

RECEIVED

04-13-2020

CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2019AP000928 - CR

ST. CROIX COUNTY,

Plaintiff-Respondent,

v.

KELLY M. LAGERSTROM,

Defendant-Appellant.

ON APPEAL OF A JUDGMENT OF CONVICTION
ENTERED IN THE ST. CROIX COUNTY CIRCUIT
COURT, BRANCH III, THE HONORABLE SCOTT R.
NEEDHAM PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

KARL E. ANDERSON
Assistant District Attorney
State Bar No. 1103435

1101 Carmichael Road
Hudson, WI 54016
(715) 386-4658
Karl.Anderson@da.wi.gov

Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	2
STATEMENT OF THE CASE	2
STANDARD OF REVIEW.....	6
ARGUMENT	7
THE TRIAL COURT PROPERLY ADMITTED THE EXPERT TESTIMONY AS IT WAS BASED ON RELIABLE METHODS, SUFFICIENT FACTS AND DATA, AND ANY CHALLENGES TO THE ASSUMPTIONS RELIED ON BY THE EXPERT GO TO WEIGHT, NOT ADMISSABILITY.	
CONCLUSION.....	11
CERTIFICATION AS TO FORM/LENGTH	12
CERTIFICATE OF COMPLIANCE WITH RULE 809.12(13)	13
CERTIFICATION OF MAILING	14

TABLE OF AUTHORITIES

CASES:	Page
<i>State v. Abbott Labs.</i> , 2012 WI 62, 341 Wis. 2d 510, 816 N.W.2d 145.....	8
<i>Daubert v. Merrell Dow Pharms, Inc.</i> , 509 U.S. 579 (1993)...	7
<i>State v. Giese</i> , 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687.....	4, 6, 7, 8, 9, 10
 STATUTES:	
Wis. Stat. § 907.02(1).....	7, 8
Wis. Stat. § 885.235(3).....	1, 7

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2019AP000928 - CR

ST. CROIX COUNTY,

Plaintiff-Respondent,

v.

KELLY M. LAGERSTROM,

Defendant-Appellant.

ON APPEAL OF A JUDGMENT OF CONVICTION
ENTERED IN THE ST. CROIX COUNTY CIRCUIT
COURT, BRANCH III, THE HONORABLE SCOTT R.
NEEDHAM PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

STATEMENT OF THE ISSUE

Wisconsin statute section 885.235(3) provides that a blood test result for blood drawn beyond three hours of driving “is admissible only if expert testimony establishes its probative value.” At trial, Lorraine Edwards, an Advanced Chemist for the State Hygiene Lab testified regarding retrograde extrapolations for the timeframe where Lagerstrom could have driven. Where there was a factual dispute about when Lagerstrom drove into the ditch, did the circuit court erroneously exercise its discretion in admitting the blood result evidence and expert testimony regarding retrograde extrapolation?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the Court in deciding this appeal.

The State believes publication is unnecessary, as there is already binding case law on this issue.

STATEMENT OF THE CASE

Kelly M. Lagerstrom was charged with Operating While Intoxicated and Operating With a Prohibited Alcohol Concentration 1st offenses, with an offense date of February 18, 2018. (R1) The case proceeded to jury trial. Kevin Bonte testified at the trial that Kelly Lagerstrom is a brother of Bonte's friend. (R52 at 99:16-17) In February 2018, Bonte worked part time as a bartender at the Pump House in Downing, WI. (R52 at 98:24-99:6) Lagerstrom's house is three blocks from the Pump House. (R52 at 99:18-21) There are no other bars in Downing, WI. (R52 at 99:11-13) Bonte worked until the Pump House closed at 2:30 a.m. on February 18, 2018. (R52 at 103:19-24)

Sometime after closing the bar, Lagerstrom's son called Bonte to request help finding Lagerstrom, who was missing. (R52 at 100:3-4 & 104:9-11) Bonte drove around trying to find Lagerstrom but could not. (R52 at 101:1) Bonte eventually found Lagerstrom's truck in the ditch, but Lagerstrom was not in the vehicle. (R52 at 100:5-16) Bonte looked through the truck windows, but did not see any alcohol. (R52 at 109:11-13) Bonte yelled for Lagerstrom but couldn't find him. (R52 at 101:4-5) The temperature was around negative 20 degrees Fahrenheit. (R52 at 104:3-6)

