STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2021AP001252-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY ARTHUR WRIGHT,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Douglas County Circuit Court, the Honorable George L. Glonek, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Whether the circuit court erred, in a case that involved a dispute about Wright using a "dangerous weapon" designed or used to "immobilize or incapacitate [L.M.] by use of electric current," by allowing a detective to offer expert opinion testimony at trial that violated Wis. Stat. § 907.02(1) and *Daubert*.

At a pretrial hearing, the circuit court denied Wright's motion to prevent the detective from testifying as an expert witness. The detective then testified at trial and offered his opinion about Tasers, stun guns, and the device allegedly used by Wright. The jury convicted Wright of all charges.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Wright would welcome oral argument should this Court deem it necessary or helpful. However, it is likely that the issue presented in this case be resolved with straight-forward application of well-settled legal principles. As such, publication is likely not warranted. *See* Wis. Stat. §§ (Rules) 809.22 and 809.23.

STATEMENT OF THE CASE AND FACTS

The charges

The state charged Danny Arthur Wright with first-degree sexual assault (count one), strangulation and suffocation (count two), and misdemeanor battery (count three). (2; 13). Count one was based on an allegation that Wright had sexual intercourse with L.M. by use of a "dangerous weapon." (2:1). Specifically, the state alleged that Wright used a "Zap Stick stun gun" to compel L.M. to have sexual intercourse with him. (2:2-3).

The probable cause section of the criminal complaint set forth the following narrative. On March 12, 2020, an officer with the Superior Police Department met with an individual named Bradley Faulkner, who reported a "possible sexual assault." (2:1). Mr. Faulkner stated that earlier that morning, he heard a knock on his door and saw a woman on his front steps. (2:1). He said the woman was barefoot and one of the straps on her tank-top was ripped. (2:1). He said she was "visibly upset and cold." (2:1). Mr. Faulker then allowed the woman to use his phone and he overheard the woman call her father and "describe an assault, possibly sexual in nature." (2:1).

Mr. Faulkner then offered to drive the woman to a hospital. (2:2). On the way, Mr. Faulker saw a man walking on the sidewalk and the woman told him "that

was the person who assaulted her." (2:2). Mr. Faulker said that the man saw the woman and "waved at her." (2:2). Mr. Faulker then dropped the woman off at a hospital in Duluth, Minnesota. (2:2).

Later, on April 3, 2020, another officer met with L.M. (2:2). L.M. alleged that she was with Wright on March 12, that they went to a casino and then back to Wright's residence. (2:2). L.M. further stated that Wright had given her some methamphetamine to hold and that when she gave it back to him Wright accused her of "having taken some." (2:2). Next, L.M. alleged that Wright punched her in the ribs, struck her with a metal broom handle and "zapped" her with a "zap stick gun" at least 25 times, which caused pain. (2:2). L.M. then alleged that Wright forcefully had sex with her. (2:2). L.M. also alleged that at one-point Wright grabbed her throat and strangled her for an "estimated 15 seconds." (2:2). L.M. alleged that the assault was recorded by a small video camera in Wright's bedroom and that Wright "sent the assault to his phone." (2:2). L.M. alleged that "[n]one of the sexual contact was done with her permission." (2:2). L.M. then stated that she grabbed some clothing and fled Wright's bedroom and residence. (2:3).

L.M. admitted that she "had gone back to [Wright's] residence in the past several days," and that Wright had showed her a video of the incident. (2:3).

A search warrant was later executed at Wright's residence and during the search officers located a Zap stick stun gun. (2:3).

At the time of the search of Wright's residence, officers interviewed Wright's eight-year old son. (2:3). Wright's son stated that he knew L.M. and identified her as Wright's girlfriend. (2:3). Wright's son recalled the night of this alleged incident. (2:3). He described hearing "banging," "pounding," and "moaning" coming from Wright's bedroom that night. (2:3). He said he also knew his dad had a "stun gun" and that his dad and L.M. "played with it." (2:3). At one point, he said he heard "buzzing" and heard L.M. say "it hurt." (2:3).

Furthermore, a video was located on Wright's phone that documented an episode of sexual intercourse between Wright and L.M. (2:3-4). As described in the complaint, the episode begins when Wright "performs oral sex on L.M. and then they have intercourse." (2:3). Later, L.M. performs oral sex on Wright and Wright later "grabs L.M.'s hair and pulls it and kicks her while appearing angry, causing L.M. to cry." (2:3). The complaint further alleged that the video shows Wright briefly grab L.M. by the throat "for several seconds." (2:3). Finally, the complaint alleges that the video shows Wright using a stun gun on L.M. several times and L.M. "appears to try to protect herself from being stunned." (2:3).

The Daubert [1] hearing

Prior to trial, the defense filed a motion in limine, pursuant to Wis. Stat. § 907.02(1), to prohibit Detective Michael Jaszczak from offering

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

expert opinion testimony or evidence at trial. (38). The court held a motion hearing two days prior to Wright's jury trial. (94).

