

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 8, 2007**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2006AP674-CR**

**Cir. Ct. No. 2004CT1108**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DONALD R. CALLAHAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County:  
STUART A. SCHWARTZ, Judge. *Affirmed.*

¶1 DYKMAN, J.<sup>1</sup> Donald Callahan appeals from a judgment convicting him of operating a motor vehicle while intoxicated, as a fourth offense.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Callahan contends that the circuit court erred in allowing the State's expert witness to remain in the courtroom during Callahan's testimony despite the court's sequestration order. Callahan also contends that the court erred in permitting the expert to testify in rebuttal to Callahan's testimony, because the testimony was irrelevant and unreliable. We disagree with both contentions, and affirm.

### ***Background***

¶2 At around 1:30 a.m. on April 4, 2004, Dane County Deputy Sherriff Robby Vick was dispatched to investigate a one-vehicle crash in the Town of Dunn. Vick found Callahan's vehicle overturned on the side of the road, and learned that Callahan was at a hospital in Madison. At the hospital, Callahan told Vick that he did not have a drivers' license, that he had driven away from a tavern after drinking a couple of beers, and that he had crashed his car after swerving to avoid a deer. Callahan told Vick he had consumed alcohol between 8:30 p.m. and 11:00 p.m. Medical staff at the hospital withdrew a sample of Callahan's blood at 5:23 a.m., which was analyzed for alcohol.

¶3 Callahan was charged with operating a motor vehicle while intoxicated (OMVWI), contrary to WIS. STAT. § 346.63(1)(a), operating a motor vehicle with a prohibited alcohol concentration, contrary to § 346.63(1)(b), and operating a motor vehicle after his drivers' license was revoked, contrary to WIS. STAT. § 343.44(1)(b). During a jury trial, after the State's case-in-chief, the court granted Callahan's motion for a directed verdict on the prohibited alcohol concentration charge. The jury convicted Callahan on the other two charges. Callahan appeals from the judgment of conviction for OMVWI.

### *Discussion*

¶4 Callahan argues that the trial court erroneously exercised its discretion and committed reversible error by allowing the State's expert witness, Sarah Miller,<sup>2</sup> to remain in the courtroom during Callahan's testimony despite the court's sequestration order. We conclude that even if the court erred, that error was harmless.

¶5 We review a trial court's ruling allowing testimony for an erroneous exercise of discretion. *Nyberg v. State*, 75 Wis. 2d 400, 409-10, 249 N.W.2d 524 (1977), *overruled on other grounds by State v. Ferron*, 219 Wis. 2d 481, 579 N.W.2d 654 (1998). We will not find reversible error for violation of a sequestration order if no actual prejudice resulted from that violation. *Id.* Callahan argues that he was prejudiced by the violation of the sequestration order because Miller's testimony was tailored to contradict his testimony. However, as the state points out, if Miller had not been allowed to remain in the courtroom during Callahan's testimony, the prosecutor could have still used the facts of Callahan's testimony in hypothetical questions posed to Miller.<sup>3</sup> We fail to see how Callahan was prejudiced by Miller's hearing those facts during Callahan's testimony, when she would have heard them during direct examination anyway.

¶6 Next, Callahan argues that the trial court erred in allowing Miller to calculate the blood alcohol content for a person who had consumed alcohol in the amount and at the times Callahan testified, in rebuttal to Callahan's testimony.

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<sup>2</sup> Miller is a chemist at the Wisconsin State Laboratory of Hygiene. Callahan does not contest Miller's qualification as an expert.

<sup>3</sup> This was, in fact, what the prosecutor did.

Miller testified in the State's case-in-chief that she analyzed the sample of Callahan's blood collected at the hospital and determined its blood ethanol concentration was .101. At the conclusion of the State's case, the court granted Callahan's motion for a directed verdict on the prohibited alcohol content charge, because his blood sample was drawn outside the required time frame to support that charge.<sup>4</sup>

¶7 Callahan then testified that he consumed two beers between 8:30 p.m. and around 10:30 p.m. to 11:00 p.m. before crashing his car. He testified that he then went home and drank about nine ounces of Dr. McGillicuddy's before his mother picked him up and took him to the hospital at approximately 11:30 p.m.

¶8 In rebuttal, Miller used retrograde extrapolation to calculate the blood alcohol content of a person weighing 185 to 190 pounds who had consumed two twelve-ounce beers between 8:30 p.m. and 10:30 p.m., and then nine ounces of Dr. McGillicuddy's between 11:30 p.m. and 12:30 p.m. Miller testified that those factors were not consistent with having a blood alcohol content of .101 at 5:23 a.m. Callahan argues that Miller's testimony should not have been admitted because the prohibited alcohol concentration charge had been dismissed, and the analysis was not relevant to the operating while intoxicated charge. Callahan further argues that the State did not lay a proper foundation to admit the retrograde extrapolation testimony, which is unreliable and highly contingent on the expert's knowledge of the subject's metabolic system. Callahan argues the testimony, which did not establish Miller's knowledge of Callahan's metabolic system, was

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<sup>4</sup> That ruling is not challenged in this appeal.

misleading to the jury and confused the issues in dispute under WIS. STAT. §§ 904.01, 904.03, and 907.03. We disagree with each contention, and conclude that the circuit court properly exercised its discretion in admitting the testimony.

¶9 A circuit court has broad discretion in ruling to admit or deny evidence. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Further, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” WIS. STAT. § 904.01. Finally, an expert witness may offer an opinion if the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue ....” WIS. STAT. § 907.02.

¶10 In this case, the parties agree that Miller qualified as an expert. They also agree that Miller’s testimony discredited Callahan’s testimony, and that credibility—whether Callahan was telling the truth about when and how much alcohol he consumed before driving—was the central issue in the operating while intoxicated charge. Therefore, we do not agree that Miller’s testimony was not relevant. It had the tendency to make the facts presented in Callahan’s testimony less probable, which was clearly of consequence to the determination of the action.

¶11 Callahan’s argument about the unreliability of retrograde extrapolation is similarly unavailing. In Wisconsin, “admissibility of expert testimony is not conditioned upon its reliability.” *Ricco v. Riva*, 2003 WI App 182, ¶20, 266 Wis. 2d 696, 669 N.W.2d 193 (citation omitted). An expert’s testimony is admissible if it is relevant and assists the jury in determining an issue of fact. *Id.* The reliability of that testimony is an issue left to the jury. *Id.*, ¶21.

Once a witness is qualified as an expert, “Wisconsin relies on the vehicle of cross-examination to test the reliability of an expert witness.” *Id.*

¶12 Callahan was afforded an opportunity to challenge Miller’s use of retrograde extrapolation during cross-examination, and did so. Thus, the jury was presented with Miller’s analysis and the many limitations to retrograde extrapolation Callahan espouses on appeal. The jury weighed the evidence and found Callahan guilty of driving while intoxicated. It is the jury’s function to weigh expert testimony, not the court’s, and we therefore do not agree that the circuit court erred in admitting expert testimony without proof of its reliability. Accordingly, we affirm.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