Bonte testified that they searched for Lagerstrom for an estimated two hours before calling 911. (R52 at 102:12-4) They called 911 as they didn't think Lagerstrom could survive

in the cold much longer. (R52 at 102:20-22) Approximately two minutes after calling, they heard Lagerstrom hollering in the woods. (R52 at 102:19-20) They heard him hollering at about 5:20 or 5:30 a.m.. (R52 at 108:5-8)

They followed the sound of Lagerstrom's voice. (R52 at 103:3-5) They ran through a field and into the woods and found Lagerstrom on the bank of a creek. (R52 at 103:6) Lagerstrom was missing a shoe and his glasses, and he was wet from the chest down. (R52 at 103:7-10) The snow in the fields was knee deep but Bonte thought the roads were plowed. (R52 at 103:11-16). Bonte testified that he did not ask Lagerstrom how Lagerstrom ended up in the creek. (R52 at 110:7-8)

Deputy Nick Krueger testified that he was dispatched at 5:26 am on February 18, 2018 for a vehicle in the ditch. (R52 at 113:22-114:1) When he arrived, he observed vehicle tracks in the snow leading to the vehicle. (R52 at 115:20-22) It appeared to the deputy that someone gradually drove off the road and into the ditch. (R52 at 115:23-116:1) Emergency medical service personnel were tending to Lagerstrom. (R52 at 114:17-21) Deputy Krueger observed that Lagerstrom's pants were wet and frozen, and he was also missing a shoe. (R52 at 115:12-13) Lagerstrom's skin that had been open to the elements was red, his lips were blue, and he was shaking. (R52 at 115:13-15)

Deputy Krueger testified that Kevin Bonte approached him and told him that Lagerstrom "had closed the bar." (R52 at 116:20-23) Deputy Krueger documented that statement in his report. (R52 at 116:24-25) Contrarily, Bonte testified that Lagerstrom was not at the Pump House. (R52 at 103:25-104:2) Kevin Bonte also testified that he did not tell Deputy Krueger that Lagerstrom closed the bar. (R52 at 105:4-17) Bonte acknowledged during his testimony that he told Deputy Krueger that he wanted to remain anonymous. (R52 at 105:21-23) Bonte further testified that he could get in trouble if he overserved someone. (R52 at 105:18-20)

Lagerstrom was brought to the hospital, and Deputy Krueger made contact with him there. (R52 at 117:1-3) At the

hospital, Lagerstrom admitted to Deputy Krueger that he drove his vehicle into the ditch. (R52 at 117:23-25) Deputy Krueger observed that Lagerstrom had red and glossy eyes, an odor of intoxicants coming from him, and slurred speech. (R52 at 117:15-22) Lagerstrom said prior to going into the ditch he was drinking “at the bar.” (R52 at 118:11-18) Lagerstrom said he did not drink anything after leaving the bar, while driving, or after driving into the ditch. (R52 at 118:18-119:1) Lagerstrom said he was driving to his semi-truck parked at a Kwik Trip. (R52 at 118:1-6) Lagerstrom said he left his vehicle and cut through the woods because he did not want to get an OWI. (R52 at 120:21-121:2) Lagerstrom appeared lucid and was answering Deputy Krueger’s questions. (R52 at 123:17-23)

Lagerstrom testified that he did not remember much from February 17th and the early morning of February 18th, 2018. (R52 at 91:19-24 & 93:4-7) He did testify, however, that he was consuming alcohol in the afternoon of February 17, 2018. (R52 at 91:25-92:1) He said he was consuming alcohol at his parent’s house and then at a bar, but not at the Pump House. (R52 at 92:3-10) He estimated they had dinner and drinks at the bar at three or four in the afternoon and does not remember anything after that. (R52 at 92:21-93:7) He testified he did not believe he was intoxicated but he does not know why he does not remember anything. (R52 at 93:8-9) His first memory after being at the bar was waking up at the hospital the following day. (R52 at 94:19-24)

