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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2019AP1261 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY R. SCHUMACHER,

Defendant-Appellant.

Appeal from a Judgment of Conviction
and Order Denying Postconviction Relief,
Entered in the Circuit Court for Monroe County,
the Honorable Todd L. Ziegler Presiding
Circuit Court Case No: 2017CF132

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

Was Gary Schumacher denied the effective assistance of counsel when trial counsel failed to adequately cross-examine the State's expert witness regarding the unreliability of retrograde extrapolation and the expert's estimates of Schumacher's blood alcohol concentration at the time of driving?

Trial Court Answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue in this case involves the application of well-settled law to the facts of this case; therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE

This is an appeal from the Judgment of Conviction entered on July 18, 2018, in the Circuit Court for Monroe County, the Honorable Todd L. Ziegler presiding, wherein the Court entered judgment on a jury verdict finding Gary Schumacher guilty of one count of operating with prohibited alcohol concentration (3rd), contrary to Wis. Stat. § 346.63(1)(a). (72; App. 101-02.) Schumacher was also convicted of hit and run but does not appeal that conviction.

This case arises out of an automobile accident involving Schumacher and another vehicle that occurred near Schumacher's home on the evening of February 7, 2017.

Schumacher was charged in relevant part¹ with OWI (3rd), hit and run, and OWI-PAC (3rd). (1.)

A jury trial was held on July 12, 2018. (122.) The jury found Schumacher not guilty of operating while intoxicated but convicted him of hit and run and OWI-PAC. (65; 66; 67; 122:341-42.)

Schumacher was sentenced on July 18, 2018, to 125 days jail on the OWI-PAC count and 30 days jail on the hit and run count, to run consecutively. (72; App. 101-02.) That sentence was stayed pending appeal. (79.)

Schumacher filed a postconviction motion requesting a new trial arguing that his trial counsel was ineffective for failing to cross-examine the State's expert witness regarding the unreliability of retrograde extrapolation and the assumptions used by the expert to perform her calculations regarding Schumacher's blood alcohol concentration at the time of driving. (102.) A *Machner* hearing was held on June 19, 2019, at which trial counsel testified. (130.)

The court denied Schumacher's motion. (110; App.181; 130:44-54; App.170-80.) The court held Schumacher failed to meet the first prong because trial counsel's actions were "within the professional norms." (130:50; App.176.) The court also held Schumacher failed to show he was prejudiced because he had not shown the expert

¹ A charge of resisting and obstructing was dismissed prior to trial. (122:9.) Schumacher was also convicted by the court of several non-criminal traffic violations, including failure of occupant to notify police of accident, operating motor vehicle without proof of insurance, and failure to wear seat belt. (72; App.101-02.) These non-criminal violations are not at issue in postconviction proceedings.

would have testified that his blood alcohol concentration was below the legal limit. (130:51-53; App.177-79.)

STATEMENT OF FACTS

Around 8:45 p.m. on February 7, 2017, Monroe County Sheriff Sergeant Ryan Lee was dispatched to a two-vehicle crash that occurred near the intersection of Highway 131 and Nightingale Avenue in the Township of Sheldon. (122:106.) Lee arrived at the scene forty-five minutes after the initial call came out. (122:108.) There, he found B.C. and A.W., the occupants of one of the vehicles. (122:109-10.)

B.C. and A.W. told Lee they were heading northbound on Highway 131 when a red truck driving southbound turned left at Nightingale and collided with the driver's side left quarter panel of their vehicle. (122:110, 173-74, 183-84.) Both vehicles stopped after the accident occurred. (122:111, 184.) B.C. and A.W. left their vehicle to talk to the driver of the red truck. (122:174-75, 184.) B.C. testified that when he approached the vehicle he was upset, yelled at the other driver, and opened the driver's vehicle door. (122:187-89.) B.C. and A.W. testified the driver gave his name then left the scene of the accident, turning onto Nightingale and stopping at a residence just up the hill from the scene. (122:176-77, 185-87.)

A.W. testified she could smell alcohol when she and B.C. spoke to the other driver in his vehicle. (122:175-76.) A.W. also testified the driver had a confused demeanor and slurred speech. (122:178.) However, she did not report this to police at the time. (122:154, 181.) B.C. did not smell alcohol on the driver, but testified he assumed based on his actions that the driver was intoxicated. (122:154, 184-85.)

