RECEIVED
02-14-2019
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2018AP001750 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER DURSKI

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND ORDER PERMITTING EXPERT TESTIMONY WITHOUT CONDUCTING A DAUBERT HEARING IN WALWORTH COUNTY CIRCUIT COURT WITH THE HONORABLE PHILLIP A. KOSS PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

NATALIE L. WISCO
State Bar No. 1101661

RICHARDS & DIMMER, S.C.
209 Eighth Street
Racine, WI 53403
262-632-2200 (P)
262-632-3888 (F)
wisco@racinedefense.com

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2018AP001750 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER DURSKI

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND ORDER PERMITTING EXPERT TESTIMONY WITHOUT CONDUCTING A DAUBERT HEARING IN WALWORTH COUNTY CIRCUIT COURT WITH THE HONORABLE PHILLIP A. KOSS PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

STATEMENT OF ISSUES

Whether the court erred when it denied Mr. Durski's motion to suppress statements elicited by law enforcement during the custodial interrogations before and after his field sobriety tests?

Whether the court erred when it permitted the introduction of retrograde extrapolation expert testimony conducting a proper *Daubert* hearing, when Mr. Durski had consumed several alcoholic beverages after the time of driving?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as Defendant anticipates that the briefs of the parties will fully meet and discuss the issues on appeal. Publication is not requested.

STATEMENT OF THE CASE

On October 22, 2016, at 1:13am, City of Whitewater Police Officers were dispatched regarding a disturbance at 167 S. Locust Lane in the City of Whitewater. R. 17:1. The individuals at the residence informed police that a "family dispute" type altercation had taken place between the defendant-appellant, Christopher Durski (Mr. Durski) and a Mr. J. Patrick Fredrich. R. 66:124. Mr. Fredrich informed Officer Jim Elder that after a disagreement occurred in the home, Mr. Durski had left the residence, in a "very belligerent manner" in a white "Suburban/Escalade" type vehicle. *Id.* at 113. While there, Officer Elder was informed that Mr. Durski had possibly consumed alcohol before leaving the residence. *Id.* at 126-27.

Officer Elder later located Mr. Durski's vehicle at a Super 8 Motel not far from the location of the alleged disturbance. *Id.* at 128. After speaking with the front desk clerk, he was then able to locate Mr. Durski as the occupant of one of motel rooms and questioned him about the disturbance that occurred on Locust Lane. *Id.* Officer Elder then asked Mr. Durski about his conduct after the reported disturbance, where Mr. Durski informed the officer that he had consumed several alcoholic beverages after arriving at the motel. *Id.* Officer Elder then began to interrogate Mr. Durski and asked specific questions about how much alcohol he had consumed, what brand of alcohol he had consumed, what kind of containers the alcohol was in, and where the containers could be located. *Id.* at 132. Officer Elder then conducted field sobriety tests on Mr. Durski and came to the conclusion that he "was under the influence of an intoxicant and his ability to drive would be impaired." *Id.* at 140. Officer Elder continued to interrogate Mr. Durski, asking specific follow-up questions as to the location of the empty containers, before placing Mr. Durski under arrest. R. 67:5.

After Mr. Durski was placed under arrest, Officer Elder and other responding officers continued to question Mr. Durski as to his OWI-related conduct. *Id.* The officers interrogated Mr. Durski on where he had consumed alcohol, where the alcohol containers were, and even had Mr. Durski do a walk-though of the motel parking lot, describing his actions, all while still handcuffed and never having been informed of his rights under *Miranda v. Arizona*. *Id.* Finally, a blood draw was taken at 4:31 am, which showed a BAC of .094. On November 22, 2016, the Walworth County District Attorney's Office charged Mr. Durski with one count Operating a Motor Vehicle While Intoxicated—4th Offense and one count Operating a Motor Vehicle with a Prohibited Alcohol Content—4th Offense, as well as one count Disorderly Conduct, which—for

some unknown reason—was separately charged in Walworth County Case 2016CM633. R. 4.