Medical Technologist Karen Littlefield testified that she drew Lagerstrom’s blood at 8 a.m. on February 18th, 2018. (R52 at 143:5-17) Following Littlefield’s testimony, at a side bar, Lagerstrom objected to the blood test result and the testimony of Advanced Chemist Lorraine Edwards regarding retrograde extrapolation. (see R52 at 151-153) The State provided a proffer on how Edwards would establish the probative value and argued why it met the standard laid out in *State v. Giese*, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687. (R52 at 147-155) The State had also previously filed a

pretrial notice of expert and motion to admit the blood test result. (R10)

In an oral ruling, the circuit court applied *Giese* and allowed Edwards to testify. (R52 at 154:14-24) The court held that Lagerstrom's objections go to the weight of the evidence, and Lagerstrom was free to cross examine Edwards on the facts and assumptions she would rely on in her testimony. (R52 at 15:14-24)

During Edwards' testimony, Lagerstrom stipulated that she was a qualified expert. (R52 at 157:17-22) Edwards testified that she tested Lagerstrom's blood sample. (R52 at 165:20-166:6) Edwards testified regarding the well-known and studied average elimination rate of alcohol, which is .015 g/100 ml per hour. (R52 at 162:12-163:4) She testified about studies she has been a part of where dosed subjects' blood alcohol concentration (hereinafter "BAC") were tested over time to measure the BAC decrease. (R52 at 163:5-164:6)

Edwards testified that she is able to do retrograde extrapolations based on the average elimination rate. (R52 at 164:7-11) She explained that retrograde extrapolation is "phrase for using scientific mathematical models that have been established over the 34 years of research, including the research that I've done in our laboratory, to make an estimation of what someone's alcohol concentration could be at a later point in time once drinking has stopped." (R52 at 164:14-20) She said when she does the calculations, she prefers to do a range based on slow and fast "metabolizer" rates. (R52 at 165:8-10)

Edwards also testified about the blood test result and the testing procedure the lab uses. (R52 at 166-168) Analysis of the blood sample revealed a BAC of .152 g/100 ml. (R52 at 167:24-168:2) Using that blood test result as a starting point, she was able to do retrograde extrapolations to estimate a BAC at times before the 8 a.m. blood draw. (R52 at 169:1-9) In doing the calculations, she assumed that all alcohol was absorbed. (R52 at 165:6-12) Edwards also testified that 80% of

alcohol would be absorbed in less than 30 minutes of consumption. (R52 at 172:16-22)

Using retrograde extrapolation, Edwards calculated estimated BACs for the various times, including the following:

4 am: BAC between .19 and .25 (R52 at 170:19-22)

3 am: BAC between .2- .28 (R52 at 182:19-183:8)

2 am: .BAC between .21-.31 (R52 at 183:19-20)

After the close of testimony, Lagerstrom requested a jury instruction that instructed the jury to disregard the BAC evidence if the jury believed Bonte's testimony that Lagerstrom did not close down the bar. (R52 at 200:19-201:4) The circuit court read the following instruction to the jury prior to deliberations:

If you accept Kevin Bonte's testimony given in court today that Kelly Lagerstrom was not at the bar and did not close down the bar, then you may not consider the blood test result, as it would be irrelevant without proof of when Mr. Lagerstrom last operated a motor vehicle. If you accept Deputy Krueger's testimony given in court today that Kevin Bonte told the deputy that Mr. Lagerstrom closed down the bar, then you may give the test result the weight you determine it is entitled to receive in the light of all of the evidence received during this trial.

(R52 at 221:5-17)

The jury found Lagerstrom guilty of Operating with a Prohibited Alcohol Concentration and not guilty of Operating While Intoxicated. (R52 at 260:24-261:7) Following the verdict, Lagerstrom filed an appeal challenging the circuit court's decision to allow admission of the expert testimony.

STANDARD OF REVIEW

"Appellate courts review a circuit court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard." *State v. Giese*, 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 804, 854 N.W.2d 687, 691.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED THE EXPERT TESTIMONY AS IT WAS BASED ON RELIABLE METHODS, SUFFICIENT FACTS AND DATA, AND ANY CHALLENGES TO THE ASSUMPTIONS RELIED ON BY THE EXPERT GO TO WEIGHT, NOT ADMISSABILITY.

Expert witness Edwards' testimony was based on retrograde extrapolation, an accepted scientific method. Moreover, her testimony was based on sufficient facts and data, similar to the facts and data in *State v. Giese*, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687. The Court of Appeals in *Giese* found that the expert testimony satisfied the standard from *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993), codified in Wis. Stat. § 907.02(1). *Giese*, 2014 WI App 92, ¶ 2. In the present case, like in *Giese*, the test was outside the three hour window and there was no clear time of driving.

