposed testimony met the legal standard for admission under section 907.02(1), and that the circuit court improperly applied that standard. Dobbs asserts that the proper standard is "whether Dr. White would assist the jury, not whether Dr. White had specific

opinions based on the specific facts of this case." (Dobbs' Br. 17.)

Dobbs argues that *Smith*, 366 Wis. 2d 613, "is directly on point." (Dobbs' Br. 18.) He asserts that in *Smith*, the court of appeals affirmed a decision of the circuit court admitting testimony by an expert that was not "about case specifics and the specific alleged victim," but "about what the expert often saw from child sexual assault victims." (Dobbs' Br. 18.) Dobbs argues that the circuit court in this case erroneously exercised its discretion "because its decision is not in accordance with accepted legal standards." (Dobbs' Br. 18.)

Dobbs has not shown that the circuit court erroneously exercised its discretion in excluding Dr. White's testimony. As he acknowledges, "the *Daubert* test for admissibility is flexible and courts should have 'considerable leeway' in determining admissibility consistent with the goal of ensuring reliability and relevancy." (Dobbs' Br. 18) (citing *Smith*, 366 Wis. 2d 613, ¶ 7.)

Here, the circuit court set forth the proper legal standard, and properly applied it. Dobbs argues that the circuit court erroneously exercised its discretion in excluding Dr. White's testimony because it based its conclusion that the testimony would not assist the jury on Dr. White's failure to apply his research to the facts of this case. (Dobbs' Br. 17.)

But Wis. Stat. § 907.02(1) requires an expert to apply his or her "principles and methods reliably to the facts of the case." Under the plain language of the statute, a person can give expert testimony if it will assist the jury, 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. Dr. White's proposed testimony plainly did not satisfy these standards.

It appears that what Dobbs is really arguing is not that the court failed to apply the correct legal standard, but rather that it applied that standard too strictly by not admitting expert testimony even though it did not satisfy the statutory criteria.

In some cases, courts have allowed the admission of expert testimony even when the testimony does not satisfy all of the statutory criteria for admission. For instance, in *Smith*, the case Dobbs relies upon, this Court noted that it had affirmed the admission of expert testimony that did not satisfy all of the criteria in *Seifert ex rel. Scuptur v. Balink*, 2015 WI App 59, 364 Wis. 2d 692, 869 N.W.2d 493. *Smith*, 366 Wis. 2d 613, ¶ 8. And in *Smith*, this Court affirmed the admission of expert testimony that "did not neatly fit the *Daubert* factors." *Id.* ¶ 9.

This Court has made clear that a circuit court has "considerable leeway" in exercising its discretion to determine whether to admit evidence under section 907.02(1), and that a court's admission of evidence that does not satisfy the statutory criteria is not necessarily an erroneous exercise of discretion. But nothing in *Smith* or *Seifert* or any other case *requires* a circuit court to admit expert testimony that does not satisfy the criteria in *Daubert* and section 907.02(1). Here, the circuit court applied the correct legal standard—the criteria set forth in section 907.02(1)—and concluded that expert testimony from a witness who did not apply his principles and methods reliably to the facts of the case was inadmissible. The court properly exercised its discretion and this Court should affirm.

II. The circuit court properly exercised its discretion in denying Dobbs' motion to suppress his statements to police.

Before trial, Dobbs moved to suppress his statements to police, asserting that they were involuntary and given in

violation of *Miranda*. (R. 35.) The circuit court, the Honorable David Flanagan presiding, denied the motion after a hearing, concluding that Dobbs was not interrogated until he had been read the *Miranda* warnings, and that all of his statements were voluntary.

After the case was reassigned, Dobbs moved for reconsideration. The circuit court, the Honorable Clayton Kawski presiding, denied the motion without a hearing, concluding that Judge Flanagan's decision was "well supported by controlling law," and that "[t]he court correctly applied the law to the facts." (R. 256:7.)

On appeal, Dobbs challenges Judge Flanagan's decision denying the motion to suppress evidence. He does not address Judge Kawski's decision denying his motion for reconsideration.

A. The circuit court correctly concluded that Dobbs was properly detained by police, and not arrested, when he made his initial statements to police.

Law enforcement is required "to inform suspects of their rights to remain silent and to have an attorney present during custodial interrogations." *State v. Bartelt*, 2018 WI 16, ¶ 27, 379 Wis. 2d 588, 906 N.W.2d 684 (citing *Miranda v. Arizona*, 384 U.S. 436, 458 (1966)). Under both the United States Constitution and the Wisconsin Constitution, "the *Miranda* safeguards apply only to custodial interrogations." *Id.* ¶ 30 (citation omitted).