Sergeant Lee went up Nightingale to investigate and found a red truck with damage, which was found to be registered to Schumacher. (122:115-16, 118.) Lee then knocked on the door to Schumacher's residence and questioned him regarding the accident. (122:119.) Lee testified that by this point it was approximately one hour after the accident had been reported. (122:121.)

Schumacher told Lee he was driving and had been in an accident. (122:120.) Schumacher said he initially stopped at the scene, but ultimately left because he did not feel comfortable staying because of the way B.C. spoke to him. (122:121.)

Lee testified Schumacher admitted he had consumed one or two Pabst Blue Ribbon beers prior to the crash. (122:121.) Schumacher also told Lee he had consumed alcohol after the crash. (122:122.) Schumacher did not specify exactly how much during their conversation, instead indicating that Lee could look around his apartment to see what he had drank. (122:122.) Lee testified he did not see any open containers around the house. (122:122-23, 147-48.) Schumacher testified he had gestured toward his sink, where he had placed empty beer containers. (122:233, 240.)

Lee testified Schumacher's speech was slurred and deliberate, his eyes bloodshot and glossy, and there was a moderate odor of alcohol from Schumacher's breath. (122:124.) Lee asked Schumacher to step out of his house and requested that he perform standard field sobriety tests. (122:129-30.) Schumacher declined to perform the standard field sobriety tests, stating he had disabilities. (122:131, 151.)

Schumacher was arrested on suspicion of operating while intoxicated. (122:132.) He was taken to the Sparta Mayo Hospital, where he consented to a blood draw.

(122:135-36.) A blood sample was taken from Schumacher at 10:56 p.m. on February 7, 2107. (122:141; 191-92.)

Expert Testimony at Trial

Schumacher's blood sample was sent to the State Lab of Hygiene, where it was analyzed and peer reviewed by Kristin Drewieck. (122:200.) Drewieck opined, based on her review of original analyst's work, that Schumacher's blood alcohol concentration at the time of the blood draw was 0.171 grams per 100 mL of blood. (122:208.)

Drewieck admitted on cross-examination that she did not know the concentration of alcohol in Schumacher's blood at the time of the accident, which was around 8:45 p.m. (122:209.) On redirect, Drewieck testified she could estimate a blood alcohol concentration at an earlier time knowing what the blood alcohol concentration was later, but that the estimate would only be as good as what additional information was available to her. (122:210; App.117.) Drewieck explained,

I would need to know as far as possible, as much as possible, what the drinking consumption was like; was there a lot of drinking between 8:30 and 8:45; was there any continuing consumption between 8:45 and 10:56; what -- the specific individual we're talking about, are they male -- in this case, obviously -- what their weight is. Food potentially could have an impact, if they had a full stomach at the time of consumption. Those are the big things.

(122:210-11; App.117-18.)

Drewieck was then asked to estimate Schumacher's blood alcohol concentration at the time of the accident,

assuming “the individual was roughly 200 pounds and ... assume there was no additional alcohol consumption in that two-hour time period.” (122:211; App.118.) Drewieck estimated a blood alcohol concentration ranging between 0.190 to 0.210, explaining:

All I did for this calculation was evaluate how much alcohol had been removed from the body during that intervening two-hour period, because I was told, assume no, you know, continuing absorption, no continuing consumption.

So basically there’s a range of elimination. The vast majority of people would fall within that range. Depending on how frequently a person consumes alcohol, if someone is a teetotaler and consumes alcohol very rarely, then their body eliminates it much more slowly. A chronic consumer, even an alcoholic, can eliminate alcohol pretty quickly because their body has gotten more used to it. They are a little better at it, okay?

For the purposes of these calculations I use kind of an average in the middle. I certainly can do a range if you would like, but in this case, I used an average elimination rate, which is supported by scientific literature, the studies that have been done that I talked about earlier.

(122:211-12; App.118-19.)

Schumacher’s trial counsel did not cross-examine Drewieck regarding this opinion. (122:213; App.120.)