On March 30, 2017, Mr. Durski challenged the admissibility of the statements he provided during the non-*Mirandized* custodial interrogation which occurred in his hotel room and the parking lot of the Super 8 Motel. R. 17. On May 15, 2017, the state filed a written response to Mr. Durski's motion and conceded that "any interrogation that occurred in the parking lot of the hotel after the defendant was arrested and before he was given his *Miranda* warnings must be suppressed." R. 18. However, the matter was still heard in front of the Honorable Phillip A. Koss on June 5, 2017, to address the admissibility of the statements given in Mr. Durski's hotel room, before he was placed in handcuffs. R. 63:5. There, testimony was taken from Officer Elder and body camera footage of the interrogation was played. R. 63. After the testimony concluded, Judge Koss agreed with the defense that Mr. Durski was not free to leave during the interrogation, however, held that the interrogation was reasonable as part of a probable cause detention, and that the statements were admissible. *Id.* at 22.

The final pretrial conference occurred on December 12, 2017, and the court specifically addressed one of Mr. Durski's motions in limine at that time. R. 65. Due to the time of the blood draw being over three hours after the alleged time of driving, and the fact that Mr. Durski consumed several alcoholic beverages after driving, the motion asked the court to prohibit the introduction of any expert testimony, unless the Court determined prior to trial that the testimony at issue met the standards of Wis. Stat. § 907.02(1) and *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993). R. 19. Specifically, Mr. Durski asked the court to prohibit the introduction of expert testimony regarding blood alcohol

results without establishing, outside the jury's presence, "the time of driving, the time of the blood draw, and if that time is outside of the three-hour window in Wis. Stat. § 885.235, the state be required to first establish the scientific reliability of the method used to tie Mr. Durski's blood test result to the time of driving." R. 19:2. After hearing oral argument from both sides, the court held that under *Fonte*, the testimony was permissible under *Daubert*, without a separate hearing, and denied the motion. R. 63:7.

The matter proceeded to trial and was heard in front of a 12-person jury on December 21-22, 2017. R. 66. Testimony was taken from two citizen witnesses, Officer Elder, Officer Ryan Weston, Thomas Neuser—the state toxicology expert witness—and Mr. Durski himself. After deliberating, the jury found Mr. Durski guilty of both courts, R. 68:59, and the matter continued to sentencing that same day. *Id.*at 60. Mr. Durski was subsequently sentenced to 360 days local jail, 24 months Ignition interlock, 24 months DOT license revocation, payment of fines and court costs. *Id.* at 64. Mr. Durski filed a timely notice of intent to seek postconviction relief as well as notice of appeal. Mr. Durski now asks the Court of Appeals to review the trial court's erroneous denial of his motion to suppress statements and order permitting the introduction of retrograde extrapolation expert testimony without a *Daubert* hearing, when Mr. Durski consumed alcohol after driving.

ARGUMENT

I. DEFENDANT WAS SUBJECTED TO CUSTODIAL INTERROGATION WITHOUT BEING READ *MIRANDA* WARNINGS IN VIOLAITION OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION.

A. Standard of Review.

In this case, the trial court erred when it denied Mr. Durski's motion to suppress the statements he provided officers as the result of a custodial interrogation. In reviewing the denial of suppression motion, the trial court's findings of fact will be upheld unless they are clearly erroneous. Wis. Stat. § 805.17(2). Whether those facts satisfy the constitutional requirements, however, presents a question of law subject to *de novo* review. *State v. Jackson*, 147 Wis.2d 824, 829, (1989).

B. Legal standards

In this case, Mr. Durski was subjected to custodial interrogation in his motel room by Officer Elder without being read his *Miranda* warnings, in violation of his Fifth Amendment right against self-incrimination and therefore, the trial court erred in denying the motion to suppress Mr. Durski's statements.

The Fifth Amendment to the United States Constitution guarantees the privilege against compelled self-incrimination, and the Fourteenth Amendment requires state courts to observe this privilege. U.S. Const. Amend. V, XIV. In *Miranda v. Arizona*, the United States Supreme Court created procedural safeguards to protect the right against compelled self-incrimination, holding that:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the

> authorities in any significant was and is subjected to questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. 436, 478-79 (1966). If officers fail to comply with the constitutional safeguards established in *Miranda*, the person's statement is inadmissible against that person. *Id.*

Miranda warnings are required to be delivered at the time a citizen is subjected to custodial interrogation. *State v. Armstrong*, 223 Wis.2d 331, 344-45 (1999), citing *Miranda v. Arizona*, 384 U.S. 444, *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980), *State v. Mitchell*, 167 Wis. 2d 672, 686 (1992). A person is "in custody" for purposes of *Miranda* when he or she is "deprived of his [or her] freedom of action in any significant way." *Armstrong*, 223 Wis. 2d at 353. At the time the police begin considering a citizen to be a suspect, and the citizen would no longer be permitted to leave, that citizen is in custody for *Miranda* purposes. See *State v. Fillyaw*, 104 Wis. 2d 700, 722 (1981).