"[T]he test for whether a person has been arrested is whether a 'reasonable person in the defendant's position would have considered himself or herself to be "in custody," given the degree of restraint under the circumstances.'" *State v. Blatterman*, 2015 WI 46, ¶ 30, 362 Wis. 2d 138, 864 N.W.2d 26 (quoting *State v. Swanson*, 164 Wis. 2d 437, 447, 475 N.W.2d 148 (1991)). "[W]hether a person is in custody under

Miranda is an objective test." *Bartelt*, 379 Wis. 2d 588, ¶ 31 (citing *State v. Lonkoski*, 2013 WI 30, ¶ 27, 346 Wis. 2d 523, 828 N.W.2d 552.) "The inquiry is 'whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest.'" *Id.* (quoting *Lonkoski*, 346 Wis. 2d 523, ¶ 27).

Dobbs asserted in his motion to suppress his statements that any statement he gave before he was read the *Miranda* warnings should be suppressed because he was arrested when Officer Milton had him exit his truck, handcuffed him, and placed him in the back of the squad car.

The circuit court rejected Dobbs' argument for two reasons. First, it concluded that when Officer Milton initially encountered Dobbs, who was driving a visibly damaged truck that was consistent with the description of the vehicle involved in the crash the officer was investigating, he had a reasonable basis to detain Dobbs. (R. 67:4.) The court further concluded that the officer's handcuffing Dobbs and putting him in the back of the squad car did not constitute a custodial arrest. (R. 67:4.) Second, the court also concluded that Dobbs was not interrogated until Officer Pine read him the *Miranda* warnings at the hospital. Therefore, any statement he gave before that point is not subject to suppression. (R. 67:5.)

The court made a number of factual findings that supported its conclusions. It does not appear that Dobbs challenges any of those findings in this appeal.

The court found the following facts: Dobbs' truck "fit the description of the hit and run vehicle and had significant visible damage to the front end, including a completely deflated front driver's tire and tree branches imbedded on the truck" (R. 67:1); Officer Milton believed that Dobbs may have been involved in the crash, so he ordered Dobbs out of his truck, handcuffed him, and placed him in the back of the squad car (R. 67:2); Officer Milton learned that the crash had

resulted in the death of a pedestrian, and he told Dobbs that he was being detained as part of an accident investigation (R. 67:2).

Officer Milton asked Dobbs for identification and where he had come from and was going. (R. 67:2.) He also asked how the truck had been damaged. (R. 67:2.) Dobbs identified himself, and told the officer that he had been trying to adjust his arm sling when he lost control and hit a curb. (R. 67:2.) Dobbs also told the officer that he had consumed alcohol the night before, that he was taking painkillers, and that he suffers from anxiety and depression. But Dobbs said he did not need medical attention. (R. 67:2.)

Officer Milton looked into Dobbs' truck and saw a can of air duster. (R. 67:2.) He contacted another officer and learned that people sometimes inhale air duster and become intoxicated. (R. 67:2.) Officer Milton removed the handcuffs and asked Dobbs to perform field sobriety tests. (R. 67:2.) Dobbs agreed, and performed the tests. (R. 67:2.) After marijuana residue was found in Dobbs' truck, Officer Milton asked Dobbs if he would give a blood sample, and Dobbs agreed to do so. (R. 67:2.) Officer Milton then transported Dobbs to the hospital. (R. 67:2.)

On appeal, Dobbs does not appear to dispute any of these facts. He acknowledges that Officer Milton reasonably believed that he was the driver who was involved in the crash and then left the scene, and he does not dispute that Officer Milton properly detained him after the officer encountered him a short distance from the crash scene.

But Dobbs argues that when Officer Milton handcuffed him and placed him in the back of the squad car, the detention became a seizure and that the officer did not have probable cause justifying a seizure because "there was no evidence that it was a felony traffic crime." (Dobbs' Br. 19.)

Dobbs is correct that when Officer Milton had him exit his truck, handcuffed him, and placed him in the back of the squad car, he was seized. This was a temporary investigative detention, and therefore, a seizure. *Blatterman*, 362 Wis. 2d 138, ¶ 17.

But the investigative detention did not require probable cause. A police officer may "temporarily detain a person for purposes of investigating possible criminal behavior even though there is not probable cause to make an arrest." *Id.* ¶ 18. Under Wis. Stat. § 968.24, an officer may detain a person for an investigation when the officer reasonably suspects that the person has committed a crime.