Schumacher testified that on February 7, 2017, he consumed three Pabst Blue Ribbon beers prior to the accident, between 6:00 p.m. and 7:30 p.m. (122:226-27, 239,

241-43.) Schumacher testified he was not drunk when drove. (122:244-45.) After the accident happened, Schumacher left the scene because he felt he was being threatened by B.C. (122:228-30.) He returned to his house just up the hill from the scene of the accident. (122:229.) There, he drank three to four beers and about two shots of whiskey prior to Sergeant Lee arriving. (122:230-31, 243.) Schumacher had consumed the two shots of whiskey immediately before Lee arrived at his house. (122:244.)

The State called Drewieck as a rebuttal witness. She testified the allegations of additional alcohol consumption after the crash and prior to the blood draw would change her calculation of Schumacher's estimated blood alcohol concentration at the time of the accident. (122:258; App.122.) In order to do the recalculation, Drewieck testified:

[W]e are starting with a known alcohol concentration of the time when the blood was drawn. That's a known concentration. Then we are accounting for the time span in between. We are accounting for the amount of alcohol that was consumed before the blood was drawn but after the driving.

The things that go into that type of calculation are knowing some information about what a person consumed when; information about that person like I talked about earlier, their weight, their gender, those sorts of things.

It is just an estimate. The solid number that we have is the blood alcohol concentration that was reported on the sample that was tested in our laboratory.

(122:259; App.123.) In performing the calculation, Drewieck did not consider alcohol consumed prior to driving, she only

considered the alcohol consumed after driving by subtracting that from the known test result:

Using standard concentrations for those drinks, because I don't know offhand what Pabst Blue Ribbon alcohol concentration is, and my internet isn't working in the building, and my phone, I couldn't connect to the wifi. So using a standard alcohol concentration for a beer of 4% and using for the shots a standard 100 proof one ounce for each shot, okay, and the beer is 12-ounce cans, I would estimate that under that scenario with the information as I just stated, the blood alcohol concentration at the time of driving would be somewhere between 0.08 and 0.11, with those assumptions that I stated.

(122:264; App.128.)

The State also asked Drewieck to quantify how many drinks a blood alcohol concentration "is equivalent to" starting at 6:30 p.m. (122:165-66; App.129-30.) Drewieck testified,

This calculation looks at the total time span of consumption from 6:30 to the test result, okay? Because during that whole time alcohol is being removed through the process of elimination, okay?

So we have to add that back in to what I call the theoretical maximum. That is, if a person consumed all their alcohol immediately and it immediately all went into their blood stream and it was available to be tested all at once, okay, that's – so that's why we have to account for what's been lost during that elimination time.

Okay, I also then have to calculate what each standard drink would contribute approximately to a blood alcohol concentration in a 200-pound man, okay?

So I calculated that a 200-pound male who consumes one alcoholic beverage, one standard alcoholic beverage, that one drink would contribute approximately 0.019 grams per 100 milliliters to that person's BAC, okay. Then I take that number and I divide it by the theoretical maximum that accounts for the elimination time. And I would estimate that -- this is just an estimate -- but that it would take, under the scenario as I was given it, 12 to 13 drinks for a 200-pound male to reach 0.171, accounting for that time span.

(122:266-67; App.130-31.)

Dreweick explained the theory behind her calculations was retrograde extrapolation:

The "retrograde" part just means we're working back in time. The "extrapolation" is the part that says we're figuring out a BAC at sometime other than the test result.

...

It's widely used to evaluate drinking situations like this. As I've stated all along, and you even said yourself, the calculation, the estimate is only as good as the information that goes into it, and it's absolutely nowhere near as reliable and as solid as the test result itself.

But this type of calculation is based on scientific principles of absorption and elimination and how alcohol

spreads throughout your body. So it's based on science.
Depends on how good the information is that I am given.

(122:267-68; App.131-32.)

On cross-examination, trial counsel asked Drewieck whether her calculation would change if the alcohol consumption ended at 9:50 instead of 9:30. (122:268-69; App.132-33.) Drewieck testified that it would not. (122:269; App.133.) Counsel also asked whether the size or amount of the alcoholic beverage would impact her calculation, and Drewieck testified it would. (122:269; App.133.) Finally, counsel asked how Drewieck determined the standard alcohol value of 4% in a beer. (122:269-70; App.133-34.) Drewieck testified that was the standard value used in calculations, while acknowledging that different types beers may be higher or lower. (122:170; App.134.)

