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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP2099-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. PIERQUET,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE DALE L. ENGLISH, JUDGE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Under Wis. Stat. § 885.235, did the trial court properly both admit the blood test results and also afford them *prima facie* effect when the State did not establish that an analyst who examined the blood test possessed a valid permit?

2. Under Wis. Stat. § 907.02, did the trial court properly admit the blood test results as expert opinion testimony when the State did not establish that an analyst who examined the blood test possessed a valid permit?

    a. If properly admitted, did the trial court err in giving the test result *prima facie* effect in the jury instructions?

    b. If the trial court properly admitted the test results, but erred in affording *prima facie* effect, was the error harmless?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pierquet makes this appeal under Wis. Stat. § 752.31(2). Therefore, the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this proceeding should adequately address the arguments. Oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

On August 4, 2018, Michael J. Pierquet was charged in Fond du Lac County Circuit Court with having operated a motor vehicle while under the influence of an intoxicant and with having operated a motor vehicle with a prohibited alcohol concentration. Both were charged as second offenses, contrary to Wis. Stat. § 346.63(1)(a) and (b). At trial on October 18, 2019, a jury found Pierquet guilty of operating a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. § 346.63(1)(b), and a judgement of conviction was entered. (R.39:1–2, App. 1-2). This appeal is based on the Court's evidentiary rulings and jury instructions over defense counsel's objection.

The relevant facts of the trial are as follow:

The State called Kristin Drewieck to testify regarding Pierquet's blood test results at the time of the arrest. Based on Ms. Drewieck's testimony, she worked as a chemist and quality control coordinator for the forensic toxicology program with the Wisconsin State Lab of Hygiene. (R.50:3–4, App. 3-4) She testified to her education, knowledge, and experience in alcohol testing and peer review. *Id.* Ms. Drewieck also testified in detail regarding laboratory procedures and the way in which alcohol blood tests are processed. (R.50:6–8, App. 6-8). She testified to the quality, accuracy, and functionality of the machines. (R.50:10, App. 9). Additionally, she testified that Pierquet's blood was analyzed twice: first by an analyst who was not at trial, and then by Ms. Drewieck as a peer reviewer. (R.50:19, App. 10).

In regards to permitting, Ms. Drewieck testified that all analysts in the laboratory have a permit granted by an outside agency. (R.50:5, App. 5). Her testimony made no mention of whether the first analyst to assess Pierquet's blood test had a permit or not.

Ms. Drewieck testified about her peer review process, emphasizing the independent judgement she made regarding Pierquet's blood alcohol content. (R.50:20, App. 11). Finally, over defense counsel's objection, Ms. Drewieck was able to testify that the results of Pierquet's blood test showed .189 grams per 100 milliliters. (R.50:22, App. 13). In explanation, the Court states that "[Ms. Drewieck] testified as to what the general procedure was at the time. She testified as to how things are normally done. She testified what her peer review consisted of. And she testified as to *her independent opinion* that there was ethanol in the blood and what the level was based on *her* analysis." (R.50:27, App. 14) (emphasis added).

During the jury instruction conference, defense counsel objected to the use of the *prima facie* language from the pattern instructions. (R.50:32-33, App. 15-16). Counsel went on the record, stating "I don't think that the State has established that the provisions have been complied with. I think compliance is required to get presumptions. And I think under 343.305(6), they have to establish that the person drawing the blood has to have a valid permit." (R.50:32, App. 15). The Court overruled the objection, and kept the *prima facie* language from pattern instruction WIS JI-CRIMINAL 2669 when instructing the jury. *Id.*

STANDARD OF REVIEW

In relation to Wis. Stat. § 885.235: "The interpretation and application of a statute present questions of that [are reviewed] *de novo*. *State v. Langlois*, 2018 WI 73, ¶ 55, 382 Wis. 2d 414, 913 N.W.2d 812.

