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DISTRICT IV

09-23-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2019AP000448-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

CHRISTOPHER DREW HELWIG,
Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER ENTERED ON NOVEMBER 8, 2018,
IN THE CIRCUIT COURT FOR JEFFERSON COUNTY, THE HONORABLE
BENNETT J. BRANTMEIER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State believes the briefs submitted in this matter fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigants.

STATEMENT OF FACTS

The State generally agrees with the Defendant-Appellant's recitation of the facts in his Statement of the Case and Facts. As Plaintiff-Respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2. The relevant facts and history will be presented where necessary in the Argument portion of this brief.

STANDARD OF REVIEW

In this matter, this Court will be required to review pre-trial evidentiary determinations made by the circuit court as well as whether Mr. Helwig's Constitutional rights were violated. In addition, this matter will require this court to interpret the meaning of a statute.

"A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence." *State v. Brecht*, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988) (citation omitted). Upon review, the standard for evidentiary rulings is whether the circuit court erroneously exercised its discretion. *State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis. 2d 686, 613 N.W.2d 629. That discretion should be upheld if the court "exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *Id.* (quoting *State v. Wollman*, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979)). If a reasonable basis exists for the court's determination, this court should defer to the circuit court's discretion. *See id.*

This court's review of whether hearsay evidence violates a defendant's Sixth Amendment right to confront witnesses who testify against him at trial is a question of constitutional law subject to independent review. *State v. Mattox*, 2017 WI 9, ¶ 19, 373 Wis. 2d 122, 890 N.W.2d 256 (citing *State v. Williams*, 2002 WI 58, ¶ 7, 253 Wis. 2d 99, 644 N.W.2d 919).

Questions of statutory interpretation are also subject to de novo review. *State v. Wiedmeyer*, 2016 WI App 46, ¶ 6, 370 Wis. 2d 187, 881 N.W.2d 805.

I. MR. HELWIG HAS FAILED TO ESTABLISH THAT THE CIRCUIT COURT ERRED WHEN IT FOUND THE STATE PROVIDED PROPER AUTHENTICATION FOR THE ADMISSIBILITY OF THE BLOOD RESULTS PURSUANT TO §343.305, WIS. STATS.

Under Section 901.04, Wis. Stats. the judge makes preliminary determinations regarding the admissibility of evidence and is not bound by the rules of evidence when doing so.

Section 343.305(5)(d), Wis. Stats. states:

At the trial of any . . . criminal action . . . arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant . . . the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant. . . . Test results shall be given the effect required under s. 885.235. (emphasis added)

The only provision of Section 343.305, Wis. Stats. that references the individual who performs the blood draw is Wis. Stat. §343.305(5)(b), which requires that blood be withdrawn by an individual in one of the named professions listed under §343.305(5)(b) or (c), Wis. Stats. Registered Nurse is one of the listed professions under §343.305(5)(b), Wis. Stats.

In Wisconsin, "A blood analysis is judicially recognized as a scientific method, the result of which

carries a prima facie presumption of accuracy." *State v. Disch*, 119 Wis. 2d 461, 473-74, 351 N.W.2d 492 (1984). Whether the blood draw was performed substantially according to the methods approved by the laboratory of hygiene or whether the individual that performed the blood draw had the qualifications to do so goes to the issue of weight, not admissibility of evidence. *Id.* at 476.

In support of its Brief arguing compliance with Wis. Stat. §343.305(5)(b), the State submitted the Blood/Urine Analysis form, which Registered Nurse Amanda Ranchel filled out when she performed the blood draw, as well as a Credential Summary printout for Amanda Ranchel from the Wisconsin Department of Safety and Professional Services website. (R.26:4-7). The Blood/Urine Analysis form indicates that Amanda Ranchel checked the box indicating she is a Registered Nurse when she performed the blood draw. (R.26:4) The Credential Summary printout indicates Amanda Ranchel was granted her license as Registered Nurse on February 19, 2015, and that her license is current through February 28, 2020. (R.26:5-7). The court was allowed to consider both of these items when ruling on whether the State was obligated under §343.305(5)(b), Wis. Stats. to have Ms. Ranchel testify regardless of whether they were admissible under the rules of evidence. Wis.