Furthermore, an officer does not have to expressly "interrogate" a suspect for Fifth Amendment rights to attach, because a person is under "interrogation" for *Miranda* purposes when a person is "subjected to either express questioning or its functional equivalent." *Id.* At 356, citing *Rhode Island v. Innis*, 446 U.S. 291. Therefore,

> Even when the officer testifies that his or her actions had some purpose other than interrogation, the action must be viewed from the suspect's perspective to determine whether such

> conduct was reasonably likely to elicit an incriminating response. (Emphasis added).

Id. at 357, citing *State v. Cunningham*, 144 Wis.2d 272, 280 (1988). The objectives of the police at the time of the questioning is also a relevant factor. See *State v. Fillyaw*, 104 Wis.2d at 700. While, "generalized questioning of citizens in the fact-finding process is not a violation of *Miranda* rights," once a citizen becomes a suspect or is in custody on probable cause, the objectives of the police questioning then becomes to "seek out evidence in the field to be used at trial against him." *Id.*

The proper test for whether an individual was seized at the time of questioning is the objective test articulated by the court in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). There the court stated:

> The question of whether a police contact is a 'seizure' within the meaning of the Fourth Amendment is determined by reference to an objective test. '[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

State v. Williams, 225 Wis.2d 1, 5 (2002) (quoting *United States v. Mendenhall*, 446 U.S. at 554).

Applying this objective standard, a reasonable person in Mr. Durski's position would recognize Officer Elder's show of authority when he arrived at Mr. Durski's motel room and would not have felt free to disregard it and go about his business. Here, Mr. Durski was subjected to police contact and questioning *only* because he was the suspect in a "disorderly

conduct, family dispute type incident that occurred on Locust Lane in Whitewater." R. 63:7. As such, any questioning done by law enforcement was done with the objective to seek out evidence against him, and proper *Miranda* warnings were necessary under the circumstances.

C. The court erred when it denied Mr. Durski's motion to suppress statements elicited by law enforcement during the custodial interrogations before and after his field sobriety tests.

In this case, Mr. Durski was "in custody" for purposes of *Miranda* warnings when he was questioned in his hotel room, as he was already a suspect in Officer's Elder's disorderly conduct investigation; was not permitted to leave the scene at the time; and was subjected to express, and specific, questioning which was reasonably likely to elicit an incriminating response. Under such circumstances, Mr. Durski was objectively "seized" under the *Mendenhall* test, and the statements should not have been allowed to be admitted at trial unless proper *Miranda* warnings were given. The court, however, neglected to consider all relevant factors when it ruled on Mr. Durski's suppression motion.

After closing testimony at the June 6, 2017 hearing, the court made the following relevant findings regarding Mr. Durski's motion to suppress:

> I agree that he's not free to leave, but I think it was a reasonable—it is a detention under reasonable suspicion because I think that it is completely credible that they are looking to see if these cans are there; and if there's real issues that put him under .08, they may believe there is not probable cause to arrest…

> The officer's chatty with him. It's conversational; it's not accusatory at this point…I think the officers are doing a thorough job to ensure there's probable cause by seeing if those beer cans exist or don't…And therefore whether they find the cans right away or not, he's under arrest for that disorderly conduct, and anything after that would be suppressible.

R. 63:21-22. This decision, however, puts too much weight on the perceived objectives of the police, and affords absolutely no weight to how the situation would have been viewed from Mr. Durski's perspective, nor the fact that the officers *continued* to ask Mr. Durski specific and incriminating questions *after* putting him under arrest, and *before* reading him his *Miranda* rights. This, alone, is telling evidence contradicting the court's finding that the police were just being "thorough" by specifically interrogating Mr. Durski with no regard for his rights against self-incrimination.

