COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP2812-CR **Cir. Ct. No. 2001CF225**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALBERT A. LATTA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Albert Latta appeals from a 2002 judgment convicting him of homicide by intoxicated use of a motor vehicle contrary to WIS.

STAT. § 940.09(1)(a) (1999-2000) after a jury trial and from an order denying his postconviction motion seeking a new trial.[1] Latta argued that the circuit court erroneously excluded evidence that the victim of the automobile accident was impaired by cocaine and that this impairment caused the victim to cross the centerline and collide with Latta. We conclude that the circuit court did not erroneously exclude this testimony because Latta's witness was not qualified to give such testimony. We affirm.

¶2 The criminal complaint alleged that Latta operated a vehicle while intoxicated and caused the death of Ricky Walton. At the accident scene, Latta, whose speech was slurred and whose eyes were bloodshot, claimed that Walton's vehicle hit him. The police officer at the scene determined that Latta crossed the center line and collided with Walton's vehicle. Cocaine was found in Latta's hospital room after his clothing was removed. Latta admitted drinking large amounts of alcohol prior to the accident.

¶3 At trial, the circuit court admitted evidence of cocaine and marijuana in Latta's blood three hours after the accident. The State sought to present the testimony of James Oehldrich, a State Crime Laboratory toxicologist, about Latta's blood alcohol concentration and his resulting impairment. Oehldrich testified on voir dire that he tested Latta's blood and determined the level of his blood alcohol concentration. Based upon the test results and his review of the scientific literature describing the effect of an elevated blood alcohol concentration, Oehldrich opined that Latta was impaired at the time of the

[1] For reasons not relevant to this appeal, postconviction proceedings did not commence until late 2004.

accident. Oehldrich testified that he did not have any training in physiology or human anatomy, and he conceded that anyone could read the scientific literature upon which he based his opinion about the degree of Latta's impairment due to his alcohol consumption.

¶4 Latta objected to Oehldrich's testimony because Oehldrich did not have the necessary qualifications to render an opinion about Latta's impairment by alcohol. The circuit court agreed that Oehldrich was not qualified to testify in this fashion. For this proposition, the court cited ***State v. Bailey***, 54 Wis. 2d 679, 196 N.W.2d 664 (1972), in which the court held that a chemist may not testify about alcohol's physiological effect.

¶5 Latta sought to offer his own impairment evidence through the testimony of Robert Eberhardt. Eberhardt, a toxicologist and former laboratory director in the Milwaukee County Medical Examiner's office, was to testify about the effect of cocaine on Walton, the victim. The circuit court reviewed Eberhardt's October 2001 report discussing Walton's autopsy findings and offering his opinion that Walton was under the influence of cocaine at the time of the collision. The court excluded the latter testimony because Eberhardt, a chemist, was not qualified to opine about Walton's impairment because his training and experience did not include physiology and the effect of controlled substances on the human body.

¶6 Postconviction, Latta argued that the circuit court erroneously excluded Eberhardt's testimony about the victim's cocaine impairment at the time of the collision. In support of the motion, Latta submitted an enhanced version of Eberhardt's October 2001 report. In the July 2005 enhanced version, Eberhardt added that he based his opinion that the victim was impaired by cocaine upon an

unidentified study of the average blood cocaine concentrations of one thousand individuals arrested in California for being intoxicated by cocaine. Eberhardt also relied upon a search of the scientific literature regarding the effect of cocaine on driving ability.

¶7 The circuit court denied the postconviction motion without a hearing. In its decision, the court noted that Eberhardt had testified on voir dire about his qualifications, and that the court had concluded that Eberhardt was not qualified by training or experience to opine about the effect of cocaine on the victim. The court found Eberhardt's limited physiology course work insufficient, and that he lacked experience dealing with studies addressing the effect of alcohol and drugs. The court relied upon ***State v. Peters***, 192 Wis. 2d 674, 534 N.W.2d 867 (Ct. App. 1995), for its authority to evaluate Eberhardt's qualifications. Latta appeals.