Even if probable cause were required, the detention would have been valid. Officer Milton "was dispatched for a hit-and-run motor vehicle traffic accident that included a pedestrian casualty." (R. 253:5.) A driver who leaves the scene of a crash in which a person is killed, even if the person did not cause the crash, commits a crime. Officer Milton had probable cause that Dobbs committed a crime. He certainly had reasonable suspicion. Therefore, as the circuit court concluded, Officer Milton properly detained Dobbs in order to investigate. (R. 67:4.)

Dobbs argues that the investigative detention became a custodial arrest before an officer read him the *Miranda* warnings. He asserts that a reasonable person in his position would have believed he had been arrested because he was handcuffed, in a locked squad car or in the presence of an armed officer, transported to the hospital, told he was a suspect in a serious crash, and had "impairing physical and mental conditions" and pain in his hand. (Dobbs' Br. 20–21.)

Dobbs argues that the use of handcuffs transformed the investigative detention into a custodial arrest. But the use of handcuffs "does not necessarily render a temporary detention unreasonable [or transform a] detention into an

arrest." *Blatterman*, 362 Wis. 2d 138, ¶ 31 (quoting *State v. Pickens*, 2010 WI App 5, ¶ 32, 323 Wis. 2d 226, 779 N.W.2d 1).

As the circuit court concluded in this case, the fact that Officer Milton placed Dobbs in handcuffs did not transform the investigatory detention into a custodial arrest. (R. 67:4.) Officer Milton was justified in placing Dobbs in handcuffs and placing him in the squad car for officer safety. Officer Milton was the only officer present, and he had reason to believe that Dobbs had committed a serious offense and was fleeing the scene of the crash.

Officer Milton removed the handcuffs so that Dobbs could perform field sobriety tests. After Dobbs completed those tests, Officer Milton did not reapply the handcuffs. As the circuit court concluded, "[t]he fact that the handcuffs were removed for the bulk of the investigatory detention is an indication that it was not a custodial arrest." (R. 67:5.) As the circuit court further concluded, Officer Milton's request that Dobbs perform field sobriety tests did not make the detention a custodial arrest. (R. 67:5.) Dobbs does not dispute that the court was correct.

After the field sobriety tests, Officer Milton asked Dobbs if he would give a blood sample, and Dobbs agreed to do so. (R. 67:5.) Officer Milton then transported him to the hospital. Being transported to the hospital did not transform the detention into a custodial arrest, because Dobbs went to the hospital voluntarily.

In *Blatterman*, the supreme court concluded that a suspect transported to the hospital by police was in custody "because his transportation was involuntary, and he had experienced a significant level of force and restraint." *Blatterman*, 362 Wis. 2d 138, ¶ 33.

In contrast, here Office Milton used no force, and the only restraint was the initial handcuffing. But the officer

removed the handcuffs for the field sobriety tests, and had not reapplied them when he asked Dobbs if he would give a blood sample. And unlike in *Blatterman*, Dobbs went to the hospital voluntarily.

Dobbs knew he was a suspect in a serious crash. But he also knew that the crash was only being investigated, and that, as Officer Milton told him, he was being detained for that investigation. He had no reason to believe that he had been arrested so that officers could investigate.

Finally, Dobbs does not explain how his depression and anxiety and the pain in his hand had any bearing on whether he was arrested rather than detained.

The *Miranda* warnings were read to Dobbs by Officer Pine at the hospital. At that point, Dobbs had only answered questions from Officer Milton. In his brief, Dobbs does not point to a single question that Officer Milton asked that would constitute interrogation. The circuit court was therefore correct in concluding that, before he was read the *Miranda* warnings, Dobbs was not in custody, and he had not been interrogated. (R. 67:5.)

For all of these reasons, the circuit court correctly determined that Dobbs was detained, but not arrested, before the *Miranda* warnings were read to him, and it properly denied Dobb's motion to suppress statements he gave to police before he was *Mirandized*.

