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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NO. 2018AP001750 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER J. DURSKI,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE DECISION OF
THE HONORABLE PHILLIP A. KOSS, CIRCUIT COURT JUDGE
CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH I

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

STATEMENT OF THE ISSUES

Was the defendant in custody for purposes of *Miranda* before and after Durski completed field sobriety tests?

The trial court answered no.

Did the trial court properly exercise its discretion by allowing the introduction of retrograde extrapolation expert testimony without conducting a *Daubert* hearing?

The trial court did not answer.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication of this court's opinions nor oral argument is necessary in this case. The issues presented are adequately addressed in the brief and under the rules of appellant procedure, publication of this decision is not appropriate because it is a one-judge appeal. *See* Wis. Stat. § 809.23(1)(b)4, Wis. Court Rules and Procedures, 2013-2014.

STATEMENT OF FACTS RELEVANT TO THE SUPPRESSION HEARING

On October 22, 2016 Lieutenant Elder, an officer with nine years of law enforcement experience, traveled to the Super 8 Hotel located in the City of Whitewater, Walworth County, Wisconsin to make contact with Christopher Durski regarding a family trouble call that had occurred at a residence in the City of Whitewater. R63:6-7. Durski had

fled from the scene of the domestic disturbance and Lieutenant Elder was checking places that Durski may have gone. R63:7. Lieutenant Elder contacted the front desk worker at the hotel and they advised Durski had just checked in. R63:7. Lieutenant Elder was advised Durski was in room 202. R63:7.

Lieutenant Elder contacted Durski and he gave Lieutenant Elder permission to enter his hotel room. R63:7; R31. While talking with Durski, Lieutenant Elder observed signs of intoxication. R63:7-8. Durski also admitted that he had driven a vehicle to the Hotel. R63:8. Lieutenant Elder asked Durski how many drinks he consumed and Durski indicated he had three or four Bud Light beers and a shot of blackberry brandy. R63:8. Lieutenant Elder asked Durski if he had any alcohol in the room and he advised he did not. R63:8; R31. Durski stated Lieutenant Elder could search his truck as well. R31.

Lieutenant Elder advised Durski Lieutenant Elder wanted Durski to perform field sobriety tests to be sure Durski was not too intoxicated to be driving, as Durski had driven from the house to the hotel. R63:8. Durski then stated he consumed “a couple beers” when he arrived at the hotel. R63:8-9. Durski claimed he drank the beer outside in his vehicle. Lieutenant Elder asked Durski where the

containers were and Durski indicated he threw them away in the garbage. Lieutenant Elder asked Durski where he threw them away and Durski stated outside the door probably. R63:9, 13-14. Durski stated the beers he drank when he got to the hotel were two Bud Light 12 ounce cans, not bottles. R63:13.

Lieutenant Elder advised Durski Lieutenant Elder would like Durski to submit to Standardized Field Sobriety Testing in the hallway of the hotel. R63:9. Durski allowed Lieutenant Elder to search his person prior to the tests and Lieutenant Elder located Suboxone. Durski stated he had a prescription for the Suboxone, which was later confirmed. R63:17. Durski denied taking any drugs. R63:17. Durski was escorted to the hallway outside his room for the tests. Three officers were present in the hallway of the hotel during the field sobriety tests. R63:9-10.

At the conclusion of the field sobriety tests, Lieutenant Elder formed the opinion Durski was under the influence of intoxicants and his ability to operate a motor vehicle was impaired. R63:10. Lieutenant Elder requested Durski submit to a Preliminary Breath Test. R63:10. Lieutenant Elder received a low battery prompt on the PBT, so Officer Weston went to retrieve a different one and

check on the beer containers Durski claimed to have drank at the hotel. R63:10.