¶8 We employ the following standard of review:

> We review a challenge to the admissibility of evidence deferentially under the erroneous exercise of discretion standard. We will uphold the trial court's discretionary decision 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."

Peters, 192 Wis. 2d at 685 (citations omitted). "[S]cientific evidence is admissible if … the witness is qualified as an expert …." ***Id.*** at 687. WISCONSIN STAT. § 907.02 (2001-02)[2] provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> 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.

¶9 Whether a witness is qualified to render an expert opinion is within the circuit court's discretion. *See* ***State v. Watson***, 227 Wis. 2d 167, 186-87, 595 N.W.2d 403 (1999). In evaluating whether a witness is qualified to give expert opinion, the court should compare the technical and scientific expertise of the witness with the complexity of the point at issue. ***Wester v. Bruggink***, 190 Wis. 2d 308, 319, 527 N.W.2d 373 (Ct. App. 1994). Here, the court found that Eberhardt's technical and scientific expertise was not sufficient to qualify him to give the impairment testimony desired by Latta.

¶10 We distinguish Eberhardt's qualifications from those of the chemist in ***State v. Donner***, 192 Wis. 2d 305, 531 N.W.2d 369 (Ct. App. 1995). In ***Donner***, the court held that a Wisconsin Department of Transportation chemist was qualified to opine that all persons are impaired to some extent at a blood alcohol concentration of .09. ***Id.*** at 315, 318. The chemist in ***Donner*** had qualifications which Eberhardt did not. The ***Donner*** chemist had substantial, specific experience with impairment issues and had observed participants in "dosing" experiments. ***Id.*** at 317-18. Eberhardt did not have such experience, and his impairment opinion derived from a search of the scientific literature.

¶11 In ***Bailey***, a defendant charged with first-degree murder sought to argue that he was too intoxicated to form the requisite criminal intent. ***Bailey***, 54 Wis. 2d at 684. The defendant offered the testimony of a chemist about the effect of the defendant's blood alcohol concentration. ***Id.*** The circuit court precluded the testimony because the chemist was not competent to testify as an expert on the physiological effects of alcohol on the defendant. ***Id.*** The supreme court agreed:

> Although the city chemist was undoubtedly qualified to testify about the blood alcohol content, it was beyond the range of his expertise to testify as to its effect. He acknowledged that he had never observed the donors of blood from whom the blood alcohol samples were taken. While even a lay witness may give his opinion as to intoxication from the actual observation of the subject, the chemist was not qualified to express an opinion based on a blood sample alone.

Id. at 684-85.

¶12 Because Eberhardt was not qualified as an expert by virtue of his knowledge, skill, experience, training, or education, the circuit court did not erroneously exercise its discretion when it precluded Eberhardt from testifying that the victim was impaired by cocaine at the time of the collision.

¶13 Latta relies upon ***Bocanegra v. Vicmar Services, Inc.***, 320 F.3d 581 (5th Cir. 2003), for the proposition that a toxicologist is qualified to testify about impairment. Latta's reliance is misplaced. First, we are not bound by federal cases other than those from the Supreme Court. ***Busse v. Dane County Regional Planning Comm'n***, 181 Wis. 2d 527, 543, 511 N.W.2d 356 (Ct. App. 1993). Second, under Wisconsin law, an expert must be qualified to give an opinion. WIS. STAT. § 907.02. As we have already held, Eberhardt was not qualified to give the opinion Latta sought to elicit.

¶14 Latta contends that the circuit court's evidentiary ruling violated his constitutional right to present a defense. We reject this claim. Eberhardt was not qualified to testify as Latta desired. A constitutional right to present expert witness testimony hinges upon such testimony meeting the standards of WIS. STAT. § 907.02. ***State v. St. George***, 2002 WI 50, ¶¶53-54, 252 Wis. 2d 499, 643 N.W.2d 777.

¶15 As our supreme court recently observed:

> "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence." When evidence is irrelevant or not offered for a proper purpose, the exclusion of that evidence does not violate a defendant's constitutional right to present a defense.

State v. Muckerheide, 2007 WI 5, ¶40, ___ Wis. 2d ___, 725 N.W.2d 930 (citation omitted).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.