B. The circuit court correctly concluded that Dobbs' statements to police were voluntary.

1. Applicable legal principles

Where the voluntariness of a statement to police is challenged, the burden is on the State to show by a preponderance of the evidence that the statement was voluntary. *State v. Hoppe,* 2003 WI 43, ¶ 40, 261 Wis. 2d 294, 661 N.W.2d 407. "A [suspect's] statements are voluntary if

they are the product of a free . . . will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." *Id.* ¶ 36. A necessary prerequisite for a court finding of involuntariness is coercive or improper police conduct. *Colorado v. Connelly,* 479 U.S. 157, 167 (1986). This police misconduct need not be egregious or outrageous but it must exceed the defendant's ability to resist. *State v. Jerrell C.J.*, 2005 WI 105, ¶ 19, 283 Wis. 2d 145, 699 N.W.2d 110.

The voluntariness of a confession is based on the totality of the circumstances surrounding the confession. *Id.* ¶ 20. "This analysis involves a balancing of the personal characteristics of the [suspect with] the pressures and tactics used by the [police]". *Id.* The factors as to the defendant include his "age, education and intelligence, physical and emotional condition, and prior experience with law enforcement." *Id.* (citation omitted). The factors as to police conduct include "the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any . . . physical or psychological pressure brought to bear on the [suspect], any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination." *Id.* (citation omitted).

2. Dobbs' statements to police were voluntary.

Dobbs moved to suppress all of his statements to police on the ground that they were involuntary. (R. 35.) The circuit court denied Dobbs' motion, concluding that all of Dobbs' statements were voluntary. (R. 67.) The court made a number

of factual findings supporting its conclusion, including those that follow.

Officer Nicholas Pine read the *Miranda* warnings to Dobbs at 10:19 a.m. (R. 67:2–3.) Dobbs acknowledged that he understood the warnings, and he agreed to answer questions. (R. 67:3.) Officer Pine observed that Dobbs was emotional, but that he "was able to follow directions, understand questions, and respond appropriately." (R. 67:3.) Dobbs said that his injured hand had an "aching feeling," but he did not ask for medical attention or pain medication. (R. 67:3.)

After the interview with Officer Pine, Dobbs was escorted back to the squad car. (R. 67:3.) He was not in handcuffs. (R. 67:3.) Dobbs, who had initially asked for a breath test, told Officer Milton that the PBT had registered a reading of 0.0, so he no longer wanted his breath tested by the Intoximeter. (R. 67:3.)

Shortly after noon, Officer Milton told Dobbs that a pedestrian had been killed in the crash. (R. 67:3.) He read Dobbs the *Miranda* warnings and placed him under arrest. (R. 67:3.) Dobbs again acknowledged that he understood his rights and said that he wanted to answer questions. (R. 67:3.) During the interview with Officer Milton, Dobbs was emotional, but coherent and cooperative. (R. 67:3.) He admitted to huffing Ultra Duster, passing out and losing control of his vehicle. (R. 67:3.)

Dobbs was transported to the City County Building and interviewed by Officer Fleischauer. (R. 67:3.) He again admitted to huffing Ultra Duster and passing out. (R. 67:3.) Dobbs was coherent and cooperative. (R. 67:3.) He had a visible injury to his hand, but did not complain of pain. (R. 67:3.)

Dobbs was then transported to the Public Safety Building, but he could not be booked into jail until he was medically cleared. (R. 67:3.) Officer Van Hove transported

Dobbs to Meriter Hospital, and then to St. Mary's Hospital. (R. 67:3.)

Dobbs was admitted to St. Mary's and received an intravenous antibiotic medication. (R. 67:3.) He was guarded at the hospital by Officer Dyer, and then By Officer Baehmann. (R. 67:3.) The next morning Officer Baldukas went to the hospital to give Dobbs a copy of the Informing the Accused form under which he had authorized the blood draw. (R. 67:3.)

Dobbs made statements to Officers Van Hove, Dyer, Baldukas, and Baehmann, as well as statements to others that the officers overheard. (R. 67:3.) But none of the officers questioned him. (R. 67:3.)

The court found that the testimony of each of the officers at the suppression hearing was "consistent, responsive, clear, credible and convincing." (R. 67:3.) The court found that "no competent evidence" was presented "suggesting that the defendant, during the investigation in question, was in need of medical care for any significant physical or psychological condition so as to compromise his ability to understand his right to decline to be interviewed by Officers." (R. 67:4.)

The court concluded that Dobbs "has been shown to have possessed the capacity to understand the Miranda warnings provided and to have knowingly waived the right to decline to be interviewed." (R. 67:4.) It also concluded, "[e]ach of the statements made by the defendant to Officers Milton, Pine, Kleinfeldt, Van Hove, Dyer, Baldukas, and Baehmann has been demonstrated to have been voluntary and not the product of coercion in any degree." (R. 67:4.)