Lieutenant Elder escorted Durski into his hotel room and spoke with him further about the beer he was claiming to have consumed at the hotel. R63:11-15. During this contact, Durski was standing and sitting on the bed at various times. R3:11. Lieutenant Elder asked Durski questions to clarify where the beers cans Durski claimed to have drank could be located. R63:11-14. Lieutenant Elder was then advised over the radio by Officer Matteson that Durski would need to be taken into custody for domestic battery and disorderly conduct. R63:12, 14-15. Lieutenant Elder advised Durski he was going to be under arrest for disorderly conduct. Durski was secured in handcuffs. R31.

Prior to the radio transmission from Officer Matteson, Durski was never told her was under arrest, never handcuffed, and no weapons were ever drawn. R63:10, 15. On scene conversations between Durski and Lieutenant Elder were done in a calm voice. R31.

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE SUPPRESSION HEARING

Based upon the evidence adduced at the suppression hearing, the trial court found that Durski was not under arrest until Officer Matteson told Lieutenant Elder to

place Durski under arrest for disorderly conduct. R63:21-22. Specifically, the Court made the following findings:

> 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.
>
> So if he drank two or more cans after getting there, after he stops driving, they're not going to arrest. I think if it was otherwise, they would have just arrested him immediately, they wouldn't bother to take these steps to try and determine it.
>
> The officer's chatty with him. It's conversational; it's not accusatory at this point. They're really trying to determine where these cans are, if they exist. Now, I don't doubt the officer, in the back of his mind, was thinking: I really wonder if they are there, but he can think what he wants in his mind. It is clear to the defendant that he's trying to show I'm not impaired, yeah. And even when he has accused him – "he" being Elder – has accused him of lying or misleading, the defendant has a perfectly good explanation: Oh, that you thought did I have beers here, in the room; that's what I thought you meant. Quoting Mr. Durski.
>
> I think the officers are doing a thorough job to ensure there's probable cause by seeing if these beer cans exist or don't. That becomes somewhat moot when Officer Matteson says there's enough to arrest him. I assume he hears that. 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.

R63:21-22.

ARGUMENT

I. DURSKI WAS NOT IN CUSTODY WHEN HE GAVE HIS INITIAL STATEMENTS TO LIEUTENANT ELDER, SO MIRANDA WARNINGS WERE NOT REQUIRED.

A. General Principles In Determining Whether A Person Is In Custody For *Miranda* Purposes And Standard Of Review.

1. The Standard For Review.

When a suppression motion is reviewed, the circuit court's finding of fact will be sustained unless they are clearly erroneous. *State v. Roberts*, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, the Appellate Court will independently examine the totality of the circumstances at the time of the complained of conduct to determine whether the officer's acts were reasonable. *Id*.

2. "In Custody" Under Miranda.

The government "may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). *Miranda* warnings must be administered prior to the onset of a custodial interrogation. *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004); *see also State v. Armstrong*, 223 Wis. 2d 331, 351-52, 588 N.W.2d 606 (1999). Therefore, in order to trigger

the requirement of *Miranda* warnings the individual must be in custody and must be subject to interrogation. *State v. Buck,* 210 Wis. 2d 115, 123, 565 N.W.2d 168 (Ct. App. 1997).

Even under *Miranda,* police are allowed to engage in "[g]eneral on-the-scene questioning as to facts surrounding the crime" without having to provide the warnings first. 384 U.S. at 477-78; *State v. Kraimer,* 99 Wis. 2d 306, 329-30, 298 N.W.2d 568 (1980); *State v. Leprich*, 160 Wis. 2d 472, 477, 465 N.W.2d 844 (Ct. App. 1991).

A person is "in custody" for purposes of *Miranda* if the person is either formally arrested, or restrained in freedom of movement to the degree associated with a formal arrest. *State v. Goetz*, 2001 WI App 294, ¶ 11, 249 Wis. 2d 380, 638 N.W.2d 386; *see also Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). The test for custody is an objective one. *See State v. Pounds*, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993). The relevant inquiry is "'whether a reasonable person in the [suspect's] position would have considered himself or herself to be in custody, given the degree of restraint under the circumstance.'" *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998) (citations omitted).