Stat. §901.04(1). The court found that Mr. Helwig failed to provide any meaningful challenge to the evidence the State put forth to establish Amanda Ranchel's qualifications as a registered nurse. (R.69 10:17-24, 11:2-8). The Court also found the State proved Ms. Ranchel's qualifications through its submissions. (R.69 11:2-8).

Mr. Helwig has failed to show that the circuit court erred in its interpretation of the foundational requirements for the individual that performs the blood draw under Section 343.305, Wis. Stats. Mr. Helwig has not provided any authority that admission of the blood test results requires the State to prove anything other than that the blood was drawn by a qualified person pursuant to §343.305(5)b), Wis. Stats. Mr. Helwig argues that admissibility of the blood test results is also conditioned upon the State providing sufficient proof of compliance with §343.305(6), Wis. Stats. See Brief and Appendix of Defendant-Appellant [hereinafter "Appellant's Brief"], pp. 24-26. Mr. Helwig interprets §343.305(6), Wis. Stats. to require the State to show that the individual performing the blood draw performed the blood draw "substantially according to the methods approved by the laboratory of Hygiene and by an individual possessing a valid permit to perform the analysis issued by the department of health

services." See Appellant's Brief, p. 24 (quoting Wis. Stat. §343.305(6)(a)). This is an incorrect interpretation of the statute. See *Wiedmeyer*, 2016 WI App 46.

In *Wiedmeyer*, the issue was whether the blood test results were admissible despite the fact that the analyst who tested the defendant's blood for controlled substances did not have a valid permit from the Department of Health Services (DHS) to conduct the test. *Id.* at ¶¶ 4, 6-7. The defendant argued that the results were not admissible because the State would not be able to lay a proper foundation for their admissibility. *Id.* at ¶¶ 11-12. The court rejected this argument finding that the State could lay the foundation for the admissibility of the blood results through other means, such as allowing scientific testimony if it would help the trier of fact pursuant to §907.02, Wis. Stats. *Id.* at ¶¶ 8, 14.

Had Michael Knutsen, the analyst who performed the testing on Mr. Helwig's blood, not possessed a valid permit to perform such testing, Mr. Helwig might have an argument. However, Mr. Helwig's claim that the foundational requirements of Wis. Stat. §343.305(6), Wis. Stats. apply to individuals that perform the blood draw does not comport with a plain reading of the statute or any interpretation by our courts. When considering the admissibility of blood

test results, the only foundation the State must provide for the individual who performed the blood draw is that they were qualified to do so pursuant to §343.305(5)(b), Wis. Stats.

II. MR. HELWIG WAIVED HIS RIGHT TO CHALLENGE THE COURT'S EVIDENTIARY RULING REGARDING THE ADMISSION AND PUBLICATION OF THE BLOOD/URINE ANALYSIS FORM.

Mr. Helwig waived any right to challenge the admission and publication of the Blood/Urine Analysis form on appeal because he failed to object to its admission and publication. *Bennett v. State*, 54 Wis. 2d 727, 735-36, 196 N.W.2d 704 (1972).

At trial, the Blood/Urine Analysis form had been marked as State's Exhibit Eight. (R.69 129:7-16). During the questioning of Deputy Brandenburg, the State asked Deputy Brandenburg to explain to the jury what the Blood/Urine Analysis report was. (R.69 129:11-16). After Deputy Brandenburg gave his answer, the State moved to admit The Blood/Urine Analysis form. (R.69 129:11-17). Mr. Helwig did not object to the report's admission. (R.69 129:17-19). After another question, the State asked to publish the form, and the defendant did not object. (R.69 130:3-17). Because the defendant failed to object to the

form's admission or publication, he waived his right to bring this claim on appeal.