Machner Hearing

Schumacher filed a postconviction motion alleging his counsel was ineffective for failing to effectively cross-examine the State's expert witness regarding the unreliability of retrograde extrapolation and the assumptions used by the expert to perform her calculations regarding Schumacher's blood alcohol concentration at the time of driving. (102.) A postconviction hearing was held on June 19, 2019, at which Schumacher's trial attorney testified. (130.)²

² Prior to trial counsel's testimony, the State argued Schumacher's motion failed to meet the burden to warrant an evidentiary hearing because it failed to show that Schumacher was prejudiced by any deficient performance because the motion contained no "information or allegations how this could be that the defendant would be under the legal limit of .08." (130:3-5.) Schumacher argued that because the expert's testimony was the only evidence the jury heard regarding how

Trial counsel acknowledged that, because Schumacher had admitted to driving, the key element to the OWI-PAC charge was Schumacher's blood alcohol level at the time of driving. (130:13-14, 26; App.148-49, 161.)

Counsel testified he had two years of experience as an attorney at the time of Schumacher's trial, which was his second OWI trial. (130:13, 22; App.148, 157.) Counsel believed he had attended at least one seminar or course related to OWI offenses but did not recall the material that covered or whether it included retrograde calculations. (130:23-24; App.158-59.)

Prior to trial, counsel reviewed the state's expert report. (130:14; App.149.) Counsel believed he identified areas for potential cross-examination in the report but did not recall what those areas were. (130:15; App.150.) Counsel did anticipate the expert using retrograde extrapolation to calculate Schumacher's blood alcohol level at the time of driving. (130:15; App.150.) Counsel testified he discussed strategy related to retrograde calculations with other attorneys in his office prior to the trial. (130:26; App.161.)

Counsel was familiar with retrograde extrapolation from his review of books and materials focusing on defending OWIs that were available "around the office." (130:15; App.150.) However, counsel was unable to provide specific titles of books or materials he used to prepare for trial. (130:15; App.150.) Counsel testified he reviewed materials

Schumacher likely absorbed and eliminated alcohol so as to estimate his blood alcohol concentration at the time of driving versus the time his blood was drawn, trial counsel's failure to call the expert's calculations into question prejudiced Schumacher. (130:7-8.) The court found the motion sufficiently alleged both deficient performance and prejudice to proceed with the evidentiary hearing. (130:9-10.)

critical of retrograde extrapolation and was familiar with the criticisms within the field of those using those calculations, as well as the different variables that would affect the retrograde extrapolation calculations, such as “height, weight, drinking history, thing along those lines.” (130:15-16; App.150-51.)

Counsel believed he attempted to talk to the state crime lab regarding the end results and the calculations made in this case prior to trial but was not successful in speaking with anyone regarding the case. (130:28-29; App.163-64.) His reason for attempting to speak with an analyst at the crime lab regarding retrograde extrapolation was that, “obviously, especially given the PAC allegation, it’s fundamental to the case.” (130:29; App.164.)

Counsel testified he did not ask any questions on cross-examination regarding the expert’s initial calculation of a blood alcohol concentration between .19 to .210 because,

So I thought the expert had actually done a pretty good job herself of qualifying how she had come to the conclusions in the -- in her testimony. It was, you know, the fact that she had brought up that there were a number of variables, she was making guesses. So I didn’t want to beat a dead horse. I thought it would be apparent to the jury.

(130:16-17; App.151-52.) On cross, counsel elaborated he did not want to “double down” on things the expert already said because he did not think it would be perceived well by the jury. (130:30; App.165.) He did not believe there was “anything new for me to elicit, and I really just thought she went over the issues herself.” (130:30-31; App.165-66.) It was trial counsel’s opinion that the expert’s testimony came across as “pure conjecture,” so he did not feel it necessary to cross-examine her. (130:30; App.165.)

Counsel testified he was familiar with the particular criticism that retrograde extrapolation is not reliable where only one variable, the final test result, is known. (130:17; App.152.) Yet counsel chose not to highlight this criticism during cross-examination after Drewieck used retrograde extrapolation make calculations based only on the later test result. (130:17; App.152.)