In determining whether a person is in custody for purposes of *Miranda*, this court must consider the totality

of the circumstances, including factors such as the suspect's freedom to leave; the purpose, place and length of the interrogation; and the degree of restraint. *State v. Morgan*, 2002 WI App 124, ¶ 12, 254 Wis. 2d 602, 648 N.W.2d 23, citing *State v. Gruen*, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). The degree of restraint is determined by considering the following seven factors:

> 1) whether the suspect is handcuffed;
> 2) whether a weapon is drawn;
> 3) whether a frisk is performed;
> 4) the manner in which the suspect is restrained;
> 5) whether the suspect is moved to another location;
> 6) whether questioning took place in a police vehicle; and
> 7) the number of officers involved.

Id.

The only objective factors that are relevant to the inquiry about custody are those known to the suspect. *See Mosher*, 221 Wis. 2d at 218.

The State must disprove "custody" by a preponderance of the evidence. *See State v. Armstrong*, 223 Wis. 2d 331, 351, 588 N.W.2d 606 (1999). The state bears the burden of proving by a preponderance of the evidence whether a custodial interrogation took place such that *Miranda* warnings were required. *State v. Armstrong,* 223 Wis. 2d 331, 345, 351, 588 N.W.2d 606 (1999); *State v. Fischer,* 2003 WI App 5, ¶ 22, 259 Wis. 2d 799, 656 N.W.2d 503.

Applying the above principles, the State will demonstrate why Durski was not in custody, but was merely detained when he spoke with Lieutenant Elder.

B. A Reasonable Person In Durski's Situation Would Have Believed He Was Free To Leave Pending The Outcome Of The Investigation At The Time He Made His Statement To Lieutenant Elder.

Both custody and official interrogation are necessary to trigger the need for *Miranda* warnings. Absent one or the other, *Miranda* warnings are not necessary. *See Miranda,* 384 U.S. at 477-78.

Under the totality of the circumstances, the facts of this case support the conclusion that Durski was *not* in custody when Lieutenant Elder spoke with him in his hotel room. After knocking on Durski’s hotel room, Durski allowed officers to enter his hotel room. Upon entering the room, Lieutenant Elder explained why he was there and subsequently made the decision to conduct field sobriety tests on Durski. Durski, who agreed to perform the tests, accompanied Lieutenant Elder into the hallway outside his hotel room to perform the tests. Prior to performing the tests, Durski agreed to allow Elder to frisk Durski. Durski was not told that he was under arrest, and Durski was never placed in handcuffs. The investigational conversation that occurred was done in a calm and

nonthreatening manner. Only two or three officers were present during the interview and no weapons were displayed, Durski was neither threatened nor made any promises, and the interview lasted a short time. At the conclusion of the field sobriety tests and subsequent interview Lieutenant Elder placed Durski under arrest. Finally, Durski never said he did not want to talk to Lieutenant Elder or that he wanted a lawyer.

As these facts demonstrate, the primary factor supporting the determination that Durski's initial contact with police was investigative is the utter lack of restraint on Durski during the interview, as measured by the seven criteria customarily considered in evaluating the degree of restraint on a suspect.

Durski was not handcuffed or otherwise confined; no weapon was displayed, he was neither threatened nor made any promises, he was interviewed in his own hotel room before being moved to the public hallway, rather than in a squad car or the jail; and only two, sometimes three officers, were present. In addition, Durski had agreed to speak with the officers, and let them into his hotel room to talk. Based on all these circumstances, the degree of restraint on Durski was nil.

The other two factors identified in *Morgan* as bearing on the question of custody – the freedom to leave and the purpose, place and length of the interrogation – further support the determination that Durski was not in custody.

An objective person in Durski's position would have understood that he was "free to leave" pending the conclusion of the investigation. The officers never told Durski he was under arrest or that he was not free to leave, nor threatened to arrest him if he refused to give a statement or refused to perform field sobriety tests. Moreover, the officers did not put Durski in handcuffs, and did not draw their weapons during the interview. Although Durski may argue that he was going to be placed under arrest, that is irrelevant unless it was conveyed to Durski. The totality of the circumstances in determining "custody" does not include "the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994); *Mosher*, 221 Wis. 2d at 211. Thus, the focus is on the factors known to the suspect, and here Durski invited the officers into his hotel room to talk, agreed to perform field sobriety tests in a public hallway, and two officers who made no show of force whatsoever interviewed him in his hotel room.