The State itself conceded that Officer Elder and the other law enforcement members involved violated Mr. Durski's Fifth Amendment rights by continuing the unconstitutional interrogation of Mr. Durski, after he had been placed in handcuffs. R. 18. Although no testimony was taken regarding those later statements, due to the stipulation, it is entirely reasonable to assume that Officer Elder's explanation for those constitutional violations would have been that he was "just being thorough" in his investigation, as he claimed when justifying the former. This, however, does not justify the denial of Mr. Durski's Fifth Amendment protections, and how the situation would have been viewed through Mr. Durski's point of view. See *State v. Armstrong*, 223 Wis.2d at 357. ("Even when the officer testifies that his or her actions had some purpose other than interrogation, the action must be viewed

from the suspect's perspective to determine whether such conduct was reasonably likely to elicit an incriminating response) (emphasis added).

The court admitted that Mr. Durski was not free to leave when it denied his motion to suppress, however completely failed to address whether or not the officers' conduct was reasonably likely to elicit an incriminating response. See *State v. Fillyaw*, 104 Wis. 2d at 722. See also, *Rhode Island v. Innis*, 446 U.S. at 291. In this case, Officer Elder testified that while still at 167 S. Locust Lane, he received information that Mr. Durski was seen driving a vehicle as he was leaving the residence, and that he had possibly consumed alcohol before he left the residence. R. 66:127. He then testified that "as part of his investigation," he thought it was "important to find Mr. Durski." *Id.* The only reasonable inference from this testimony, is that it was "important" to Officer Elder that he locate Mr. Durski, *because* he suspected Mr. Durski of operating a motor vehicle while intoxicated. Officer Elder's initial intentions *may* have been to only gather more information to determine probable cause to support this suspicion, however, the surrounding circumstances of Mr. Durski's questioning "transformed [a] reasonable seizure into an unreasonable one." *State v. Griffith*, 2000 WI 72, ¶ 41.

Mr. Durski was woken up out of a sleep by police banging on his motel door, in a town where he did not live. R. 67:76. He was then questioned about an emotional "family" dispute by Officer Elder and was asked to perform field sobriety tests, after having very quickly consumed at least four alcoholic drinks at the motel. *Id.* at 73-77. Before conducting these tests, Officer Elder asked Mr. Durski *specific* questions about what kind of alcohol he had consumed, what brand of alcohol it was, where the containers could be located, etc. R. 63:8-9. He was asked to complete field sobriety tests, and his

detention was prolonged at least ten minutes while officers addressed an equipment failure. R: 63:10. Officers continued to interrogate Mr. Durski all the while, *id.* at 5, and later, even asked Mr. Durski to do a walk-through of his exact actions, before ever reading him his rights. R. 67:5. At this time, Officer Elder already had reasonable suspicion that Mr. Durski had been involved in the disorderly conduct that took place on Locust Lane, and that he had operated a motor vehicle while intoxicated, and any additional, specific questioning conducted by police would, therefore, have no purpose, other than to elicit an incriminating response.

From the facts and testimony in this case, it is clear the Mr. Durski was in custody for the purposes of *Miranda* warnings when he gave incriminating statements to Officer Elder, before and after his field sobriety tests, in response to repeated questioning. Accordingly, *all* statements given by Mr. Durski prior to the delivery of his *Miranda* warnings must be suppressed—not just those elicited while he was in handcuffs. Furthermore, in addition to the suppression of the statements made by Mr. Durski prior to his *Miranda* warnings, this Court should order the suppression of all derivative evidence, pursuant to *Wong Sun v. United States,* 371 U.S. 471 (1963).

II. THE TESTIMONY OF THE STATE TOXICOLOGY EXPERT SHOULD NOT HAVE BEEN ADMITTED WITHOUT ESTABLISHING THE APPROPRIATENESS OF THE METHODS USED AND PROBATIVE VALUE OF THE FINDINGS, OUTSIDE THE PRESENCE OF THE JURY.

