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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

REPLY BRIEF OF
DEFENDANT-APPELLANT

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INTRODUCTION

Gary Schumacher was involved in a car accident within sight of his home. He left the scene of the accident, returned home, where he began drinking alcohol until law enforcement arrived about an hour later. At trial on the charge of OWI-PAC, Schumacher's defense was that the alcohol he consumed *after* the car accident was the cause of his blood alcohol concentration over the legal limit. The State's key evidence on this count was its expert's testimony regarding her use of retrograde extrapolation to estimate Schumacher's blood alcohol concentration at the time of driving. Schumacher's trial counsel was ineffective in cross-examining the State's expert witness regarding her opinions, as an ordinarily prudent lawyer would have done. It is reasonably probable that the jury's decision to convict Schumacher on this charge was impacted by the deficient performance; therefore, Schumacher's conviction should be reversed.

ARGUMENT

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

The only element the PAC charge at issue at trial was Schumacher's blood alcohol concentration at the time of driving. Given the time that elapsed between the accident and his contact with law enforcement, which Schumacher spent consuming alcohol, the state's expert testimony regarding Schumacher's blood alcohol concentration was fundamental to the jury's decision whether that element had been met.

An ordinarily prudent lawyer, faced with the expert opinions put forth by Drewieck and knowing they were fundamental to a conviction would not have chosen to forego cross examination of the expert on those opinions as Schumacher's counsel did during the expert's direct testimony. Nor would a prudent lawyer have failed to challenge those opinions with evidence from the scientific community calling the reliability of retrograde extrapolation in general, and the expert's calculations in particular, into question, as trial counsel did during rebuttal. *See State v. Zimmerman*, 2003 WI App 196, ¶ 39, 266 Wis. 2d 1003, 669 N.W.2d 762 (finding counsel's failure to adequately question expert constitutes deficient performance); *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).

Trial counsel failed to challenge the State's expert regarding the unreliability of using retrograde extrapolation to estimate Schumacher's blood alcohol concentration at the time of the accident and did not adequately cross-examine her regarding the accuracy of the assumptions she was relying on in making her calculations. This failure was not the strategic decision of a reasonably prudent lawyer, but instead was deficient performance. *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (deficient performance is that which falls "outside the wide range of professionally competent assistance"); *State v. Felton*, 110 Wis. 2d 485, 501-02, 329 N.W.2d 161 (1983) (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). The strategic decisions made by trial counsel fell below an

objective standard of reasonableness and were therefore deficient performance.

II. Trial Counsel's Deficient Performance Prejudiced Schumacher

Because it is reasonably probable that trial counsel's deficient performance had an adverse effect on Schumacher's defense, he has satisfied the prejudice prong. *State v. Jenkins*, 2014 WI 59, ¶ 37, 355 Wis. 2d 180, 848 N.W.2d 786; *Strickland*, 466 U.S. at 694.

The State argues Schumacher was not prejudiced because the circuit court instructed the jury that it was not bound by the expert's opinion, and that the alcohol concentration in the blood sample taken within three hours of operating a motor vehicle is evidence of the Schumacher's alcohol concentration at the time of driving. (Resp. Br. at 13-14.) These instructions did not protect Schumacher from prejudice.

First, though the jury was not legally bound by the expert's opinion, counsel's inadequate cross-examination failed to provide the jury a basis for questioning the expert's opinion. As noted by the Supreme Court of the United States in its seminal case on the admissibility of expert opinion testimony, the appropriate way to attack the weight and credibility of admissible expert opinions is through "[v]igorous cross-examination [and] presentation of contrary evidence". *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 596, 113 S.Ct. 2786 (1993). Trial counsel failed to present evidence that experts in the field question the reliability of retrograde extrapolation as a basis of estimating blood alcohol concentration at a time other than the time that blood was drawn. Trial counsel also failed to vigorously cross-examine regarding the minimal amount of data used to

make the assumptions in this case. Because of these failures, the jury lacked key information that would have discredited the State's expert opinion regarding Schumacher's blood alcohol content at the time of the accident.

Second, although Wis. Stat. § 885.235(1g) provides that a blood sample taken within three hours of a defendant's driving is admissible on the issue of whether a person had a prohibited alcohol concentration at the time of driving, the state's expert rebutted any probative value that the test result may have as to Schumacher's alcohol concentration at the time of driving, when she testified that she could not determine the concentration of alcohol in Schumacher's blood at the time of the accident based on that result. (122:209.) As with any other piece of admissible evidence, a test result within three hours is not irrefutable and can be called into question by competing evidence at trial.

In light of all the evidence at trial, had trial counsel vigorously challenged the State's expert and introduced evidence regarding the unreliability of retrograde extrapolation during cross-examination, it is reasonably probable the results of the proceeding would be different. Contrary to the State's argument (resp. br. at 14-15), 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. (*See* App. Br. at 24.) This is evidenced by the jury's decision not to convict Schumacher of operating while intoxicated – indicating there was insufficient evidence of impairment at the time of the accident. The weight of evidence does not override the prejudice caused by counsel's failure to demonstrate the unreliability of the retrograde extrapolation calculations.

Because there is a reasonable probability the jury would have found Schumacher not guilty had the state's expert opinions been challenged, 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 24th day of March, 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 1,071 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 24th day of March, 2020.

Signed:

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CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on March 24, 2020, 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 24th day of March, 2020.

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