Giese was found lying in the roadway in the early morning. *Id.* ¶ 3. He told the deputy he thought he had crashed his vehicle about three hours earlier, began to walk home, then fell asleep in the road. *Id.* ¶ 4. Although there was no precise time of driving, the expert calculated Giese's BAC at various times during the window of estimated time of driving. *Id.* ¶ 8.

Giese had objected to admission of the blood test result as it was outside the three hour window of driving. *Id.* ¶ 9. Wisconsin statute section 885.235(3) provides that the blood test result for a blood sample drawn beyond three hours of driving "is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony."

Giese further argued that "the State cannot prove the facts underlying the expert's opinion,' i.e., the time of the driving, the time of the drinking, and that no drinking occurred between the time of the driving and the time of the blood test." *Giese*, 2014 WI App 92, ¶ 11. Because the State could not prove those facts, Giese argued that the expert testimony was not based on sufficient facts and data as required by Wis. Stat.

§ 907.02(1). *Id.* ¶ 2. Giese further argued, citing to out of state court cases, that retrograde extrapolation is only accurate if it is based on multiple blood samples over time. *Id.* ¶ 24. The Court of Appeals rejected all of Giese's arguments.

The Court of Appeals held that the expert's testimony was admissible as it was based on "reliable principles and methods and based upon sufficient facts and data, which is all that *Daubert* requires." *Id.* ¶ 2. The Court ruled that Giese's objections go to the weight of the expert opinion, not its admissibility. *Id.*

The Court also found that it was appropriate for the expert to make several assumptions when doing the calculations. *Id.* ¶ 8. The expert assumed that all alcohol was fully absorbed at the time of driving and that there was no drinking since driving. *Id.* ¶ 8.

The Court said that Giese was free to challenge the expert's assumptions and facts the expert relies on. *Id.* ¶ 28. Giese could also "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." *Id.* (quoting *State v. Abbott Labs.*, 2012 WI 62, ¶ 69, 341 Wis. 2d 510, 816 N.W.2d 145).

In finding that there was sufficient "facts and data", the Court laid out how the evidence supported the expert's assumptions that alcohol was absorbed and Giese did not consume additional evidence after crashing.

Despite Giese's assertions to the contrary, the record confirms that the expert had more to work with here than a single test result. A number of known facts made the expert's assumptions plausible—Giese was found lying in a roadway at 2:12 a.m.; he said he had crashed his vehicle three hours earlier, started walking away from the scene, and fell asleep in the road; there were no bars or restaurants along the route he walked and no alcohol containers found in his car or along that route; and his blood sample drawn an hour or so later had a blood alcohol concentration of .18.

Giese, 2014 WI App 92, ¶ 25.

Lagerstrom rehashes the same arguments proffered by Giese and specifically rejected by this Court. As they did in *Giese*, Lagerstrom's arguments fall short.

Edwards relied on the same assumptions and applied the same scientific calculations as the expert in *Giese*. As in *Giese*, there are a number of facts that validate those assumptions. The evidence shows that the time of driving was sometime between 2:30 a.m. and 3:30 a.m. As Deputy Krueger testified, Bonte told him that Lagerstrom closed down the bar (R52 at 116:20-23), which closed at 2:30 a.m.. (R52 at 103:19-24) At trial, Bonte denied telling Deputy Krueger that Lagerstrom closed down the bar. (R52 at 103:25-104:2) However, that discrepancy is a factual determination for the jury. The circuit court even instructed the jury to disregard the blood test result if they believed Bonte's testimony that Lagerstrom did not close down the bar. (R52 at 221:5-17)

Additionally, circumstantial evidence suggests that Lagerstrom was drinking at the Pump House. First, it is the only bar in town. (R52 at 99:11-13) Second, it is only a few blocks away from Lagerstrom's house. (R52 at 99:18-21) Additionally, Lagerstrom told Deputy Krueger that he was drinking "at the bar." (R52 at 118:11-18) Furthermore, it defies logic that Bonte would save Lagerstrom from hypothermia, say nothing incriminating about Lagerstrom, but then ask the deputy to remain anonymous. Lagerstrom already knew that Bonte was at the scene, as Bonte found Lagerstrom. If Bonte, as he testified, did not tell Deputy Krueger that Lagerstrom closed down the bar, Bonte would have no reason to want to remain anonymous. What would make sense is that Bonte, a family friend of Lagerstrom, would want to remain anonymous after telling the deputy that Lagerstrom was drinking at a bar until 2:30 a.m..