A. Standard of Review

A circuit court's decision to admit or exclude expert testimony s reviewed for erroneous exercise of discretion. *State v. Giese,* 2014 WI APP 92, ¶ 16; *State v. Shomberg*, 2006 WI

9, ¶10; see also *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997) (applying discretion standard to a *Daubert* ruling). A trial court's discretionary decision will not be reversed if it had a rational basis and was made in accordance with the accepted legal standards, in view of the facts contained in the record. *Id.*, citing *State v. Shomberg*, 2006 WI 9, ¶ 11. In turn, a court's construction and interpretation of legal principals is a question of law that a court of appeals should review *de novo.* See, e.g. *State v. Bentdahl*, 2013 WI 106, ¶ 17 (citations omitted). Here, the circuit court failed to construe and interpret Wisconsin Statute section 885.235 when it permitted the introduction of the retrograde BAC calculation without a *Daubert* hearing. Accordingly, this decision should be reviewed *de novo.*

B. Legal standards

1. Wisconsin Statute 885.235

Wisconsin Statute section 885.235 governs the admissibility of chemical tests for intoxication for a range of offenses or "event[s] to be proved." These events include being under the influence of an intoxicant or having a prohibited alcohol concentration:

- While operating or driving a motor vehicle, or if the vehicle is a commercial motor vehicle, on duty time;
- While operating a motorboat, except a sailboat operating under sail alone;
- While operating a snowmobile;
- While operating an all-terrain vehicle or utility terrain vehicle; or
- While handling a firearm.

§ 885.235(1). If the sample was obtained within three hours of the "event to be proved," then the statute directs the court to

admit the evidence, subject to a range of presumptions and effects. *Id.* If the sample was *not* obtained within three hours of the "event to be proved," then the statute requires the proponent to present expert testimony to show its probative value before the court can admit the test results as evidence or give it any additional presumptive effect. *State v. Sonin*, 2012 WI App 52, ¶ 10 n. 4. Wisconsin courts have not interpreted the language of section 885.235, as it relates to what is the "event to be proved."

2. Wisconsin Statute section 907.02

Wisconsin Statute section 907.02 adopted the expert testimony admissibility standards established by the United States Supreme Court in *Daubert v. Merell Dow. Pharm., Inc.*, 509 U.S. 579 (1993). Specifically:

> 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 the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Id. Simply put, the statute requires the trial court to make four findings before admitting expert testimony:

1. The testimony at issue will assist the trier of fact to understand the evidence or to determine a fact in issue;

2. The testimony is based upon sufficient facts of data;

3. The testimony is the product of reliable principles and methods;

4. The witness has applied the principles and methods reliably to the facts of the case.

The previous statutory language only looked to the expert's qualifications and whether the testimony at issue would assist the trier of fact. *State v. Kandutsch*, 2011 WI 78, ¶ 26. "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*." *State v. Giese*, 2014 WI App 92, ¶ 18, (citing *Daubert*, 509 U.S. at 589 n. 7) (emphasis added.) "The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Id.* at ¶ 19 (citation omitted).

3. Application of section 907.02 and 885.235 together

State v. Giese, 2014 WI App 92, applied both sections 907.02 and 885.235 together to address whether "reverse extrapolation" met the standards of section 907.02 to support admitting a blood sample taken more than three hours from the "event to be proved." There, Giese admitted to the officer that he crashed his vehicle about three hours earlier (he was found at 2:12 a.m.). *Id.* at ¶¶ 4, 15. His blood-alcohol concentration was .181 grams per 100 milliliters of blood. *Id.* at ¶ 6. Assuming that Giese had ingested no alcohol after last operating his vehicle on the highway and that he had fully absorbed all consumed alcohol, the expert calculated that his blood-alcohol level would have been at least .221 at the time of driving. *Id.* at ¶ 8.

Because the expert had "more than just a single test to work with," the court deemed that the expert's testimony, the product of a "reverse extrapolation" met the standards of

section 907.02. *Id.* at ¶ 27. The expert had an approximate time of driving—four hours prior to taking the sample. *Id.* at ¶¶ 4, 15. The expert relied on assumptions about the absence of intervening drinking and absorption of alcohol. *Id.* at ¶ 27. Consequently, challenges to the expert's testimony and the sample could be made to weight, not admissibility. The trial court properly admitted the blood-alcohol results under section 885.235.

C. The trial court erred when it ruled that the State had met its burden regarding admissibility and denied Defendant's request for a *Daubert* hearing, regarding the blood-alcohol test results and reverse extrapolation.