At the hearing, counsel for Wright explained that the state recently provided the defense with a "one-page report" that demonstrated the state's intent to use the detective "as an expert witness on the stun gun in this case." (94:20). The state did not object to the defense characterization of the issue and proceeded to call the detective in an attempt to lay the foundation, under Wis. Stat. § 907.02(1) and *Daubert*, for the detective's trial testimony. (94:21, 25).

Detective Jaszczak testified that he has been employed as a police officer by the Superior Police Department for more than 25 years. (94:25; App. 3). He explained:

> I've been a firearms instructor. I've been a defense and arrest tactics instructor and a Taser instructor. And part of that Taser instructor training, we go through the – how a taser works, how a stun gun works, the differences between the two, what is an electric weapon, those sorts of things.
>
> I've also been on the Wisconsin Tactical Skills Advisory Committee for the State of Wisconsin. That determines what training our new police recruits will get in the State of Wisconsin, and as a part of that, we've had long, lengthy discussions about Taser and where it is going to sit within our use of force continuum at the time.

(94:26; App. 4).

The detective testified that he deployed a Taser "[o]nce upon -- out on the street" and "probably over a hundred times" in training. (94:26; App. 4). He also testified that he had been tased as part of his training. (94:26; App. 4).

Next, he testified about his training "as to how Tasers and stun guns work and what effect they have on a person's body." (94:27; App. 5). He first clarified that a Taser and a stun gun are "two different things." (94:27; App. 5). He explained:

> A Taser is different than a stun gun, but generally an electric weapon like that, it causes involuntary muscle contraction within the body, and it oftentimes immobilizes that muscle to -- what we call lock them up, and it causes them to stop what they are doing or in the area of a stun gun, offers time for someone to get away.
>
> …
>
> Well, the difference between a stun gun and a Taser is that a Taser has two probes that are propelled out of the gun, and as a part of that, the probes are separating as -- as the difference between the subject and the officer is -- is lengthened. So the probes are spreading, if you will, creating a -- two points of contact on the target, and the electricity goes between the probes.
>
> On a Taser -- or on a stun gun, there are two electrical contact points that are very close to

> each other, and they don't propel out. It is part of the weapons system that creates that electrical arc that creates that muscular contraction within the person or within the target that creates that immobilization -- brief immobilization.

(94:27-28; App. 5-6).

At this point the court confirmed with the detective that a "stun gun has to be against a person's skin or body" and that "a Taser can be deployed toward somebody." (94:28-29; App. 6-7). The detective stated further that "a Taser can also be used like a stun gun" and that police officers call it "a drive stun technique, and it is essentially a pain compliance technique, which is similar to a stun gun." (94:29; App. 7).

With regard to this case, the detective confirmed that he had the opportunity to "look at" the "ZAP Stick stun gun" seized from Wright's residence. (94:29; App. 7). The detective confirmed that the Zap Stick "is very similar to" the "kind of stun gun" he had previously testified about. (94:29; App. 7). The detective further confirmed that he went "online" and found the "two-page instruction manual" for the "exact kind of stun gun" at issue in this case. (94:29-30; App. 7-8). The state offered and the court accepted the manual, marked as Exhibit 1, into evidence. (94:30; 47; App. 8, 25). He then confirmed that the manual's descriptions of the "use of a stun gun" were consistent with his understanding of "what happens when someone uses a stun gun." (94:31; 47:2; App. 9).

Finally, the detective confirmed that "yesterday," he examined the "stun gun" and, after changing the batteries, found "that it, in fact, still works." (94:31; App. 9).

On cross-examination, Detective Jaszczak admitted that he has no education or degrees in "human physiology," that he has published no papers, regarding the "ZAP Stick stun gun" or any "similar devices," that he has written no articles about the ZAP Stick or any "similar stun guns," that he has conducted no experiments with the ZAP Stick, that he is aware of no studies analyzing the effect of the Zap Stick on a human being or on animals, and that he can identify no "peer-review study, experiment, authoritative text indicating that application of the ZAP Stick stun gun causes a person to be immobilized or incapacitated." (94:32-33; App. 10-11).

The detective did attempt to explain that "it says it in the manual here, I guess," in terms of what he was relying on to offer his opinion on the ZAP Stick. (94:33; App. 11).

Next, the detective confirmed that he wrote a report for the prosecutor with the understanding that "the State would need an expert to testify that this specific electric device was designed or used to incapacitate a person." (94:34; App. 12). Further, the detective confirmed that he wrote in his report that the ZAP Stick stun gun is a "seven-watt electric weapon," and that generally, "stun guns are seven to eleven watts" and that Tasers are typically "[t]wenty-six

watts." (94:34; App. 12). Finally, the detective confirmed that while his report noted that stun guns "generally are charged by nine-volt batteries," the ZAP Stick at issue in this case is charged with two "[r]elatively small cylinder" "three-volt batteries." (94:35-36; App. 13-14).

