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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2019AP000928

ST. CROIX COUNTY,

Plaintiff-Respondent,

vs.

KELLY M. LAGERSTROM,

Defendant-Appellant.

ON APPEAL OF A JUDGMENT OF CONVICTION ENTERED IN THE ST. CROIX COUNTY CIRCUIT COURT, THE HON. MICHAEL R. WATERMAN PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Kelly Lagerstrom, the defendant-appellant, replies to the State's response brief as follows:

1. **The State's only argument is that this case is like *State v. Geise*, but *Geise* is distinguishable.**

The problem with the State's argument that this case is controlled solely by ***State v. Geise***, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687, is that the facts in ***Geise*** are distinguishable from those in this case. In fact, they are so different that an expert was arguably not needed in that case. Because the blood draw was taken within 3 hours of the event in ***Geise***, Wis. Stat. § 885.235(1g) arguably allowed admissibility of the blood drawn without any expert testimony. The State apparently provided expert testimony to eliminate any doubt about the admissibility because Geise had said he drove "about" 3 hours before the blood draw.

Unlike in Geise, the blood was drawn much later in this case than 3 hours after the event; the police did not search Lagerstrom's car[1] and therefore cannot rule out that he drank in his car after the event; the police also cannot say with certainty that Lagerstrom did not drink after leaving his car as they never searched where he had been while out of the car[2]; and the evidence is disputed that he was even at a bar near the time of the event. In addition, there is no evidence that the analyst

[1] Which makes the officer's claim that he did not see any liquor bottles irrelevant.

[2] The State wrongly implies that it is the defendant's burden of proving that there was no "opportunity to drink since going into the ditch." (State's brief at 10). That is incorrect. Under the ***Daubert*** rule, "The court may admit proffered expert testimony only if the proponent, who bears the burden of proof, demonstrates that (1) the expert is qualified, (2) the evidence is relevant to the suit, and (3) the evidence is reliable." ***Jacked Up, LLC v. Sara Lee Corporation***, 291 F.Supp. 3d 795 (U.S. Dist. Ct., N.D. Tex. 2018); *See also*, ***Moore v. Ashland Chem Inc.***, 161 F.3d 269, 276 (5th Cir. 1998)(en banc) ("[T]he party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusion are based on the scientific method, and, therefore, are reliable.") Wis. Stat. § 907.02 requires that expert testimony be based on sufficient facts and data.

factored in Mr. Lagerstrom's weight, age, mental state, or drinking pattern at the time of the event, and type of amount of beverage consumed when making her calculations. As this court stated in ***Geise***, the expert in that case "had more to work with than a single test result. A number of known facts made the expert's assumption plausible" including the fact that Geise was found at the scene and there was no evidence of any further drinking or opportunity to drink. ***Geise***, 356 Wis. 2d 796 at ¶25. Neither of those facts is present in this case, and therefore ***Geise*** is readily distinguishable. Lorrine Edwards, the State's analyst, did not have a number of known facts in her possession that made her assumptions reliable.

Without having additional facts available to her, Ms. Edwards could not overcome the inadequacy of the "biggest" assumption that she said was most important. She could not know and did not know whether Mr. Lagerstrom's stomach contained any unabsorbed alcohol at the time of the test. Without knowing that, her analysis was not reliable and was not founded on sufficient facts and data as required by Wis. Stat. § 907.02 (1). The State does not claim otherwise and therefore concedes this claim. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (Arguments not refuted are deemed admitted.).

2. **The State concedes that a single test without more information is unable to determine where a person is on the BAC curve and therefore is unreliable.**

Lagerstrom's brief cited multiple cases for the principle that a single test for alcohol in a person's system without more information—especially information about the last time of ingestion of alcohol—is unreliable because the analyst is unable to tell where a person is on the BAC curve. (Lagerstrom's brief at 7-8) He cited ***Mata v. State***, 46 S.W. 3d 902 (Tex.Crim.App, En Banc, 2001), ***Burns v. State***, 298 S.W.3d 697 (Tex.App 2009) and ***Com v. Petrovich***, 648 A.2d 771 (Pa.

1994) to support this principle. The State concedes that these cases are distinguishable from Giese "and are more similar" (Lagerstrom's brief at 8 citing ***Mata***) to Mr. Lagerstrom's case because the State never disputes these claims. In fact, the State never even bothers to mention these cases much less argue that these cases are not binding precedent in Wisconsin. It is true that they are not binding precedent, but cases from other jurisdiction that are on point can be "helpful" and "may be persuasive." ***State v. Muckerheide***, 2007 WI 5, ¶38, 298 Wis. 2d 553,725 N.W.2d 930.

The weakest part of the State's argument is that they have not actively disputed that it is possible Mr. Lagerstrom may have drunk after the accident. It is entirely possible that there were a couple of empty liquor bottles in the car or down by the creek which Mr. Lagerstrom consumed after he drove to the scene, and the State has not disproven this possible fact. The State having conceded this possibility, this court must find that the analyst's testimony was not based on sufficient facts and data and should not have been admitted as a matter of law.

3. **The admission of the blood alcohol test was more prejudicial than probative.**

The State also concedes, because it does not dispute it, that admission of the blood alcohol test was more prejudicial than probative. The fact that the jury acquitted Mr. Lagerstrom of the Operating While Intoxicated charge (OWI) but convicted on the Blood Alcohol Content (BAC) shows how prejudicial the analyst's testimony was. The jury was not convinced that he had operated while under the influence but found that he had operated with a prohibited blood alcohol content. They could not have done so without the analyst's improper expert testimony. The harm was more prejudicial than probative.

Again, the State does not discuss this issue or refute it. It also has not explained why the logic of the Nevada Supreme Court in ***State v. Dist. Ct. (Armstrong),*** 267

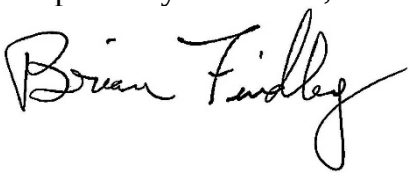
P.3d 777 (Nev. 2011) does not apply. As in that case, this court should find that, "[A] single test conducted some time after the offense could result in a reliable extrapolation only if the expert had knowledge of many personal characteristics and behaviors of the defendant." Without knowing when Mr. Lagerstrom last drank and how much he drank, the retrograde analysis was based entirely on assumptions and conjecture about facts that were necessary to know before the analyst could reliably analyze the blood data in a single test. As in ***Armstrong***, this court should find that a single retrograde analysis test conducted without knowing the last time of drinking and the amount drunk is more prejudicial than probative.

CONCLUSION

For these reasons, Kelly Lagerstrom, the defendant-appellant, respectfully requests that this court find that the retrograde analysis test and the analyst's testimony regarding it were improper. Based on this error he requests reversal of his conviction and remand to the trial court for a new and fair trial.

Dated this 21st day of April, 2020.

Respectfully submitted,



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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 1245 words.

Dated this 21st day of April, 2020.

Signed:

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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 21st day of April, 2020.

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