Thus, measured by the factors identified in *Morgan*, Durski was not in custody when he made his initial statements. Under the totality of the circumstances, a reasonable person in Durski's position would not have believed that he was subject to a restraint on freedom of movement of the degree associated with a formal arrest when Lieutenant Elder asked him questions. Consequently, Lieutenant Elder was not required to obtain a waiver of *Miranda* rights from Durski before he could elicit admissible statements from him.

Finally, that brings us to the question of whether or not a reasonable person in Durski's position would have considered himself in custody. In Wisconsin, our Supreme Court has held that the mere request for performance of field sobriety tests, coupled with no show of force or arms, does not reasonably connote an arrest. *State v. Swanson*, 164 Wis.2d 437, 448, 475 N.W.2d 148, 153 (1991). The court also noted that in far more intrusive circumstances (the drawing of weapons, the use of handcuffs), the courts nonetheless have concluded that a custodial situation did not exist. *See id*.

In *State v. Quartana,* 213 Wis.2d 440, 443, 570 N.W.2d 618 (Ct.App.1997), the Court held that an officer ordering a defendant to ride in a police car was not an arrest.

There, an officer arrived on the scene of a one-car accident and determined that the car belonged to Quartana. *Id.* at 443–44, 570 N.W.2d 618. The officer drove to Quartana's home and asked to see his driver's license. *Id.* at 444, 570 N.W.2d 618. After noticing the smell of intoxicants and observing that Quartana had bloodshot and glassy eyes, the officer informed Quartana that he would have to accompany him to the scene of the accident. *Id.* Quartana asked if he could ride with his parents to the scene. *Id.* The police officer told Quartana he would have to come with him, because he needed to keep him under observation, and that he was temporarily being detained in connection with the accident investigation. *Id.* At the scene of the accident, Quartana took and failed several field sobriety tests, refused to take a preliminary breath test, and consequently was arrested. *Id.*

Quartana argued that he had been unlawfully arrested when the police transported him to the scene of the crime. *Id.* at 449, 570 N.W.2d 618. The court concluded "that a reasonable person in Quartana's position would not have believed he or she was under arrest." *Id.* at 450, 570 N.W.2d 618. The court found that the fact that Quartana was not transported to an institutional setting, not detained for an unusually long period of time, and that if he passed

the field sobriety test that he would be free to go, supported a conclusion that Quartana was not arrested. *Id.* at 450–451, 570 N.W.2d 618.

While the *Quartana* Court did consider the fact that the defendant was not transported to a "more institutional setting", it was but only one factor in the totality of the circumstances analysis. The *Quartana* Court saw the nature of the purpose of the investigation as significant in determining what a person in Quartana's position would reasonably think:

> Quartana had to be aware that the detention was only temporary and limited in scope. The officer told him that he was being temporarily detained for purposes of the investigation and that he was being transported to the accident scene, not a police station, to talk with the state trooper investigating the accident. At no time prior to taking the field sobriety test did any police officer communicate to Quartana, through either words or actions, that he was under arrest, or that the restraint of his liberty would be accompanied by some future interference with his freedom of movement. *See generally Terry,* 392 U.S. at 26, 88 S.Ct. at 1882 (arrest occurs when there is a restraint of liberty accompanied by future interference with the individual's freedom). Quartana had to realize that if he passed the field sobriety test, any restraint of his liberty would be lifted and he would be free to go. Therefore, we affirm the trial court's finding that the police did not exceed the scope of a *Terry* stop.

State v. Quartana, 213 Wis.2d at 450-451.

Thus, nothing in *Quartana* dictates that the location of the temporary detention be considered in any other manner than as part of the totality of the circumstances.