The court then sought to clarify whether the detective's opinion, that a stun gun "may cause someone to be immobilized or temporarily -- suffer temporary paralysis," was an opinion based on the device manual or on his "training and experience." (94:36; App. 14). The detective testified that his opinion was based on his training and experience. (94:36; App. 14).

On re-cross-examination, the detective admitted that he has zero "training and experience" "with this specific model ZAP Stick stun gun." (94:37; App. 15).

The court then heard arguments from the parties. (94:38-40; App. 16-18). The state began by arguing that "a lot of what Detective Jaszczak would be testifying to is not an expert opinion. For example, I'm not asking the detective, does this stun gun qualify as an electric weapon under Wisconsin Law?" (94:38; App. 16). Instead, the state argued that he would ask the detective, "based on his training and his own experience what happens when electrical weapons such as stun guns are deployed because of the elements that are required to be proved." (94:38; App. 16).

Counsel for Wright argued that this wasn't "even close. This is basic *Daubert*. The state has to put forth a witness who has the requisite qualifications. Clearly, this detective doesn't on the issue of the impact of the use of this particular model stun gun." (94:38-39; App. 16-17). Further, counsel argued that the court, as "gatekeeper under *Daubert*," must prevent that kind of "opinion testimony [from] coming in." (94:39; App. 17). Specifically, counsel argued that the detective has training and experience in the use and deployment of Tasers and that maybe he could be qualified on the "use of force continuum," but that is not what the state intends to elicit from Detective Jaszczak. (94:39; App. 17).

In response, the court asked the state: "You're not intending to ask him whether this stun gun meets the legal definition, are you?" (94:40; App. 18). While the state responded, "I am not," counsel for Wright argued that, "Well, he's not going to use those words, but that's what he's going to do." (94:40; App. 18).

The court then denied Wright's motion to prohibit Detective Jaszczak from testifying as an expert witness regarding the "Zap Stick stun gun" at issue in this case:

> I know there has been an argument here about the requisite qualifications of [Detective] Jaszczak. Obviously, qualifications to render opinions can be based on a number of things, not the least of which is based upon, you know, training and experience. And I believe based upon the testimony I've heard and the training and

> experience of [Detective] Jaszczak, that he certainly has the requisite qualifications to render the opinion. I think the opinion is admissible.

(94:41; App. 19). The case proceeded to trial on August 13 and 14, 2020. (96, 95).

The trial

As relevant here, during its opening statement, the state explained that the jury would hear from Detective Jaszczak, who would "talk to you a bit about Tasers and stun guns, and what happens when electric current is introduced into a person's body with one of those devices." (96:72).

In response, counsel for Wright conceded that the state would present video evidence of a physical assault that occurred while Wright and L.M. were engaged in sexual intercourse. (96:82). Counsel admitted that the video would show that Wright "punches her, he zaps her with this electric device called a ZAP Stick." (96:82). Accordingly, counsel told the jury that at the end of the trial they "should absolutely convict him of battery." (96:82-83).

However, with respect to count one, the charge of first-degree sexual assault by use of a dangerous weapon, counsel told the jury that "[t]here will be no credible evidence in this trial that the device used in this case was designed or used to incapacitate [L.M.]" and that while Wright used the ZAP Stick to hurt her and to cause her pain, "[h]e did not use it to compel her to have sexual intercourse with him." (96:84-85).

L.M. testified at trial. (96:168-202). L.M. testified that Wright is her "ex." (96:169). L.M. testified that on the night of March 11 and early morning of March 12, 2020, she was with Wright. (96:169-171). L.M. described Wright being "mad" about something and then having sex. (96:171-174). L.M. testified that at one point Wright complained that she wasn't doing "good enough" and that Wright "hit me in the head, and it went on from there." (96:174-175, 177). L.M. testified that she wanted Wright to stop but he didn't stop. (96:178). L.M. eventually explained that she later ran out of the house and that Wright "tased" her as she left. (96:179).

With regard to the "stun gun," L.M. stated that Wright had used it "a lot…Like he -- first he did it, like oh, does this hurt? Yeah, it hurts. Okay. Now you know it hurts, why aren't (sic) you doing it?" (96:180). L.M. explained that during this alleged incident, Wright used the "ZAP Stick" on her stomach, legs, and "once in the vagina." (96:180-181). Asked how it felt, L.M. said, "[i]t hurt." (96:181).

Immediately after L.M. testified, the state called Detective Jaszczak. (96:202). In line with his testimony at the *Daubert* hearing, the detective testified that he has "had many, many trainings over the years as a police officer in the use of force and firearms training. I am a Taser instructor. I am a firearms instructor. Defense and arrest tactics instructor." (96:204; App. 22). The state then asked the detective about stun guns and the detective testified that "as part of a Taser instructor training, they talked

about the differences between a Taser and a stun gun. A Taser is different than a stun gun, and so they talked about that and -- and how a Taser works versus a stun gun and how that works." (96:206; App. 24).