In relation to expert opinion testimony: A trial court's decision to admit expert testimony is reviewed under an erroneous exercise of discretion standard. *State v. Pepin*, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). "The burden to demonstrate an erroneous exercise of discretion rests with the appellant." *Winters v. Winters*, 2005 WI App 94, ¶ 18, 281 Wis. 2d 798, 699 N.W.2d 229. The trial court's evidentiary rulings must be upheld if it "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Loy v. Bunderson*, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982).

In relation to jury instructions: "Whether a jury instruction from the circuit court deprives a defendant of his right to due process is a question of law, which [is reviewed] *de novo*." *State v. Tomlinson*, 2002 WI 91, ¶ 53, 254 Wis. 2d 502, 648 N.W.2d 367.

ARGUMENT

Pierquet first argues that the blood test results should not have been admitted as evidence because the State did not establish compliance with Wis. Stat. § 343.305. In the alternative, Pierquet argues that even if the test results were properly admitted, they should not have been afforded *prima facie* effect in the jury instructions because the State did not establish compliance with Wis. Stat. § 343.305. Both assertions are incorrect. Pierquet

concedes that the test results can be admitted under a statute other than Wis. Stat. § 343.305.

First, the Court was correct in admitting the test results and in affording the results *prima facie* effect under Wis. Stat. § 885.235.

Second, even if Wis. Stat. § 885.235 did not apply, the Court was correct in admitting the test results expert opinion testimony under Wis. Stat. § 907.02. The Court was also correct to apply *prima facie* effect to the expert opinion testimony in accordance with the Wisconsin pattern jury instructions. Even if the Court improperly applied the *prima facie* effect in the form of the jury instruction, then the error was harmless.

1) The Court properly admitted the blood test results and properly afforded *prima facie* effect to the results under Wis. Stat. § 885.235.

Pierquet asserts that blood alcohol tests must comply with Wis. Stat. § 343.305 in order to be admissible, or in the alternative, be given *prima facie* effect. This statute establishes a series of standards for administering blood tests under the doctrine of implied consent. A test that is compliant with these standards must be given *prima facie* effect. Wis. Stat. § 343.305(5)(e). However, there is no language in Wis. Stat. § 343.305 to indicate that compliance with the statute is the exclusive means for a blood test to be either admitted. Nor is there language that compliance is the exclusive means for a blood test to be given *prima facie* effect. Moreover, Wis. Stat. § 885.235 establishes a number of scenarios in which a chemical blood test can be both admitted and granted *prima facie* effect outside of the standards specified in Wis. Stat. § 343.305.

"In any action or proceeding in which it is material to prove that a person…had a prohibited alcohol concentration…while operating or driving a motor vehicle…evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood… is admissible on the issue of whether he or she…had a prohibited alcohol concentration…" Wis. Stat. § 885.235(1g). The statute also states that a blood test showing an alcohol concentration of 0.08 or more is *prima facie* evidence that he or she had an alcohol concentration of 0.08 or more. Wis. Stat. § 885.235(1g)(c).

Under Wis. Stat. § 885.235, the results of chemical analyses are not only admissible, they are also to be granted *prima facie* effect.

2) The Court properly admitted the blood test results as expert testimony under Wis. Stat. § 907.02.

Even if the blood test results were not admissible under Wis. Stat. § 885.235, they would still be admissible as expert testimony under Wis. Stat. § 907.02. The trial court's evidentiary rulings must be upheld if it "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Loy v. Bunderson*, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982). First, the Court examined the relevant facts within the content of Ms. Drewieck's testimony. Second, the Court applied the proper standard, Wis. Stat. § 907.02, in admitting the testimony. Finally, the Court demonstrated a rational process to conclude that the expert opinion testimony was admissible, which is a conclusion that a reasonable judge could reach.