III. THE ADMISSION AND PUBLICATION TO THE JURY OF THE BLOOD/URINE ANALYSIS FORM DID NOT VIOLATE MR. HELWIG'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS.

In *State v. Mattox*, a toxicology report was admitted at trial, but the author of the report did not testify as a witness. 2017 WI 9, ¶¶ 1, 18, 373 Wis. 2d 122, 890 N.W.2d 256. The defendant challenged the admission of the report arguing that it violated his confrontation rights. *Id.* at ¶ 18. The Wisconsin Supreme Court, relying on the Supreme Court decision *Ohio v. Clark*, found that it did not. *Id.* at ¶ 3. The court applied the "primary purpose test" announced in *Ohio v. Clark* in which the Court held, "[W]hen the statement's primary purpose is something other than to 'creat[e] an out-of-court substitute for trial testimony' its admission does not implicate the Confrontation Clause." *Id.* (citing *Ohio v. Clark*, 136 S.Ct. 2173, 2193, 83 USLW 4484 (2015) and quoting *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143 (2011)).

The court determined that the toxicologist's report was not testimonial because the purpose for writing the report was to inform the medical examiner of the cause of death, not to prove criminal charges. *Mattox*, 2017 WI 9, ¶

33. The court also considered other factors such as the formality of the report and whether it was prepared for law enforcement. *Id.* at ¶ 34. Applying these factors, the court found that the toxicology report was not testimonial because its primary purpose was to help determine the cause of death of the victim, "not to create a substitute for out-of-court testimony or to gather evidence against Mattox for prosecution." *Id.* at ¶ 37.

Determining whether the purpose of the Blood/Urine Analysis form in this matter was for prosecution is not as simple. The form was submitted with the blood sample to the Hygiene Lab and was considered part of the whole blood draw "packet" that went to the lab with the blood specimen to be tested as part of the OWI investigation. (R.69:126-129). The form's purpose, however, was not to act as a substitute for any kind of substantive testimony, such as the blood alcohol content contained in the Laboratory Report.

The following language from *State v. Disch* provides guidance on this issue:

. . . [T]he defendant may challenge the test results on the basis of the lack of the authentication of a test sample, *i.e.*, the chain of custody. If a test is not proved to be the test performed on the sample that came from the defendant's person, it can be suppressed . . . [T]he weight and credence to be given to the results can be tested by various components of due process: Was the test conducted in the manner directed by statute, *e.g.*, . . . was the person who

performed the test a qualified person as required by the statutes; was the person who performed the test analysis qualified under the statute and did he or she have the necessary qualifications as an expert to testify with credibility. Other due process inquiries can explore such questions as: What is the experience of the operator who drew the blood. . .
119 Wis. 2d at 497-98 (emphasis added)

In a few unpublished opinions, cited here as persuasive authority, the courts have indicated that the purpose of the Blood/Urine Analysis form is to provide proof of the chain of custody of the results of a blood alcohol test.

In the unpublished case *City of Berlin v. Adame*, cited here as persuasive authority, the defendant claimed that "the City failed to present sufficient proof to establish the chain of custody for the blood sample." 2018 WL 1870520, ¶ 12, 382 Wis. 2d 272, 915 N.W.2d 730 (Resp-App.B:2-3). The Court of Appeals disagreed noting that when the medical technologist drew the blood, she filled out Exhibit 4, which was the Blood/Urine analysis form, at the same time she was drawing the blood. *Id.* at ¶¶ 7, 12, 15, 19 (Resp-App.B:2-3). The court found that the Blood/Urine analysis form, which was admitted into evidence, along with the testimony of the medical technologist and chemist supervisor were sufficient to establish chain of

custody for the blood test results. *Id.* at ¶¶ 15-19 (Resp-App.B:3).