Counsel testified that after the expert's rebuttal testimony, in which she estimated a blood alcohol level ranging between .08 to .11 at the time of driving, he felt there were things missing from the expert's calculation. (130:18; App.153.) For example, counsel believed that food consumption and rates of absorption and elimination would impact the resulting calculations. (130:18-19; App.153-54.) Despite this, counsel agreed he did not question the expert regarding whether and how food consumption could play into the calculation. (130:18; App.153.) He did not recall whether he questioned the expert regarding absorption or elimination. (130:18; App.153.)

Counsel stated his reasons for not questioning the expert about these issues:

So I think the single factor that I was keyed in on is it was very late; the trial had gone on for a long time. And, being honest, I don't think it looked like the jury was paying attention at all at that point.

I think I might have talked with other attorneys before I went up to do the cross. I don't recall exactly. But I figured I had maybe a few questions that they would pay attention to, so I just tried to focus on the things that I thought someone in the jury would know, like, you know, that's a really low assumption for an alcohol content for a beer or that a shot was poured

perfectly or in that amount, things like that. I figured I had a really limited window to actually make an impression on the jury.

(130:19; App.154.) Regarding whether counsel thought challenging the state's expert would be important to a determination on the PAC count, counsel testified,

Sure. I think more so in theory just because, like I said, I thought -- and I don't remember exactly, I did review the transcript probably like a month ago, but I also didn't want to color my opinions too much in my memory -- is that she seemed very upfront about the -- her own -- well, I guess the issues themselves regarding retrograde. So, like I said, while I think that's -- I think it would be important to cross on it, I thought she did a good job of raising the issues herself. And while I likely planned to go more in depth, by the time we got to cross, like I said, I just really felt like I had a really limited window to make an impression on the jury.

(130:20; App.155.)

On cross, counsel testified his general trial strategy related to the PAC charge was,

I think had I not -- it is to call into question the value of retrograde extrapolation. I think had it not been that late in the day, my direct would have been -- or my cross would have been much more thorough when she was recalled as a witness. But, like I said, I think what time it was and how the jury just, really, looked really had an effect.

(130:31; App.166.)

The trial court denied Schumacher's motion. (130:44-54; App.170-80.) Regarding the initial testimony of the expert, the court found that trial counsel's failure to cross examine regarding retrograde extrapolation was because:

That was because he felt, and I think the record supports, that the expert did make a fair amount of qualifications or indicated limitations as to her estimates as to what Schumacher's blood alcohol level would be.

I am not going to get into all that. The record speaks for itself. But she did get into some of those different qualifications she would need; height, weight; they talked about food consumption, all those different things.

And [trial counsel] didn't feel it was necessary to point out or to do that further in front of the jury in concern of potentially alienating the jury.

(130:47; App.173.)

Regarding cross-examination of the expert during rebuttal, the court found,

[Trial counsel] indicated that he did what he felt was focus on some more issues that the jury would have, he felt, understood more and maybe focused more on as far as his cross-examination.

He talked about it being later in the day, this was a trial that lasted longer than sometimes we anticipate. So it was a little bit later in the day, and he wanted to focus on a few questions rather than, again, potentially alienating the jury.

...

I will also point out that [trial counsel] did address, not all the issues, but the one she was more focused on in his closing argument.

I know [defendant] has suggested or at least indicated that there might have been some thought to the jury that there was a stipulation to the expert's calculations. I don't find that to be something that the jury would have felt was the case, based on some cross-examination, based on the closing argument that [trial counsel] did make.

[Trial counsel] clearly understood the issue of retrograde extrapolation before the trial started. He addressed it. And I don't think there's any question that some attorneys would have done this differently; some would have engaged in more cross-examination, others may not have. And [trial counsel] had what I believe to be strategic reasons as to why he handled the issue the way he handled it.

(130:48-49; App.174-75.) The court went on to find trial counsel's actions were "within the professional norms," focusing on the fact that the jury acquitted Schumacher of the OWI charge (130:50; App.176.) The court held counsel's performance was not deficient. (130:51; App.177.)