First, the Court examined the relevant facts. Ms. Drewieck testified that she conducted the peer review of Pierquet's blood test. (R.50:19, App. 10). She presented the methods used by both analysts and peer reviewers within the laboratory, as well as to the functional status of the machinery. *Id.* She testified to what data is used in the procedure. *Id.* She also testified that she could form an opinion based on independent review about whether there was any substance found in Pierquets's blood. (R.50:20–21, App. 11-12). Importantly, she emphasized that the test result was her own, based on her own judgement, and that she was not "just spitting back what [the first analyst] says the result is." (R.50:20, App 11).

Second, the Court applied the correct legal standard. The admissibility of expert testimony is governed by Wis. Stat. § 907.02. This statute requires that courts look "at whether the testimony is based upon sufficient facts or data, whether the testimony is the product of reliable principles and methods, and whether the witness has applied the principles and methods reliably to the facts of the case." *In re Commitment of Jones*, 2018 WI 44 at ¶ 32, 381 Wis. 2d 284, 911 N.W.2d 97. This standard "is not exceedingly high; the court's role [is to ensure] that the courtroom door remains closed to junk science." *Id* at ¶ 33.

Finally, the Court demonstrated a rational process to reach a conclusion that a reasonable judge could reach by examining the facts of Ms. Drewieck's testimony using the legal standard of Wis. Stat. § 907.02. In overruling Pierquet's evidentiary objection, the Court takes note of the relevant facts. (R.50:19, App. 10). The Court notes that Ms. Drewieck testified to the general procedure at the time of the test. *Id.* The Court also

notes that she testified to her peer review process, as well as to the independent opinion she had formed as a result. *Id.*

There is no evidence on the record of any objection related to "junk science" or unreliable methods and principles. At most, Pierquet can claim that the possible lack of permit by one of the two analysts is an improper application of those methods and principles to the facts of the case. However, this is an issue of credibility to be presented to a jury, rather than as an evidentiary gatekeeping issue for the Court. A single analyst lacking a permit is insufficient to cast the principles and methods of blood testing as an application of "junk science." Especially in light of the "not exceedingly high" standard, admitting Ms. Drewieck's expert conclusion as to Pierquet's blood alcohol content is a conclusion that any reasonable judge could reach.

The Court examined the relevant facts, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach, using a demonstrated rational process. Therefore, the Court properly used its discretion in admitting the blood test result.

A) The Court properly gave the effect of prima facie to the expert opinion testimony regarding the blood test results.

Not only was the Court correct in admitting the test results as expert testimony, the Court properly gave *prima facie* effect to the blood test when reading instructions to the jury.

"A circuit court appropriately exercises its discretion in administering a jury instruction so long as the instructions as a whole correctly state the law and comport with the facts of the case." *State v. Langlois*, 2018 WI 73, ¶ 42, 382 Wis. 2d 414, 913 N.W.2d 812. WIS JI-CRIMINAL 2669 concerns operating a motor vehicle with a prohibited alcohol content. If a blood test result showing high alcohol content is admitted, the jury is instructed as follows:

> "If you are satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 100 milliliters of the defendant's blood at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged driving or that the defendant had a prohibited alcohol concentration at the time of the alleged driving or both, but you are not required to do so. You the jury are here to decide these questions

> on the basis of all of the evidence in this case and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged driving or that the defendant had a prohibited alcohol concentration at the time of the alleged driving, or both, unless you are satisfied of that fact beyond a reasonable doubt." WIS JI-CRIMINAL 2669.

Pierquet's brief incorrectly asserts that the above pattern instruction is the portion that included *prima facie* language. (Pierquet's Br. 10). However, the *prima facie* pattern instruction is as follows:

> "The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person." WIS JI-CRIMINAL 2669.

This paragraph is meant to be read if an approved testing device is involved. *Id.* "The intent of the paragraph is to advise the jury that the state need not prove the reliability of the underlying principles upon which the breath test is based." WIS JI-CRIMINAL 2600 Introductory Comment, Sec. VII. Subsec. D. The inclusion of the *prima facie* paragraph is conditioned on whether the device was approved, not on whether the device was used adequately. It explicitly instructs the jury that the State is required to establish that the device was correctly operated by a qualified person.