In this case, the trial court improperly permitted the State to introduce the blood-alcohol results and reverse extrapolation at Mr. Durski's trial without conducting the requested *Daubert* hearing. First, this court should find that the "event to be proved" means performing the specific actions listed in subsection 885.235(1) *while* intoxicated or with a prohibited alcohol concentration. However, for Mr. Durski's blood test results to be "probative at trial," subsection 885.235 requires expert testimony to explain how, and why, the sample relates to when the individual last operated a motor vehicle *upon a public highway*. This did not occur, as no *Daubert* hearing took place.

Mr. Durski's degree of intoxication was not, by itself an element that the State was required to prove at trial. Both subsection 885.235(1g) and 885.235(3) contain language about the initial admissibility of a chemical test for intoxicants. The trial court's built-in intoxication element creates "automatic admissibility" for a chemical test. Per the court's reasoning, the State could admit any chemical test evidence that Mr. Durski

was intoxicated at any point after last operating a motor vehicle and then allow the jury to decide whether it had a temporal connection to when he operated a motor vehicle on a highway. In turn, automatic admissibility would render meaningless language in these subsections governing admissibility (as separate from the presumptive effects). Courts should interpret or apply a statute in a manner that gives meaning to each word and avoids surplusage. See, e.g., *Wilcox v. Estate of Hines*, 2014 WI 60, ¶ 27. In effect, the trial court improperly side-stepped the issue of whether the State's expert could meet the requirements of sections 885.235 and 907.02 by finding that intoxication, by itself and with no connection to operating a motor vehicle, was probative and relevant at Mr. Durski's trial.

This court should find that the State's expert, Thomas Neuser, did not have sufficient facts to provide an expert opinion regarding the probative value of the blood sample under *Giese*, as well as sections 907.02 and 885.235. The crux of Mr. Durski's defense in this case was that he very quickly consumed several alcoholic drinks after he finished driving to the motel. In his testimony, Mr. Durski gave the following account of what occurred when he arrived in the parking lot of the motel:

> [I] decided what I was gonna do; if I was gonna go back [to the residence on Locust Lane], or stay there. Early in the night when Pattie bough the beer, she opened it in the car, and there's beet there; and I had some booze in the back from when my friends where bow hunting in October, um, blackberry brandy. And [] I knew if I stayed [at the hotel], I wouldn't fall asleep if I didn't drink…I just slammed three beers and a couple chugs of the blackberry brandy so I could pass out; and that's exactly what I did.

R. 67:73. As such, pursuant to his account, Mr. Durski definitively consumed 4-6 alcoholic drinks in significantly under an hour. The retrograde, extrapolation, however, failed to sufficiently reflect this.

At trial, counsel for Mr. Neuser answered questions on direct examination, and retroactively extrapolated as to Mr. Durski's BAC at the time of driving, 1:13a.m. There, he testified that Mr. Durski's blood-alcohol content from the 4:31 a.m. draw was .094 grams per 100 milliliters. R. 67:38. He testified that for most individuals, alcohol is removed from the bloodstream at a rate of .010-.025 grams per 100 milliliters per hour. *Id.* at 41. Upon the state's hypothetical, Mr. Neuser next opined that if a 5'11" male, weighing 200 pounds, had a blood-alcohol content level of .094 at 4:31 a.m., under normal consumption and elimination rates, with no additional alcohol consumed, that individual would have had a blood-alcohol level of .12-.17 at 1:13a.m. *Id.* at 44. Upon further hypothetical questioning, Mr. Neuser next calculated that if the same individual, as previously considered, with an identical BAC result at 4:31a.m. consumed two standard drinks after driving, the blood alcohol range at 1:13a.m. would be between .09-.14 grams per 100 millimeters. *Id.* at 44.

On cross, counsel for Mr. Durski asked Mr. Neuser to provide more information as to how blood alcohol levels work, when a person drinks faster than the removal rate of .010-.025 grams per 100 milliliters per hour. *Id.* at 52. Mr. Neuser stated:

> Well, we have to keep in mind that there are two simultaneous and competing processes going on; one is absorption and the other is elimination. And so when a person has their drink, [] the blood enters the stomach and begins to go out into the blood. And as that alcohol circulates through the blood, it eventually goes to the liver

> where the enzymes break it down. So these are going on at the same time.
>
> If they finish that first drink but don't have the second drink right away, their alcohol content will climb. It won't reach [the theoretical maximum], but it will climb; and then it will start to go down because they haven't started taking their second drink. But when they take their second drink, that alcohol that is still in the blood from the first. And so as long as the rate of absorption exceeds the rate of elimination, the alcohol content rises; and so it will rise in a stepwise fashion until the person stops drinking all together. And then it just—the blood alcohol content just declines until the individual is alcohol free.