In the unpublished case *State v. Martinez*, cited here as persuasive authority, the defendant argued the circuit court erred when it admitted his blood test results because the State did not establish a sufficient chain of custody for the results. 2015 WL 4633392, ¶ 1, 365 Wis. 2d 196, 870 N.W.2d 248 (Resp-App.C:1). The court disagreed finding that the testimony of the medical technologist that drew the blood, the officer who witnessed the blood draw, the Blood/Urine Analysis form, the lab report and testimony from an advanced chemist at the Hygiene Lab were sufficient to establish chain of custody for the blood test results. *Id.* at ¶¶ 9-10 (Resp-App.C:2-3). The court also noted that even though there was no testimony from the person who received the specimen at the crime lab, "[W]e do have the signed Blood/Urine Analysis Alcohol/Other Drugs documentation showing the date and time that the specimen was received at the lab." *Id.* at ¶ 9 (Resp-App.C:3).

The State agrees with the courts in the unpublished cases cited that the purpose of the Blood/Urine Analysis form is to establish the chain of custody for the blood test results. Sections A. - C. contain the arresting officer's information, the subject's information, and the

date and time of the offense as well as the statute violated and citation issued. See (R.26:4) (R.69 129:12-17). Section D is where the person that performs the blood draw enters the date and time of the draw, and checks the boxes next to the type of chemical test and their job title. (R.26:4) (R.69 130:9-12). The person then prints and signs their name. (R.26:4). Section E. is completed by the officer before sending the blood sample and paperwork off to the lab and simply indicates which analysis is to be conducted. (R.26:4). Section F is completed by the lab that performs the analysis, in this case the State Hygiene Lab. (R.26:4). The person who receives the sample at the lab prints their name and the date and time the sample is received. (R.26:4). Finally, the analyst that completes blood analysis and report signs and dates the form for when the analysis was completed. (R.26:4). Every Laboratory Report an analyst drafts is given a number, and that number is then stamped at the bottom of the Blood/Urine Analysis form. (R.26:4) (R.69 148:4-25, 149:1-10).

In making their entries on the Blood/Urine Analysis form, Amanda Ranchel, Deputy Brandenburg, Randy Bates and Michael Knutsen were not acting as witnesses against Mr. Helwig. They were documenting the actions they took with respect to the handling of Mr. Helwig's blood in order to

show that the results of the analysis were results that came from blood drawn from Mr. Helwig.

Because the State believes the purpose of the Blood/Urine Analysis form is to establish chain of custody for the results of the blood test and not to prove a criminal charge, the Blood/Urine analysis form is non-testimonial. Non-testimonial statements are not subject to Confrontation Clause analysis. *Mattox*, 2017 WI 9, ¶ 24 (citing *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354 (2004)). Because the purpose of the Blood/Urine form was non-testimonial, Mr. Helwig's rights under the Confrontation Clause were not violated by its admission and publication.

IV. HELWIG'S CLAIMS ARE SUBJECT TO HARMLESS ERROR ANALYSIS, AND THE STATE IS CONFIDENT THAT ABSENT ANY ERROR, THE JURY WOULD STILL HAVE FOUND MR. HELWIG GUILTY.

The erroneous admission of a report determined to be inadmissible hearsay is subject to the harmless error test. See *State v. Williams*, 2002 WI 58, ¶¶49-50, 253 Wis. 2d 99, 644 N.W.2d 919. To determine whether harmless error occurred, this court must determine "whether there is a reasonable possibility that the error contributed to the conviction." *Id.* at ¶ 50 (citing *State v. Jackson*, 216 Wis. 2d 646, 668, 575 N.W.2d 475 (1998)). "A reasonable

possibility is a possibility sufficient to undermine . . . [the court's] confidence in the conviction." *Id.* (citing *State v. Grant*, 139 Wis. 2d 45, 51, 406 N.W.2d 744 (1987)).