In this case, the Court was correct in reading both instructions, as there were properly admitted test results that involved an approved testing device. The instructions give *prima facie* effect to the science of blood testing; it is not a guarantee that a qualified operator conducted the test. Rather, the instructions make it clear that the jury's role is to determine whether the State had met the burden of showing that a tester was qualified. The jury returned a guilty verdict, so the jury clearly determined that the burden was satisfied by either Ms. Drewieck's peer review or by her testimony to the lab procedures. If the jury had reasonable doubt that the State had met the burden, it would have returned a verdict of not guilty.

The Court correctly used its discretion in presenting the pattern jury instruction regarding *prima facie* effect for blood tests.

B) Even if the Court's prima facie jury instruction was in error, the error was harmless.

An error is harmless unless it has "affected the substantial rights of the party seeking to reverse or set aside the judgement." See *State v. Rocha-Mayo*, 2014 WI 57, ¶ 31, 355 Wis.2d 85, 848 N.W.2d 832. The State concedes that if the test results were inadmissible under both Wis. Stat. § 885.235 and Wis. Stat. § 907.02, then the substantial rights of the Pierquet were affected. However, if the Court properly admitted the evidence while improperly giving the evidence *prima facie* effect, the error was harmless.

When evaluating the possible impact of an erroneous jury instruction, the instruction must be viewed "in the context of the entire trial to determine whether there is a reasonable possibility that the jury was misled such that the error contributed to the defendant's conviction." *State v. McDowell*, 2003 WI App 168, ¶ 76, 266 Wis. 2d 599, 669.W.2d 204.

In this case, the jury instruction in question was merely advising the jury that the principles and methods of blood testing are scientifically sound. (R.50:46, App. 17). The Court specifically instructed the jury that the State must establish beyond a reasonable doubt that the testing device was operated by a qualified person. *Id.* Pierquet further emphasized to the jury their role in weighing the credibility of the blood test in closing arguments, while presenting arguments for impeachment. (R.50:67–69, App. 18-20). It is clear from the record that the jury was aware of the potentially improper application of blood testing principles, and that they were not required to believe the blood test results. In the context of the entire trial, the jury still found that the State had satisfied its burden beyond a reasonable doubt. There is not a reasonable possibility that the jury was misled in a way that contributed to defendant's conviction. Therefore, the error was harmless.

CONCLUSION

The trial court properly admitted the blood alcohol test results under Wis. Stat. § 885.235(1g). Even if the trial court erred in admitting the test results under Wis. Stat. § 885.235(1g), the trial court was correct in admitting the test results as expert testimony under Wis. Stat. § 907.02.

The trial court properly afforded the test results *prima facie* effect under Wis. Stat. § 885.235(1g)(c). Even if the trial court erred in affording *prima facie* effect under Wis. Stat. § 885.235(1g)(c), the trial court appropriately afforded the test results *prima facie* effect per WI JI-

CRIMINAL 2669. Even if the trial court erred in affording *prima facie* effect under any legal theory, the error was harmless.

For the reasons above, the judgement of the trial court should be affirmed.

Dated this 30th day of June, 2020.

Respectfully Submitted,

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in §§ 809.19(6) and 809.19(8)(b)-(c). This brief has been produced with a proportional serif font. The length of this brief is 14 pages. The word count is 3864.

Dated this 30th day of June, 2020.

CATHERINE BLOCK
Assistant District Attorney

CERTIFICATION 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 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 30th day of June, 2020.

CATHERINE BLOCK
Assistant District Attorney

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 809.19(2)(a) that contains: 1) a record of a judgement of conviction essential to an understanding of the issues raised; and 2) relevant excerpts from the trial court record.

I further certify that if this appeal is taken from a circuit court order or a judgement 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.

Dated this 30th day of June, 2020.

_____

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