Similarly, the courts have said that the use of handcuffs on an individual does not automatically affect an arrest. In *State v. Marten–Hoye,* 2008 WI App 19, ¶ 2, 307 Wis.2d 671, 746 N.W.2d 498, police stopped the defendant to determine if she was violating a curfew ordinance. After she was told that she was free to leave, Marten–Hoye began to yell obscenities at the officers. *Id.,* ¶¶ 2–3. The police again approached her, told her she was under arrest for disorderly conduct, and placed her in handcuffs. *Id.,* ¶ 3. The police told her that she would be free to go if she cooperated while they wrote her a citation. *Id.* In that situation, the court concluded that a reasonable person would not consider themselves under arrest because Marten–Hoye was told that she would be issued a citation and then would be free to leave. *Id.,* ¶¶ 28–29.

Finally, the supreme court has found that a police order to an individual at gunpoint does not automatically affect an arrest. In *Jones v. State,* 70 Wis.2d 62, 69–70, 233 N.W.2d 441 (1975), police stopped a car containing Jones, Walker, and another man after receiving a tip that they were involved in an armed robbery. An officer ordered

Jones at gun point to get out of the vehicle and to raise his hands in the air. *Id.* at 70, 233 N.W.2d 441. The supreme court concluded that Jones was not under arrest when he was ordered out of the car at gunpoint. *Id.*

As in *Quartana, Marten–Hoye*, and *Jones,* a reasonable person in Durski's position would not have considered himself to be in custody. No officer told Durski he was under arrest, brandish a weapon, or use any show of force whatsoever. An objective person in Durski's position would have understood that he was being detained so that officers could investigate the scene, and that depending on the outcome the defendant would be "free to leave".

Thus, the trial court properly found that any questions Durski made in response to Lieutenant Elder's questions in the hotel room prior to being placed under arrest are not subject to suppression.

II. THE STATE MET ITS BURDEN TO ESTABLISH THE ADMISSIBILITY OF THE PROFFERED EXPERT TESTIMONY REGARDING RETROGRADE EXTRAPOLATION.

A. Applicable Law And Standard Of Review.

The trial court's decision to admit expert testimony is reviewed for an erroneous exercise of discretion and must be affirmed as long as "it has a rational basis and was made in accordance with accepted legal standards in

view of the facts." *State v Giese*, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687.

Wisconsin Stat. § 907.02 governs the admissibility of expert testimony and provides:

> (1) 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 [qualified] witness ... may testify thereto ... if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

This statute adopts the reliability standards established by the United States Supreme Court in *Daubert*. *Giese*, 356 Wis. 2d 796, ¶17. Under these standards, the circuit court performs the function of "gate-keeper ... to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Id.*, ¶18.

This standard is flexible. *Id.*, ¶19. As the United States Supreme Court stated in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id*. at 152. The trial court has broad discretion in deciding what procedure to use in making a determination as to the reliability of scientific evidence under *Daubert*. Trial courts have the option of taking judicial notice of

the reliability of scientific evidence, just as in our current case. In particular, the *Daubert* Court noted that if a trial court decides to take judicial notice of the reliability of scientific evidence, a hearing as to that issue would no longer be necessary. If a theory or technique is "so firmly established as to have attained the status of scientific law," then the theory or technique need not be examined at all. *Daubert*, 509 U.S. at 592, n. 11. Other courts have indeed embraced this concept and noted that a *Daubert* hearing is not necessary when other courts have found the scientific evidence sufficiently reliable under the *Daubert* analysis. *U.S. v. Pena*, 586 F.3d 105, 110 (1st Cir. 2009); *United States v. Alatorre*, 222 F.3d 1098, 1099 (9th Cir. 2000) (holding that a separate *Daubert* hearing outside the presence of the jury was unnecessary).