On appeal, Dobbs does not dispute any of the circuit court's findings. But he argues that his statements to police, both before and after he was arrested, were involuntary. (Dobbs' Br. 21.) He argues that he "was suffering from both

mental health conditions and pain from physical injuries," and "had a serious infection in his hand, such that the jail would not admit him and which ultimately required surgery the next day." (Dobbs' Br. 22.) Dobbs adds that he "suffered from depression and anxiety," and that "he had not taken his medication for any of these conditions." (Dobbs' Br. 22.) Dobbs argues that he was "partially unclothed," and "distraught that he had hit and injured a pedestrian." (Dobbs' Br. 22.)

Dobbs' assertions, even if true, would not render his statements involuntary. There is no dispute that Dobbs' hand was painful, and that he had depression and anxiety. But there is no evidence that his pain and his mental health conditions were so debilitating that they overcame his ability to resist police questioning. Dobbs does not point to a single instance of telling any officer that he was in need of medical treatment or pain medication. And there is no evidence that Dobbs not having taken medication for depression or anxiety had any effect on his ability to understand his rights and decide whether to answer questions or to obtain counsel.

Multiple officers testified that Dobbs was coherent, understood his rights, and was willing to answer questions. Dobbs' response to Officer Milton's request that he give a blood sample demonstrates that his will was not overcome. Dobbs agreed, but on the condition that he also be able to take a breath test. Then, after he took a PBT administered by Officer Pine, that showed no alcohol in his system, he elected not to take another breath test. He understood what Officer Milton told him, and his rights, and he understood the results of the PBT. His will was not overcome by police questioning.

Dobbs argues that Officer Milton provoked an emotional breakdown by telling him that the pedestrian Dobbs hit had died and then read him his rights and questioned him. He asserts that he "became suicidal, indicated he wanted to die, and did not care what happened

to him" and "simply went along with what the Officer wanted him to say." (Dobbs' Br. 22.)

But Officer Milton did not coerce Dobbs by telling him the truth. Officer Pine had already read the *Miranda* warnings to Dobbs, and Dobbs understood his rights. Officer Milton told Dobbs that the pedestrian had died before he arrested him, and he read the *Miranda* warnings to Dobbs again. As the circuit court found as fact, Dobbs "acknowledged that he understood his right[s] and expressed willingness to answer questions," and he "did not choose to decline to answer nor did he ask the assistance of an attorney." (R. 67:3.) Officer Milton testified that Dobbs was emotional, but also "coherent, intelligent, and present." And the court found that Dobbs "was emotional," but that he was also "coherent and cooperative during the interview." (R. 67:3.) Dobbs points to no evidence to the contrary.

After his interview with Officer Milton, Dobbs told Office Fleischauer that he was willing to answer a few questions. (R. 67:3.) Officer Fleischauer testified that Dobbs was upset, but also coherent, aware of what was happening, and understood what the officer as asking him. (R. 67:3.)

Later, when Officer Van Hove was transporting Dobbs to the hospital, the officer asked Dobbs when he had surgery on his arm. (R. 67:3.) Dobbs understood that he did not have to answer questions, and told the officer that he could not talk because he had killed a man. (R. 67:3.)

At the hospital, even after he received intravenous antibiotic medication, Dobbs continued to talk to police and others who did not ask him questions. Dobbs told Officer Dyer that he had killed a man, and that he had purchased duster, huffed it, and hit someone with his car. (R. 67:3.) The next morning, Dobbs told Office Baehmann that he had taken one puff and did not remember what happened after that. (R. 67:3.) He told Officer Baldukas that he had taken a puff of

duster. (R. 67:3.) None of these officers asked Dobbs any questions. They did nothing to coerce him into talking or to overcome his will. Dobbs seemingly just wanted to explain what he had done.

In summary, there is no evidence that Dobbs' pain, his mental condition, or anything else rendered his statements to police involuntary. There is no evidence that Dobbs' will was overcome by anything police did. There is no evidence that police did anything coercive or improper. Instead, as the circuit court concluded, Dobbs "did knowingly waive the right to decline to be interviewed," and each of his statements "has been demonstrated to have been voluntary and not the product of coercion in any degree." (R. 67:4.)

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the judgment convicting Dobbs of homicide by intoxicated use of a vehicle.

Dated this 1st day of August, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,994 words.

Dated this 1st day of August, 2018.

_____
MICHAEL C. SANDERS
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 1st day of August, 2018.

_____
MICHAEL C. SANDERS
Assistant Attorney General