Next, Detective Jaszczak testified about Tasers:

> A Taser is a police tool that we use that actually propels two what we call probes, and they're like fishing hooks on a -- on weights that get propelled out of the Taser and that are connected by wires. And the farther the distance the probes go from the weapon to the subject, the father the probes spread apart. And then the electricity from the Taser goes between each of the probes and just between each of the probes.

(96:207; App. 25). Asked "what happens when electricity from a Taser goes to the probes that are connected to a person's body," Detective Jaszczak responded:

> It creates what we call a neuromuscular incapacitation. The body is derived of a central nervous system. It's our brain and our spinal column, and the brain sends messages, if you will to your muscles.
>
> And what the Taser does is it creates this involuntarily muscle contraction, and we call it a lockup. So if a person gets hit with a Taser -- with the Taser and the probes are connected and they have a good connection, the electricity goes, and it tightens up the muscles in the body, and it locks a person up and sometimes they fall.

(96:207-208; App. 25-26).

The state then asked "[h]ow is a stun gun is different from a Taser?" (96:208; App. 26). Detective Jaszczak opined:

> Well, a Taser is a 26-watt weapons system. The stun guns are usually in that 7-watt to 11-watt power range, if you will. The stun gun has two contacts, two electrical contacts, and the electricity flows between those contacts, and in a stun gun, the -- it works on the sensory-motor system.
>
> With a Taser, it works on the nervous system, and the sensory motor system. Combining those two gets that neuromuscular incapacitation that we talked about.
>
> In a stun gun, it's a – because the electricity only goes between those two electrodes, and it is oftentimes a very short distance apart. It is a pain compliance tool that immobilizes or that oftentimes tightens up the muscles right at the point of contact.
>
> If a stun gun is used on a nerve bundle in the body, it oftentimes locks them up briefly depending on the length or duration of the stun, if you will.

(96:208; App. 26).

Next, Detective Jaszczak confirmed that "a stun gun" was found in Wright's home and that he had "a chance to look at that stun gun prior to court today." (96:208; App. 26). The stun gun was marked as Exhibit 11 for trial and handed to Detective Jaszczak. (96:209; App. 27). Detective Jaszczak noted that when

he "pulled it out of evidence earlier," it needed new batteries to function. (96:209; App. 27). The state then asked Detective Jaszczak to step down from the witness stand and demonstrate to the jury how the device worked: "This particular stun gun has a flashlight, and then you'll see the electricity between these contacts when I push the button….It operates for as long as I push the buttons. On a Taser, each squeeze of the trigger is five seconds. This one stops as soon as you let the trigger go." (96:210; App. 28).

On cross-examination, Detective Jaszczak testified that this specific stun gun was a "ZAP Stick 800KV stun gun" and that there are different models of stun guns. (96:211; App. 29). As at the *Daubert* hearing, Detective Jaszczak admitted that he had written no papers or articles on the ZAP Stick and that he had "conducted no experiments" with the ZAP Stick. (96:211; App. 29). The detective agreed that he has participated in "demonstrations in Taser training," but that "Taser, again, is a different beast than a stun gun." (96:211-212; App. 29-30). Moreover, Detective Jaszczak denied being aware of any "studies analyzing the effect of a ZAP Stick stun gun on human beings." (96:212; App. 30). In response to a question about whether he could identify any "study, paper, experiment indicating that application of the ZAP Stick stun gun causes a person to be immobilized or incapacitated," the Detective said, "Yes." (96:212; App. 30). Asked for the "study," Detective Jaszczak referred to the instructional manual for the ZAP Stick. (96:212; App. 30). Counsel confirmed that Detective Jaszczak was aware of no "study or experience" that

was not an "advertisement" for the ZAP Stick. (96:212; App. 30).

Next, Detective Jaszczak confirmed that stun guns are typically charged with "nine-volt" batteries, but that the ZAP Stick is not. (96:213; App. 31). Finally, Detective Jaszczak confirmed that he put "fresh batteries" in the ZAP Stick earlier in the week "for the purposes of this trial." (96:213; App. 31).

After Detective Jaszczak's testimony, the court read the jury portions of multiple stipulations, entered into by the parties, concerning video clips that would be played for the jury. (96:216-218; 46:1-2). Afterwards, Exhibit 15, a portion of a video documenting the events of March 12, 2020, was played for the jury. (96:217; 50).

Later, after the state and rested its case (96:233), the defense played Exhibit 16, a video clip from March 16, 2020, which Detective Jaszczak had confirmed depicted Wright and L.M. engaged in consensual sexual intercourse on that date, four days after the date of the alleged crimes in this case. (96:214, 233-234; 50).

On day two of trial, the defense moved to dismiss count one, the sexual assault charge, based on insufficient evidence. (95:4). The court denied the defense motion. (95:4-5). Thereafter, the defense confirmed that it would not be calling any witnesses and that Wright would not be testifying. (95:5). After the court conducted a colloquy with Wright about the

waiver of his right to testify, the defense rested. (95:5-7).