A violation of a defendant's Sixth Amendment Confrontation Clause rights is also subject to harmless error analysis. *State v. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362 (citations omitted). To establish a Confrontation Clause violation was harmless, the State bears the burden of showing that "it is clear beyond a reasonable doubt that a rationale jury would have found the defendant guilty absent the error." *Id.* (citations omitted). In *Deadwiller*, the court noted several factors that a court should consider when determining whether or not an error was harmless including:

[T]he frequency of the error; the importance of the erroneously admitted evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; whether the erroneously admitted evidence duplicates untainted evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case.
Id. (citation omitted).

In order to admit the lab report that provided the blood alcohol content of Mr. Helwig's blood, the State had to establish that it maintained a proper chain of custody for the blood from the time it was taken from Mr. Helwig to the time it was sent to the Hygiene Lab, received at the

Hygiene Lab and analyzed. *Disch*, 119 Wis. 2d at 497. This chain of custody was established, in part, by the admission of the Blood/Urine Analysis form. Therefore, in order to conduct a harmless error analysis in this matter, the question is whether Mr. Helwig would still have been found guilty had all the evidence related to the blood draw, including the lab report which showed the blood alcohol content of Mr. Helwig's blood, never been introduced into evidence. The State believes the jury would still have found Mr. Helwig guilty without this evidence.

Adam Schook, a citizen witness, testified that he was on his way home from work when he came upon a vehicle in a ditch. (R.69 53:3-25). Mr. Schook identified Mr. Helwig and stated that he made contact with Mr. Helwig, who was in the driver's seat of the vehicle, which was still running. (R.69 54:13-25, 55:1-9). Mr. Schook testified that the defendant's speech was slow and slurred, and that he believed he may be intoxicated based on his EMS training. (R.69 55:24-25, 56:1-22). Because he thought Mr. Helwig might be intoxicated, Mr. Schook contacted law enforcement. (R.69 55:25, 56:1-6).

Deputy Heggie testified that when she first made contact with Mr. Helwig, she could smell the odor of intoxicants on his breath and noticed that Mr. Helwig's

speech was slurred. (R.69 65:21-25). Mr. Helwig repeated statements "over and over." (R.69 65:24-25).

Deputy Brandenburg testified that when he made contact with Mr. Helwig, he was behind the driver's seat of the vehicle. (R.69 109:8-9). Deputy Brandenburg could smell an odor of intoxicants coming from Mr. Helwig when he spoke. (R.69 109:9-10). Deputy Brandenburg also observed that Mr. Helwig's eyes were glassy and bloodshot. (R.69 109:20). Deputy Brandenburg testified that Mr. Helwig's claim that his friend Al was driving did not make sense because his vehicle was very cluttered, and it would have been difficult for someone to sit in the passenger's seat. (R.69 109:23-25, 110:1-15). Deputy Brandenburg administered the Standard Field Sobriety tests, and based on Mr. Helwig's performance on those, Deputy Brandenburg testified that he believed Mr. Helwig was intoxicated. (R.69 112-118:1-25, 119:1).

Considering the testimony of Mr. Schook and Deputies Heggie and Brandenburg, the State does not believe Mr. Helwig can show the introduction of the Blood/Urine Analysis form contributed to his conviction. Even without it or the blood results, there was overwhelming evidence that Mr. Helwig was guilty of Operating While Intoxicated. That evidence consisted of three separate individuals with

professional training in detecting signs of alcohol impairment who testified that they believed Mr. Helwig was intoxicated. That combined with Mr. Schook's testimony that he found Mr. Helwig in the driver's seat with the car running and Deputy Brandenburg's testimony that having passengers in that vehicle would have been difficult, the State believes that Mr. Helwig has failed to undermine confidence in his conviction.

Dated this 20th day of September, 2019.

Respectfully submitted,



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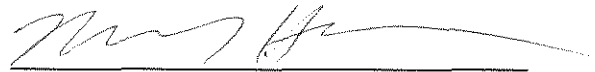
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a monospaced serif font. The length of this brief is 17 pages with 3,485 words.

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12), Wis. Stats. and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 20th day of September, 2019.

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