The court also addressed the prejudice prong, noting:

I am not sure in this situation how much the expert would have testified differently. I think it would have been an emphasis of certain points that she probably made herself. There would have been a couple of probably additional points, specifically, maybe the study or discussion of that there are individuals or experts in the field that indicate that -- and I don't know

the exact wording -- but that retrograde extrapolation just isn't a valid way of looking at things or isn't reliable.

So I have that, that she does qualify a lot herself. I don't have -- you know, not that this is necessarily required -- I don't have another expert in here saying, based on my calculations, I would say that the blood alcohol level would have been below .08 or could have been below .08. Again, that's not necessarily required, but it is a consideration for whether there would be prejudice.

And, in addition, you know, I am going to point out that in the end with the calculations that the expert made, and I know this kind of goes both ways, but the expert did indicate that his blood alcohol level, based on her calculations, was between .08 and I believe it was .19. And I could be wrong in the last figure, but that certainly would give some indication to the jury that based on her qualification, based on her not knowing the alcohol content of the beers, those type of things, that realistically she was saying, I mean, depending on how the jury looked at it, that he could have been below a .08.

(130:51-53; App.177-79.) The court also noted the jury could consider the blood test in evidence, and it was not required to believe Schumacher's testimony as to what, if anything, he consumed after the accident and before police arrived. (130:53; App.179.)

ARGUMENT

SCHUMACHER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO ADEQUATELY CROSS-EXAMINE THE STATE'S EXPERT REGARDING THE UNRELIABILITY OF RETROGRADE EXTRAPOLATION TO CALCULATE SCHUMACHER'S BLOOD ALCOHOL CONCENTRATION WHEN DRIVING

Trial counsel was ineffective for failing to adequately cross-examine the State's expert witness regarding the unreliability of retrograde extrapolation and the assumptions used by the expert to perform her calculations regarding Schumacher's blood alcohol concentration at the time of driving. This deficient performance resulted in prejudice to Schumacher which prevented him from receiving a fair trial. Schumacher should receive a new trial.

A. Legal Principles and Standard of Review

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. Amend. VI (applicable to the States by U.S.CONST. Amend. XIV; *see State v. Doe*, 78 Wis. 2d 161, 254 N.W.2d 210 (1977)); *Strickland v. Washington*, 466 U.S. 668 (1984); WIS. CONST. Art. I, Sec. 7. Assistance of counsel must be "effective" to satisfy the Sixth Amendment. *State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983).

A defendant must show two elements to establish that counsel's assistance was constitutionally ineffective: (1) that counsel's performance was deficient; and (2) that deficient performance resulted in prejudice to the defense. *Strickland*,

466 U.S. at 686; *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (the Strickland analysis applies equally to ineffectiveness claims under the state constitution). To establish deficient performance, a defendant must first demonstrate specific acts or omissions of counsel that fall below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Then, to prove prejudice, the defendant must show that the errors of counsel were so serious that there was not a fair and reliable outcome. *Id.* at 687.

Ineffective assistance of counsel claims present mixed questions of law and fact.” *State v. Guerard*, 2004 WI 85, ¶ 19, 273 Wis. 2d 250, 628 N.W.2d 12. The circuit court’s factual findings are upheld unless they are clearly erroneous. *Id.* Whether trial counsel’s performance was deficient, and whether any such deficiency was prejudicial to the defendant, are questions of law reviewed independently. *Id.*

B. Trial Counsel’s Failure to Adequately Cross-Examine the State’s Expert Witness was Deficient Performance

Trial counsel’s failure to adequately cross-examine Drewieck regarding the reliability of retrograde extrapolation – despite knowing that her opinions regarding Schumacher’s blood alcohol concentration were “fundamental” to a conviction on the PAC count – was an omission that fell “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. Trial counsel’s decisions are judged according to the prudent-lawyer standard, which requires a trial counsel to be “skilled and versed” in the criminal law, to make decisions based upon facts and law upon which an ordinarily prudent lawyer would have relied. *Felton*, 110 Wis. 2d at 501-02. An ordinarily prudent lawyer, faced with the expert opinions put forth by Drewieck and knowing they were key to a conviction would

not have chosen to forego challenging her opinions with evidence from the scientific community that called the reliability of retrograde extrapolation in general, and her calculations in particular, into question – even if the trial was going late or the jury appeared tired. The strategic decisions made by trial counsel fell below an objective standard of reasonableness and were therefore deficient performance.