Closing arguments paralleled the parties' opening statements. (95:-17-52). While the state argued that Wright used a "dangerous weapon," the "ZAP Stick," to compel L.M. to have sexual intercourse, the defense argued that the evidence showed only that Wright battered L.M. during otherwise consensual sex. Further, the court instructed the jury on the lesser included offenses, to count one, of second and third-degree sexual assault. (95:56-59).

After jury instructions[2] and deliberations, the jury returned guilty verdicts on counts one, two, and three. (95:72-74; 72). After ordering a Presentence Investigation, the court scheduled sentencing for October 7, 2020. (95:76-77).

At sentencing, the court imposed a sentence of 25 years imprisonment on count one, consisting of 15 years initial confinement and 10 years extended

[2] The court instructed the jury on the expert testimony provided by Detective Jaszczak: "Ordinarily, a witness may testify only about facts. However, a witness with specialized knowledge in a particular field may give an opinion in that field. In determining the weight to give to this opinion, you should consider: The qualifications and credibility of the witness; the facts upon which the opinion is based; and the reasons given for the opinion. Opinion evidence was received to help you reach a conclusion. However, you are not bound by any witness' opinion." (95:68-69).

supervision. On counts two and three, the court imposed sentences of six years and 9 months imprisonment, respectively, but ordered those sentences to be served concurrent to the controlling sentence imposed on count one. (88; 83; 84; App. 34-36).

This appeal follows.

ARGUMENT

Wright is entitled to a new trial because the circuit court erroneously permitted Detective Jaszczak to testify as an expert witness, contrary to Wis. Stat. § 907.02(1) and *Daubert*.

The main issue in dispute at Wright's trial was whether the "ZAP Stick stun gun" he used on March 12, 2020, against L.M. is a dangerous weapon. While an "electric weapon" may be a dangerous weapon under Wis. Stat. §§ 940.225(1)(b), 939.22(10), and 941.295(1c)(a), the state needed an expert to prove that element because L.M. never claimed that Wright's "ZAP Stick" was either designed or used to "immobilize or incapacitate [her] by the use of electric current." What L.M. originally alleged and eventually testified to at trial is that the ZAP Stick "hurt" and that the pain it caused was a "seven" on a "scale of one to ten." (96:145). Thus, to prove beyond a reasonable doubt that the ZAP Stick Wright used was a "dangerous weapon," the state needed a qualified expert witness to opine whether the ZAP Stick was

either designed or used to "immobilize or incapacitate" L.M.

When confronted with the potential testimony of Detective Jaszczak, the defense rightly called upon the circuit court to fulfill its important obligation as "gatekeeper" of expert witness testimony. At the subsequent *Daubert* hearing, the court erred when it concluded that Detective Jaszczak's "training and experience" qualified him to offer an expert opinion about the stun gun at issue in this case. (*See* 94:41; App. 19).

As argued to the circuit court, Detective Jaszczak was not a qualified expert witness under Wis. Stat. § 907.02(1). Detective Jaszczak did not have the "knowledge, skill, experience, training, or education" to qualify as an expert witness. Further, his opinion was not "based upon sufficient facts or data," it was not "the product of reliable principles and methods, and he failed to apply any "principles and methods reliably to the facts of the case." *See* Wis. Stat. § 907.02(1).

Accordingly, Wright is entitled to a new and fair trial where the jury that decides his fate is presented with only proper admissible evidence.

A. Basic principles of witness testimony, *Daubert*, and the standard of review.

Generally, a witness testifies about matters upon which the witness has personal knowledge. *See* Wis. Stat. § 906.02. Lay witnesses may offer opinions

or inferences that are "[r]ationally based on the perception of the witness," "[h]elpful to a clear understanding of the witness's testimony or the determination of a fact in issue," and "[n]ot based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1)." *See* Wis. Stat. § 907.01.

The testimony of expert witnesses is governed by Wis. Stat. § 907.02(1), which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

This standard is referred to as a "reliability standard" and mirrors "Federal Rule of Evidence 702, which codified *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), and its progeny." *Seifert v. Balink*, 2017 WI 2, ¶¶50-51, 372 Wis. 2d 525, 888 N.W.2d 816. Wisconsin caselaw interpreting § 907.02(1) is therefore based on *Daubert* and its progeny, the "Advisory Committee Notes to Federal Rule of Evidence 702," and federal and state cases interpreting the text of "Rule 702 or an analogous state law." *Id.*, ¶55.

Daubert explained that Rule 702 "contemplates that trial courts have a gatekeeper function. This gatekeeper obligation 'assign[s] to the trial court the task of ensuring that a scientific expert is qualified' and that his or her 'testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Id.*, ¶57 (citing *Daubert*, 509 U.S. at 597). While *Daubert* focused on "scientific" testimony, the Supreme Court later clarified that the reliability inquiry applies not just to scientific evidence, but to "all expert opinions, 'whether the testimony reflects scientific, technical, or other specialized knowledge.'" *Id.*, ¶60 (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999)).