Further, when appellate courts have reviewed a trial court's decision where it declined to hold a Daubert hearing, the appellate courts apply an abuse of discretion standard, and have upheld the trial court's decision. *Id*. Declining to hold a *Daubert* hearing is further justified if the defense fails to produce any novel challenge. *U.S. v. Mitchell*, 365 F.3d 215, 246 (3rd Cir. 2004). "[A] district court would not abuse its discretion by limiting, in a

proper case, the scope of a *Daubert* hearing to novel challenges to the admissibility of latent fingerprint identification evidence - or even dispensing with the hearing altogether if no novel challenge was raised." *Id*. This does not in any way shift the burden to the defense. Rather, the *Daubert* Court itself suggested that judicial notice on these issues is appropriate to preserve scarce judicial resources. *Daubert*, 509 U.S. at 582, n. 11.

There is no requirement that the trial court "recite the *Daubert* standard as though it were some magical incantation." *Ancho v. Pentek Corp*., 157 F.3d 512, 518 (7th Cir. 1998). Nor does the trial court have to apply all the factors suggested in *Daubert* or *Kumho*. *Goebel v. Denver and Rio Grande Western R.R. Co.,* 215 F.3d 1083, 1088 (10th Cir. 2000). However, when faced with a party's objection, the trial court must adequately demonstrate by specific findings on the record that the gatekeeping duty has been performed. *Id*.

B. The Trial Court Properly Admitted Evidence Regarding Retrograde Extrapolation Without Conducting A *Daubert* Hearing.

Citing *State v. Giese*, Durski argues that "the trial court improperly permitted the State to introduce the blood-alcohol result and reverse extrapolation at Mr. Durski's trial without conducting the requested Daubert

hearing.” *See* Durski’s Brief at p. 16. Durski’s reliance on *Giese* to support his position, however, is misplaced.

In *State v Giese*, Giese argued that an expert opinion is inadmissible under Wis. Stat. § 907.02 claiming that the opinion failed to satisfy the statute due to insufficient facts and data because the expert relied upon “unprovable and improper assumptions” when forming an opinion. *Id*. at 798. Giese's vehicle had crashed, Giese was located a distance from the crash, about three miles, he was lying in the roadway when located, Giese was swaying, smelled of alcohol, admitted to drinking, and stated he had crashed his vehicle, but fell asleep on the road when walking home. *Id*. at 799. Not knowing the exact time of the vehicle crash, the expert in *Giese* performed a “back extrapolation” making assumptions and calculated a range of possible blood alcohol concentrations based on different possible times of the crash. *Id*. at 801. Similarly to our case, the blood test result was not automatically admissible under Wis. Stat. § 885.235, but required expert testimony to establish probative value. *Id.* The court in *Giese* ruled that the expert's opinion about retrograde extrapolation was admissible stating that under *Daubert* the court performs “a gate -keeping function.” *Id*. at 803. The expert relied on not only the blood test result but also the “scenario”. *Id.*

Similar to *Giese*, the trial court properly exercised its discretion by allowing the State to introduce the blood-alcohol result and retrograde extrapolation at Durski's trial without a separate hearing.

At the pretrial hearing, Durski requested a *Daubert* hearing before the State be allowed to introduce expert testimony on retrograde extrapolation. Durski argued:

> I think the state has to establish that not only is the retrograde extrapolation that's being done scientifically appropriate, but also that the inferences that the expert is using are appropriate. I think that's where the difficulty is here, because of the timing, but also because there's an allegation that alcohol was consumed after the time of driving, and that specifically throws doubt on the reliability of any potential retrograde extrapolation.
>
> So I think prior to introducing that evidence in front of the jury, it's at least appropriate to have a hearing to determine what facts the expert is relying upon and whether that is then scientifically reliable to the appropriate standard.

R65:4-5. The State responded:

> Well, I think the analyst can testify about what parameters he is using to make that calculation. From my experience with asking Mr. Neuser to do retrograde extrapolation, he does just that.
>
> As to allegations of there being drinking subsequent to driving, I think that really goes more to the weight. It's for the jury to determine whether or not those allegations are credible or not. I don't see the need to have a separate *Daubert* hearing outside the presence of the jury.