Id. at 54. Finally, Mr. Neuser definitely stated that, due to these competing processes of absorption and elimination, it would be impossible for a blood-draw collected three hours after the time of driving to accurately determine what the blood-alcohol concentration would have been during the actual time of driving, if there was significant alcohol consumption after the fact. *Id.* at 55.

Considering this principle, there was no way for Mr. Neuser—or any other expert—to give an accurate estimate of Mr. Durski's blood alcohol level at the time of driving in this case, due to the competing processes of absorption and elimination at play. Although Mr. Neuser was qualified and had facts to opine as to what Mr. Durski's blood alcohol level might have been under normal retrograde extrapolation circumstances, this expert testimony, by itself was insufficient to show why the speculated result was probative of the event

to be proved—whether he was intoxicated when he last operated a vehicle on a public highway. In *Giese*, the expert had both a "scenario" of when Giese last drove on the highway as well as "reverse extrapolation" to show the requisite probative value/presumptive effect Giese's blood alcohol test result. 2014 WI App 92, ¶¶ 8, 27. In *Giese*, the expert could also rely on the fact that there was no additional alcohol consumption after the time of driving. *Id.* Here, Mr. Neuser simply did not have sufficient *facts* to calculate Mr. Durski's blood-alcohol concentration at any point in time before the 4:31a.m. blood draw, and all testimony provided was purely speculative. 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) (emphasis added). In short, to admit Mr. Durski's blood-alcohol test under the state's provided circumstances can barely speculate that it had any probative value.

In turn, allowing the State to introduce Mr. Durski's test result was not harmless error, and prejudiced him at trial. Most importantly, the jury was incorrectly informed through this testimony that Mr. Durski was heavily intoxicated when he last operated a vehicle. Dressing up this information as "circumstantial evidence," the State used Mr. Neuser's testimony to argue that Mr. Durski must have been intoxicated while driving—without consideration of the competing processes of elimination and absorption. The blood-alcohol result, with no supporting facts tying the information to any driving, would have made it impossible for any other explanation contradicting the evidence seem blatantly unreasonable. Consequently, this court should hold both that the test result and expert testimony about the result be prohibited at trial, and that he deserves a new trial heard without the unfairly prejudicial evidence being admitted.

CONCLUSION

For the reasons stated above, Mr. Durski respectfully asks this court to 1). reverse the order of the trial court, denying his motion to suppress the statements elicited by law enforcement; and 2). reverse the order of the trial court permitting the introduction of Mr. Durski's blood results at trial.

Dated this 11th day of February, 2019.

Respectfully submitted,

s/Natalie L. Wisco

NATALIE L. WISCO
State Bar No. 1101661
Richards & Dimmer, S.C.
209 Eighth Street
Racine, WI 53403
262-632-2200
wisco@racinedefense.com
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5361 words.

Dated this 11th day of February, 2019.

Signed:

____s/Natalie L. Wisco_____
NATALIE L. WISCO
State Bar No. 1101661
Richards & Dimmer, S.C.
209 Eighth Street
Racine, WI 53403
262-632-2200
wisco@racinedefense.com
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 11th day of February, 2019.

Signed:

____s/Natalie L. Wisco_____
NATALIE L. WISCO
State Bar No. 1101661
Richards & Dimmer, S.C.
209 Eighth Street
Racine, WI 53403
262-632-2200
wisco@racinedefense.com
Attorney for Defendant-Appellant

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 809.19(2)(a) and that it 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 conclusion 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 this 11th day of February, 2019.

Signed:

____s/Natalie L. Wisco_____
NATALIE L. WISCO
State Bar No. 1101661
Richards & Dimmer, S.C.
209 Eighth Street
Racine, WI 53403
262-632-2200
wisco@racinedefense.com
Attorney for Defendant-Appellant