As interpreted by our supreme court, Wis. Stat. § 907.02(1) "requires that circuit courts make five determinations before admitting expert testimony:

> (1) whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
>
> (2) whether the expert is qualified as an expert by knowledge, skill, experience, training, or education;
>
> (3) whether the testimony is based upon sufficient facts or data;
>
> (4) whether the testimony is the product of reliable principles and methods; and
>
> (5) whether the witness has applied the principles and methods reliably to the facts of the case.

In re the Commitment of Jones, 2018 WI 44, ¶29, 381 Wis. 2d 284, 911 N.W.2d 97.

In applying this standard, courts typically consider "whether the evidence can be (and has been) tested," "whether the theory or technique has been subjected to peer review and publication," "the known or potential rate of error," "the existence and maintenance of standards controlling the technique's operation," and "the degree of acceptance within the relevant scientific community." *Id.*, ¶33. The party proffering the expert testimony "bears the burden of satisfying each of these preliminary questions by a preponderance of the evidence." *State v. Dobbs*, 2020 WI 64, ¶43, 392 Wis. 2d 505, 945 N.W.2d 609.

The interpretation and application of a statute presents a question of law that this Court reviews de novo. *Seifert v. Balink*, 372 Wis. 2d 525, ¶89. Thus, this Court also reviews independently whether the circuit court applied the proper legal standard under Wis. Stat. § 907.02(1). *Id.*

After determining whether the circuit court applied the "appropriate legal framework," an appellate court reviews whether the circuit court "properly exercised its discretion in determining which factors should be considered in assessing reliability, and in applying the reliability standard to determine whether to admit or exclude evidence under Wis. Stat. § 907.02(1)." *Id.*, ¶90. "A trial court's decision on admissibility or exclusion of expert evidence is an erroneous exercise of discretion when a decision rests

upon a clearly erroneous finding of fact, an erroneous application of law, or an improper application of law to fact." *Id.*, ¶93.

B. The circuit court failed to properly apply the relevant legal standard, Wis. Stat. § 907.02(1), to the question of whether to admit or exclude Detective Jaszczak's expert testimony.

The circuit court's oral decision to deny the defense motion to exclude Detective Jaszczak's expert testimony under Wis. Stat. § 907.02(1) and *Daubert* failed to reference, cite, or apply the relevant legal standards. (94:40-41; App. 18-19). All the record shows is that the court determined that Detective Jaszczak's "training and experience" meant that he had the "requisite qualifications to render the opinion." (94:41; App. 19). In other words, the court made only one of the five required "determinations" circuit courts must make before admitting expert testimony. *See In re the Commitment of Jones*, 381 Wis. 2d 284, ¶29.

On account of this record, or lack thereof, it cannot be said that the circuit court applied the relevant legal standard when it permitted Detective Jaszczak to present his expert opinion to the jury. Had the court attempted to do so, it would have been clear that the detective was not qualified to offer an expert opinion in this case.

C. The circuit court failed to properly exercise its discretion in determining the factors that should be considered in assessing reliability.

Even assuming the circuit court's cursory decision could be said to demonstrate an implicit application of the relevant legal standard, any such application amounted to an erroneous exercise of discretion. As noted above, the circuit court was required to make five determinations before admitting proffered expert testimony. *See In re the Commitment of Jones*, 381 Wis. 2d 284, ¶29. The court, arguably, determined that Detective Jaszczak was qualified as an expert by his "training and experience." (94:41; App. 19).

The record, however, shows that there was no evidence introduced by the state and the circuit court failed to address any other factor. First, the court failed to determine "whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *In re the Commitment of Jones*, 381 Wis. 2d 284, ¶29. Admittedly, however, no argument was made by Wright that such specialized knowledge *would not have* assisted the jury. Rather, the defense simply and straightforwardly argued that Detective Jaszczak was not qualified to provide any potentially relevant and helpful knowledge to the jury. (94:38-40; App. 16-18). Thus, because Detective Jaszczak had no reliable "specialized knowledge" to provide to the jury, *his* expert testimony, eventually offered to Wright's

jury, was the result of an erroneous exercise of discretion.

Second, the court failed to determine "whether the testimony is based upon sufficient facts or data." (*See* 94:41; App. 19). To be fair to the circuit court, it could make no such determination because the state, through Detective Jaszczak, presented no relevant facts or data upon which his expert opinion was based. As argued by the defense at the *Daubert* hearing, the question was not whether the detective would have been qualified as an expert to testify generally about the use of force continuum or the police use of tasers. Rather, the question at issue was whether the ZAP Stick used by Wright qualified as a dangerous electric weapon. To prove this element, the state needed to prove that the ZAP Stick was designed or used to "immobilize or incapacitate" L.M. by use of an electric current. Detective Jaszczak presented no facts or data upon which his expert testimony related to the ZAP Stick was based.