Evidence also shows that the other end of "the time of driving" window is 3:30 a.m.; Bonte heard Lagerstrom

hollering at about 5:20 or 5:30 a.m. (R52 at 108:5-8) and estimated he found Lagerstrom's vehicle in the ditch two hours prior. (R52 at 102:12-4) Thus, Bonte found Lagerstrom's vehicle around 3:30 a.m.. So, Lagerstrom drove into the ditch sometime after leaving the bar at 2:30 a.m. and before his vehicle was located at around 3:30 a.m..

Another assumption both the expert in *Giese* and Edwards made was that the defendant did not drink after driving and that all the alcohol was absorbed. The Court in *Giese* only had circumstantial supporting that assumption, such as there were no bars in the area of the crash, and his BAC was still .18 an hour after being found. *Giese*, 2014 WI App 92, ¶ 25.

Here, there is almost identical evidence. Lagerstrom was found in the early morning hours after wondering off from his car he drove into the ditch. Also, there is no evidence of an opportunity to drink since going into the ditch. Bonte did not see any alcohol in the vehicle. (R52 at 109:11-13) Additionally, Lagerstrom, like *Giese*, had a high BAC even well after being located.

It is in fact remarkable the similarities between the present case and *Giese*. The cases somewhat diverge in that the evidence that all alcohol was absorbed is much stronger in the present case. Unlike in *Giese*, Lagerstrom himself admitted that he drank at the bar and did not drink since leaving the bar, while driving, or after going into the ditch. (R52 at 118:18-119:1) Lagerstrom's uncontested admission of not having consumed alcohol since the bar is conspicuously missing from his appellate argument, despite despite his conclusion that there was insufficient evidence to show he did not drink since driving. (Appellant Brief at 8-9) Also, the high BACs Edwards calculated for times around the driving window are corroborated by Lagerstrom's own statement that he left the vehicle and cut through the fields because he did not want to get an OWI. (R52 at 120:21-121:2) Lagerstrom himself believed he was intoxicated when he drove into the ditch.

CONCLUSION

The trial court properly exercised its discretion in admitting the expert testimony, as it was based on well-established scientific principles and sufficient facts and data. The assumptions the expert relied on were supported by the evidence, and any challenges to the assumptions went to the weight, not the admissibility of the evidence. Therefore, the State respectfully requests that this Court deny Lagerstrom's request for a new trial.

Dated this 10th day of April, 2020.

Respectfully submitted:

KARL E. ANDERSON
Assistant District Attorney
State Bar No. 1103435

1101 Carmichael Road
Hudson, WI 54016
(715) 386-4658
Karl.Anderson@da.wi.gov

Attorney for Plaintiff-Respondent

CERTIFICATION AS TO FORM AND 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 3,142 words.

Dated this 10th day of April, 2020.

Signed:

KARL E. ANDERSON
Assistant District Attorney
State Bar No. 1103435

1101 Carmichael Road
Hudson, WI 54016
(715) 386-4658
Karl.Anderson@da.wi.gov

Attorney for Plaintiff-Respondent

**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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 10th day of April, 2020.

Signed:

KARL E. ANDERSON
Assistant District Attorney
State Bar No. 1103435

1101 Carmichael Road
Hudson, WI 54016
(715) 386-4658
Karl.Anderson@da.wi.gov

Attorney for Plaintiff-Respondent

CERTIFICATE OF MAILING

I certify that this brief was deposited into the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on July 19, 2019.

I further certify that on July 19, 2019, I served three copies of this brief via United States Mail upon all opposing parties.

I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 10th day of April, 2020.

Signed:

KARL E. ANDERSON
Assistant District Attorney
State Bar No. 1103435

St. Croix County Government Center
1101 Carmichael Road,
Hudson, WI 54016
(715) 386-4658
Karl.Anderson@da.wi.gov

Attorney for Plaintiff-Respondent