Wisconsin courts have found the failure to conduct an adequate cross-examination to constitute deficient performance. *State v. Zimmerman*, 2003 WI App 196, ¶ 39, 266 Wis. 2d 1003, 669 N.W.2d 762 (counsel’s failure to adequately question expert about DNA test results constitutes deficient performance); *State v. Thiel*, 2003 WI 111, ¶¶ 46, 50, 264 Wis.2d 571, 665 N.W.2d 305 (“it was objectively unreasonable for [defense] counsel not to pursue further evidence to impeach” alleged victim); *State v. Jeannie M.P.*, 2005 WI App 183, ¶¶ 16-17, 27-28, 286 Wis.2d 721, 703 N.W.2d 694 (counsel’s failure to impeach the testimony of a key witness was a “glaring omission” constituting deficient performance).

In *Zimmerman*, a DNA expert testified that samples taken from the scene of a homicide provided no insight into the crime, suggesting the results were inconclusive. 2003 WI App 196, ¶ 40. In fact, test results excluded the defendant as a source of the DNA. *Id.* The court held that “[c]ounsel’s failure to challenge [the state’s expert’s] testimony with this data had the effect of essentially stipulating that the evidence was inconclusive.” *Id.* The court found this failure to be deficient performance. *Id.*

Here, trial counsel’s failure to adequately cross-examine Drewieck regarding the unreliability of using retrograde extrapolation to estimate Schumacher’s blood

alcohol concentration at the time of the accident or regarding the accuracy of the assumptions she was relying on in making her calculations. While expert testimony regarding retrograde extrapolation is admissible under the *Daubert* standard, challenges to the reliability of such testimony go to the weight of the evidence. *State v. Giese*, 2014 WI App 92, ¶¶ 25, 28, 356 Wis.2d 796, 854 N.W.2d 687. “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.” *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 596, 113 S.Ct. 2786 (1993).

Experts in the field have called into question the reliability of retrograde extrapolation, particularly when utilizing minimal data to support the assumptions relied upon. *See, e.g.*, Kurt M. Dubkowski, *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, 10 J. Stud. Alcohol Suppl. 98, 106 (1985) (concluding “no forensically valid forward or backward extrapolation of blood or breath alcohol concentrations is ordinarily possible in a given subject and occasion solely on the basis of time and individual analysis results.”). (App.143.) Among the factors influencing retrograde extrapolation calculations are what amount and type alcohol was consumed and when; the amount and timing of any food eaten; the height, weight, and body-fat composition of the individual; and other physiological factors such as age, weight, sleep, and stress. *Id.* at 105-06. (App.142-43.) These factors lead to different rates in absorption and elimination of alcohol among individuals. *Id.* at 99, 101. (App.136, 138.)

In Drewieck’s initial testimony, she used retrograde extrapolation to opine that Schumacher’s blood alcohol concentration was within with the range of 0.190 to 0.210 at

the time of the accident. This opinion was based only on the later test result, the estimated time of the accident, and an estimated weight provided by the State. Trial counsel declined to cross-examine Drewieck after she gave this opinion, even though it was based on minimal data and a lack of knowledge regarding the Schumacher's rate of absorption and elimination of alcohol. Drewieck's lack of additional information in this case made her opinion unreliable and should have been called to the attention of the jury through cross-examination. *See Zimmerman*, 2003 WI App 196, ¶¶ 39-40.

Drewieck's rebuttal opinion was also unreliable, even though it was based on additional information from Schumacher's testimony, because important considerations such as food consumption and whether Schumacher was in the absorption or elimination stage were ignored. Trial counsel failed to raise these issues on cross-examination, and therefore again failed to highlight the unreliability of Drewieck's opinion. *See id.*

Counsel's professed strategic reasons for failing to challenge the expert's opinions in cross-examination are unreasonable. Given that her testimony was key to a finding that Schumacher's blood alcohol concentration was above the legal limit at the time of the accident, an ordinarily prudent lawyer would have prioritized challenging the reliability of the expert opinions.