R65:5. As an offer of proof the State alleged:

> [I]n looking at the reports here, is that law enforcement was dispatched at 1:13 a.m. to the residence for an incident that had happened there. They were advised that Mr. Durski had left in a vehicle. And then they were advised while at the scene that Mr. Durski was consuming intoxicants. And then the defendant's vehicle – well, the vehicle registered to his father, the one he was driving, was found at the Super 8 Motel, and Mr. Durski was located at the motel. And they detected signs of intoxicants. He did make allegations that he had consumed a couple of beers when he arrived at the hotel…The report does not list an exact time [police encountered Mr. Durski as the motel]. The blood draw I would note was at 4:31 a.m.
>
> They did look around with Mr. Durski for some time to look for these empty alcohol cans or bottles. I don't believe they found any. But I also note the defendant's at a .02 restriction.

R65:6-7. Defense counsel added the following facts to the offer of proof:

> I would just add I believe Mr. Durski indicated that he had several beers and a shot of blackberry brandy in his vehicle prior to entering the hotel. He had apparently left the residence prior to the police being called at 1:13. And the blood draw is at four, after four o'clock in the morning.

R65:7. The State further stated that the results of the blood draw was .094. R 65:7.

Based on this record, the Court concluded:

> All right. Well, I guess what I've seen them do before, Ms. Schmeiser, is take the drinks that he has said, add them in, and then do a retrograde analysis with the average rate of elimination of .015. I mean, but they're going to have to agree – well, they can do a range, but credit his drinks. But I don't think that means – as long as they do that, I believe that under

> *Fonte*, it will – it's permissible under *Daubert*. If they don't take into account his drinks, I agree, I won't permit that to occur.
>
> …
>
> Now, it doesn't mean you have to agree to his number to drinks, Mr. Leusink. You could have a range. But I think it has to be considered, at least. All right.

R65:7-8.

Here, similar to *Giese*, the circuit court determined retrograde extrapolation was reliable, and therefore admissible, because it had been used by litigants in Wisconsin courtrooms for decades. *See, e.g., State v. Fonte,* 2005 WI 77, 281 Wis.2d 654, ¶ 18, 698 N.W.2d 594. The circuit court offered a reasoned explanation as to why it determined retrograde extrapolation was reliable and admissible pursuant to Wis. Stat. § 907.02. As acknowledged by the *Giese*, retrograde extrapolation is a widely accepted methodology in the forensic toxicology field and well-established in our courts. *See Giese*, 356 Wis. 2d 796, ¶22 (explaining that "retrograde extrapolation is a generally accepted scientific method" and "[w]e are not aware of any court that has determined that the general methodology of ... retrograde extrapolation fails the *Daubert* standard"). Of course, retrograde extrapolation is subject to "certain doubts and disagreements." *Giese*, 356 Wis. 2d 796, ¶23. But

"[t]he mere fact that some experts may disagree about the reliability of retrograde extrapolation does not mean that testimony about retrograde extrapolation violates the *Daubert* standard." *Giese*, 356 Wis. 2d 796, ¶23. In finding retrograde extrapolation admissible, the *Giese* Court ruled that "Giese still has the chance to undermine the assumptions that support the expert's opinion by introducing evidence or arguing the favor of competing inferences from the known facts. But the expert's opinion is admissible under Daubert." *Id.* at ¶28. This established history of retrograde extrapolation—revealed in appellate decisions and the circuit court's experience—was fair game for the court to rely on. *See State v. Cameron*, 2016 WI App 54, ¶25, 370 Wis. 2d 661, 885 N.W.2d 611 (relying on previous court decisions holding that "cell phone location technology" was reliable). Under current law, a *Daubert* hearing was clearly not required for testimony regarding retrograde extrapolation.

Finally, while Durski challenges the facts relied on by the expert, "[t]he accuracy of the facts upon which the expert relies and the ultimate determinations of credibility and accuracy are for the jury" as the concerns with retrograde extrapolation "go to the weight of the

evidence, not to its admissibility." *Giese*, 356 Wis. 2d 796, ¶¶23, 28.