Instead, he admitted to being a "Taser" instructor and testified that during his training "*they talked* about the differences between a Taser and a stun gun. A Taser is different than a stun gun, and so *they talked* about that and -- and how a Taser works versus how a stun gun works." (96:206-207; App. 24-25) (Emphasis added). In other words, someone told Detective Jaszczak that Tasers are different from stun guns and someone told him that they work differently. This basis for alleged expertise does not satisfy the reliability standard encompassed by § 907.02(1).

Third, the circuit court failed to determine whether the detective's opinion was based on reliable principles and methods. At trial, the detective offered scientific, technical, and specialized knowledge about the effect Tasers and stun guns have on the human body. The detective offered opinions about the body's neuromuscular system, the sensory motor system, and the effect (immobilization and incapacitation), that these sorts of devices have on a human body. Missing from the detective's pre-trial or trial testimony was any reliable basis for his opinion. Specifically, the detective testified that someone told him about the differences between Tasers and stun guns. In short, the circuit court erred because Detective Jaszczak's expert testimony was not the product of reliable principles and methods.

Fourth, the circuit court failed to determine whether Detective Jaszczak "applied the principles and methods reliably to the facts of the case." The circuit court permitted the detective to stand before Wright's jury and demonstrate how the "ZAP Stick stun gun" functioned to dramatic effect. (96:210; App. 26). Prior to doing so, the detective opined that the ZAP Stick at issue operated like the stun guns about which he previously testified. In doing so, the state was allowed to offer expert testimony to support its allegation that Wright used a "dangerous weapon."

This testimony never should have made it through the court's "gatekeeper" function. Expert testimony is compelling when offered according to the rules of evidence and dangerous to a defendant's right

to a fair trial when offered in violation of the rules. Here, the circuit failed in its role as gatekeeper. The detective applied no principles and methods reliably to the facts of the Wright's case because his opinion and testimony was not based on any reliable principles and methods. Likewise, the circuit court erred in failing to determine whether the detective's testimony met this final requirement of Wis. Stat. § 907.02(1).

D. The circuit court's decision to permit Detective Jaszczak to offer his expert opinion at trial was an erroneous exercise of discretion because it failed to apply Wis. Stat. § 907.02(1) and, even if it implicitly did so, it improperly applied the law to the facts.

Even assuming the circuit court implicitly made the required determinations addressed above, the court's discretionary decision necessarily rested upon an erroneous application of law and an improper application of law to the facts of this case. Based upon the record made at the *Daubert* hearing, the circuit court concluded that the detective's "training and experience" meant that he "certainly had the requisite qualifications to render the opinion." Under Wis. Stat. § 907.02(1) and *Daubert*, this cursory conclusion is procedurally insufficient and substantively erroneous.

Pre-*Daubert*, Wisconsin required only that expert witnesses be "qualified" and that there testimony be relevant to the case. *See In re the Commitment of Jones*, 381 Wis. 2d 284, ¶¶29-30. This

was "an easier standard to satisfy" because "the court's role was simply to determine whether the evidence made a fact of consequence more or less probable." *Id.*, ¶30. Now, however, it is the court's job, with regard to expert testimony, to ensure that only evidence of the "requisite quality" is put before the jury. *Id.*

While circuit courts retain "substantial discretion in deciding whether to admit expert testimony," our supreme court has made clear that *Daubert* and the amended version of Wis. Stat. § 907.02(1) require "more of the gatekeeper:"

> Instead of simply determining whether the evidence makes a fact of consequence more or less probable, courts must now also make a threshold determination as to whether the evidence is reliable enough to go to the factfinder. The legislature has prescribed that courts do this by looking 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.

Id.,¶32. Unlike other cases where our courts have upheld a circuit court's discretionary decision to admit contested expert testimony, this is not a case where the circuit court conducted a reasonable analysis of the proposed expert or the reliability of the proposed expert's testimony. This case is also not one party's expression of sour grapes over a reasonable discretionary decision that applied the relevant facts to the applicable law.

Rather, the problem here is that the circuit court failed to fulfill its role as gatekeeper by (1) erroneously determining that Detective Jaszczak was a qualified expert, (2) failing to determine whether Detective Jaszczak's opinion was based on sufficient facts or data or (3) the product of reliable principles and methods, and (4) failing to determine whether Detective Jaszczak applied reliable principles and methods to the facts of Wright's case. A comparison between this case and other recent cases where our courts have upheld a circuit court ruling under Wis. Stat. § 907.02(1) and *Daubert* demonstrates why the circuit court's ruling below was erroneous.