Counsel's failure to challenge the state's expert or use significant available evidence from the scientific community to call into question the reliability of her retrograde extrapolation calculations should be deemed deficient performance. *See Thiel*, 2003 WI 111, ¶¶ 46, 50 ("it was

objectively unreasonable for [defendant's] counsel not to pursue further evidence to impeach" the alleged victim).

C. Trial Counsel's Deficient Performance Prejudiced Schumacher

Trial counsel's deficient performance prejudiced Schumacher such that his trial was unfair and the resulting jury verdict unreliable. To establish prejudice, a defendant must demonstrate that if not for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *State v. Pitsch*, 124 Wis. 2d 628, 641-42, 369 N.W.2d 711 (1985). The *Strickland* test does not require a defendant "show that counsel's deficient performance more likely than not altered the outcome in the case. *Id.* (quoting *Strickland*, 104 S. Ct. at 2068). "The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different." *State v. Smith*, 207 Wis. 2d 258, 275, 558 N.W.2d 379 (1997).

"The result of a proceeding can be rendered unreliable, and hence the proceeding itself, unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Pitsch*, 124 Wis. 2d at 642. Therefore, "a defendant need not prove the outcome would more likely than not be different in order to establish prejudice in ineffective assistance cases." *State v. Sholar*, 2018 WI 53, ¶ 44, 381 Wis. 2d 560, 912 N.W.2d 89 (internal quotes and citation omitted). Instead, prejudice is shown where a defendant demonstrates that, if not for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694.

Schumacher was prejudiced by trial counsel's failure to question the State's experts regarding issues with retrograde extrapolation. Trial counsel failed to question Drewieck regarding other experts in the field who question the reliability of retrograde extrapolation in general. Additionally, trial counsel failed to highlight the minimal amount of data used by Drewieck to make her assumptions in this case. Had counsel focused on these areas in cross-examination of the State's expert, the weight and reliability of Drewieck's expert opinions regarding Schumacher's blood alcohol content at the time of the accident would have been diminished in the eyes of the jury.

Had trial counsel elicited admissions regarding the unreliability of retrograde extrapolation during cross-examination, it is reasonably probable the results of the proceeding would be different. Here, there was minimal evidence to support an inference that Schumacher's blood alcohol concentration was above the legal limit at the time of the accident. B.C. testified Schumacher's speech was slurred, though he also admitted Schumacher did not say much to allow him to observe his speech patterns and he had no knowledge of what Schumacher's speech patterns typically sounded like. (122:186-87, 189.) A.W. testified she noted an odor of alcohol when speaking with Schumacher, however she did not report this to Sergeant Lee at the time. (122:154, 175-76, 181.) Importantly, the jury did not convict Schumacher of operating while intoxicated, indicating there was insufficient evidence of impairment at the time of the accident.

It is more than reasonably probable the jury based its decision to convict Schumacher of operating with a prohibited alcohol concentration on the testimony of Drewieck and her retrograde extrapolation calculations. Had

trial counsel demonstrated the unreliability of these calculations, there is a reasonable probability the jury would not have convicted Schumacher on this count.

Further, and contrary to what the circuit court held, Schumacher is not required to prove that his blood alcohol concentration was below the legal limit in order to show he was prejudiced by trial counsel's deficient performance. *Pitsch*, 124 Wis. 2d at 642 (defendant not required to prove error determined the outcome); *Sholar*, 2018 WI 53, ¶ 44 (defendant not required to prove outcome would be different to establish prejudice).

The central issue at trial – whether Schumacher's blood alcohol concentration was at or above .08 – hinged on the credibility of the State's expert and her calculations. Because there is a reasonable probability the jury would have found Schumacher not guilty had it heard all of the available impeachment evidence, Schumacher was prejudiced by trial counsel's failure effectively cross-examine the State's expert witness.

CONCLUSION

For the foregoing reasons, Schumacher asks this Court to vacate the Judgment of Conviction and reverse the order denying his postconviction motion and remand this case to the circuit court for a new trial.

Dated this 30th day of October, 2019.

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 6208 words.

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 by mail on all opposing parties.

Dated this 30th day of October, 2019.

Signed:

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CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on October 30, 2019, I deposited in the United States mail for delivery to the clerk by first-class mail, ten copies of the defendant-appellant's brief and appendix.

Dated this 30th day of October, 2019.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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