> Giese remains free to challenge the accuracy of the expert's assumptions. He may, for instance, propose competing scenarios—e.g., that Giese drank all the alcohol soon before driving. Or that he began drinking alcohol, or continued drinking, after the crash. In our adversary system, "[j]uries resolve factual disputes" like those. *State v. Abbott Labs.,* 2012 WI 62, ¶ 69, 341 Wis.2d 510, 816 N.W.2d 145 (citation omitted); *see also Daubert,* 509 U.S. at 596, 113 S.Ct. 2786 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). Giese still has the chance to undermine the assumptions that support the expert's opinion by introducing evidence or arguing in favor of competing inferences from the known facts. But the expert's opinion is admissible under *Daubert.*

Id. at ¶ 28. Just as in *Giese*, Durski was free to, and in fact did, challenge the expert's hypothetical assumptions by "propos[ing] competing scenarios" and conducting a vigorous cross examination. *Id.*, ¶28. Durski was given ample opportunity through cross-examination to question the State's expert on the basis for his findings regarding retrograde extrapolation or present contrary evidence. The trial court in no way limited the defendant in this respect at trial. R67:29-57.

Thus, the circuit court exercised its discretion and fashioned a process to assess the reliability of the

expert's testimony through cross-examination. The main thrust of Durski's argument was that the expert had insufficient data to render a reliable opinion. Similar to *Giese*, after hearing the State's offer of proof, the circuit court concluded that the expert's testimony was sufficiently reliable and any deficiencies were best dealt with by allowing Durski to explore its factual basis and limitations on cross-examination. *Id*. at ¶28. The circuit court's decision to deal with these uncertainties by finding the underlying method reliable under Wis. Stat. § 907.02, and allowing cross-examination on its factual application here, was a reasonable exercise of discretion.

However, *even if* the court erroneously admitted the expert testimony about retrograde extrapolation, there is no reasonable probability of a different outcome so as to warrant a new trial of this case. *State v. Kleser*, 2010 WI 88, ¶94, 328 Wis. 2d 42, 786 N.W.2d 144. This was a .02 blood alcohol case. The result of Durski's blood draw of a .094 grams per 100 milliliters, was admitted into evidence. R67:38. Even without retrograde extrapolation evidence, the jury was presented with evidence from two witnesses, Patricia Bongiorno and J. Patrick Fredrich, that Durski was intoxicated prior to leaving the house in his motor vehicle and that they did not observe Durski leave with any

alcoholic beverages. R66:82-84, 87,107-110, 119. Lieutenant Elder further testified to Durski's intoxicated condition and that Durski initially stated that he had not drank after driving to the hotel, but changed his story after Elder requested Durski to perform field sobriety tests. R66:130-132. Durski originally stated he drank three to four beers and a shot of blackberry brandy at the house. R66:131. Durski later stated that when he left the house he had taken two twelve ounce cans of Bud Light beer with him and drank them after he got to the hotel. R66:132-133. Officers thoroughly searched the premises at the hotel and never located any Bud Light beer cans. Officers also searched Durski's vehicle and never located any beer cans or any other alcoholic beverages, even though Durski claimed the cans were in the area. R67:7-9, 26, 94-96, 99-101. At trial Durski changed his story yet again, and testified that when he got to the hotel he slammed three beers and a couple chugs of blackberry brandy. R67:73-74, 84, 86-87, 93. Finally, Advanced Chemist Thomas Neuser testified to the process by which alcohol will dissipate from a person's blood stream, the effects of alcohol on the central nervous system and that alcohol is impairing at all levels. R67:41, 45-46. As such, any error was harmless.

CONCLUSION

For the stated reasons, it is respectfully requested that the decisions of the Circuit Court should be upheld as the defendant was not in custody at the time he gave his statements in his hotel room and a *Daubert* hearing was not necessary due to the validity of the science. Respectfully, the defendant's conviction in the present case should stand.

Dated this _____ day of March, 2019.

Respectfully submitted,

_____
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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c).

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Signed,

_____
Attorney