For example, in *In re the Commitment of Jones*, 381 Wis. 2d 284, ¶¶2-4, the court reviewed a circuit court's decision to allow the state's chapter 980 experts to testify despite the claim that the actuarial assessments they used were "not based on sufficient facts or data, [were] not the product of reliable principles and methods, and [were] not reliably applied to the facts of his case." The circuit court held a *Daubert* hearing and issued its decision explicitly addressing § 907.02(1) and *Daubert*:

> The evidence at the hearing through the witnesses show[s] that all of the tests and the testimony offered were the product of sufficient facts or data and the product of reliable [principles] and methods. ...
>
> [W]hile publication in a journal is the most rigorous, it is not the only way to peer review. The witnesses testified that these tests are routinely

> published [ ] both in journals and in published papers. ... All of the instruments were subject of extensive review. They have been written about, and even criticized [in] the papers that [were] submitted.
>
> They have also been used in other cases, in other jurisdictions, and the Court was not able to find any cases where these tests were stricken based on admissibility or based on a Daubert challenge. The tools have been debated, reviewed, and revised. This is not junk science, which is what Daubert sought to reject. These actuarial tools are widely used in predicting recidivism in sex offenders. ... Both Dr. Jurek, and Dr. Allen testified that they ... reviewed Mr. Jones' records and all the information they had and testified that this is the type of information reasonably relied upon by experts in their field.

Id., ¶24. On appeal, the supreme court explained why it upheld the circuit court's admission of the contested expert testimony: "the circuit court considered the relevant facts, applied the proper standard, and articulated a reasonable basis for its decision." *Id.*, ¶36.

In this case, the record reveals no such consideration of the relevant facts, no application of the proper standard, and no articulation of a reasonable basis for the circuit court's decision. (94:40-41; App. 18-19). While the circuit court's decision *may* have been sufficient pre-*Daubert*, the record here demonstrates a failure by the circuit court to fulfill its post-*Daubert* gatekeeper role.

Likewise, in *Seifert v. Balink*, 372 Wis. 2d 525, ¶¶13-14, the court reviewed a circuit court's decision to admit expert testimony in a medical malpractice case that concerned whether a family doctor's "personal experiences" were sufficient to qualify him as an expert under § 907.02(1) and *Daubert*. While the phrase "personal experiences" may seem facially insufficient under *Daubert's* heightened "reliability standard," the court explained why the circuit court's admission of the doctor's expert testimony was not erroneous:

> Dr. Wener's opinion based on his personal experiences satisfied the reliability standard. He identified established risk factors (principles). He then used classic, ordinary medical methods to establish the standard of care of a family practice doctor practicing obstetrics and to opine that the defendant doctor breached this standard.
>
> In the instant case, the reliability standard entails the circuit court's assessment of methodology. In expert medical evidence, the methodology often relies on judgment based on the witness's knowledge and experience. Accordingly, reliability concerns may focus on the personal knowledge and experience of the medical expert witness. Dr. Wener's testimony was based on his knowledge of and experience with obstetrics and family practice doctors practicing obstetrics. He gained his knowledge through education, his decades of delivering thousands of babies, his repeated observations during decades of clinical experiences, and his numerous teaching and supervisory experiences in the fields of obstetrics and gynecology. Because Dr. Wener

> applied an accepted medical method relied upon by physicians and had extensive personal experiences and knowledge pertaining to the standard of reasonable care, the circuit court did not erroneously exercise its discretion in admitting his testimony.

Id., ¶¶122-123.

While it may be argued that Detective Jaszczak's "training and experience" is akin to Dr. Wener's "personal experiences," the differences between these two cases is substantial. Dr. Wener was called upon by the plaintiff to establish the "standard of care for family practitioners practicing obstetrics with regard to prenatal care, labor, and delivery." *Id.*, ¶5. Dr. Wener's testimony about the relevant standard of care was substantial and his expertise on the issue was clear. *Id.*, ¶¶38-49. While the defendant disputed whether a doctor's professional experience satisfied § 907.02(1)'s reliability standard, the court held that the standard is flexible enough to account for Dr. Wener's "clinical methodology," wherein he used "ordinary medical methods to establish the standard of care of a family practice doctor practicing obstetrics." *Id.*, ¶122.

In Wright's case, Detective Jaszczak's "training and experience," fails to meet the "reliability standard." The state used Detective Jaszczak to opine about scientific, technical, and specialized knowledge that he was clearly not qualified to offer. Detective Jaszczak's purported "training" on stun guns amounted to Detective Jaszczak being told about the

differences between Tasers and stun guns by someone else. Maybe the state could have called Detective Jaszczak's instructor, but a trainee, who offered an unfounded and conclusory opinion that stun guns can "immobilize and incapacitate" the human body by use of electric currents, is not reliable expert testimony under § 907.02(1) or *Daubert*.

The bottom line in this case is that Detective Jaszczak was not qualified to offer expert opinion testimony at Wright's trial. The circuit court erred both substantively and procedurally in denying the defense motion in limine to prevent such testimony from going in front of Wright's jury. While § 907.02(1) is designed to force circuit courts to take an active gatekeeper role when it comes to expert testimony, the circuit court here failed to subject the state's expert to even the basic prerequisites of admission. This error resulted in an unfair trial, which must be remedied.

CONCLUSION

For these reasons, Wright respectfully asks this Court to reverse his judgment of conviction and to remand this case to the circuit court for a new and fair trial.

Dated this 25th day of October, 2021.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 7,529 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 25th day of October, 2021.

Signed:
Electronically signed by Jeremy A. Newman
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