COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP466-FT **Cir. Ct. No. 2008TR4856**

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

CITY OF MEQUON,

PLAINTIFF-RESPONDENT,

V.

JAMES E. HAYNOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] James E. Haynor appeals from his conviction for operating a motor vehicle while under the influence of a drug (OWI-Drugs) in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

violation of WIS. STAT. § 346.63(1)(a). He raises three issues. First, he faults the court for allowing the supervisor of the forensic toxicology program at the Wisconsin State Laboratory of Hygiene to offer opinion testimony. He contends that she was unqualified to testify as an expert. Second, he asserts that the trial court erred in relying on inaccurate tests administered by the arresting police officers. Finally, he argues that the trial court's comment that this was a "very, very close case" goes against the court's ultimate conclusion that the City of Mequon met its burden of proof. We reject all of Haynor's arguments and affirm.

FACTS

¶2 After a single car accident, Haynor was charged with operating while intoxicated in violation of WIS. STAT. § 346.63(1)(a).[2] A bench trial was conducted over three days. After briefing by the parties, the court found Haynor guilty and this appeal follows.

¶3 Testimony at the trial established the following relevant facts. During the morning of July 7, 2008, Officer Darren Selk of the City of Mequon Police Department was dispatched to investigate a one car accident. When he arrived at the scene, he found a black Honda sedan with substantial front-end damage and the air bags deployed next to a power pole that was snapped in half, being supported by power lines strung between the poles. The driver was not in the vehicle, but Selk saw a man returning on foot to the scene. When Selk met the man, he identified himself as Haynor, the registered owner of the Honda sedan. He admitted that he was driving when the accident happened, and he left the scene

[2] Haynor was also issued a citation for operating too fast for conditions in violation of WIS. STAT. § 346.57(3). At the conclusion of the bench trial, the court dismissed the citation.

to find a telephone to call the police and report the accident. Selk testified that when he was talking with Haynor:

> He really wasn't paying attention to me. I had to ask him each question several times. He was looking around. I had to continually step in front of him, regain his attention, tell him to look at me and focus on me and the questions I'm asking him. He was just kind of walking around the area and wouldn't really focus on giving me direct answers to my questions. He appeared to be having difficulty focusing on the questions I was asking, that he wasn't clear on the questions I was asking him. I had to state or restate them in various ways in order to get him to answer my questions.
>
> ….
>
> He had—to me he appeared to have slurred and/or slow speech when he answered the questions.

¶4 In response to further questioning from Selk, Haynor denied having consumed any intoxicating beverages but admitted to having taken medications. Haynor testified that during the evening of July 6, 2008, he took the drugs mirtazapine[3] and Klonopin[4] to help him sleep. He went on to testify that when he

[3] According to the National Institutes of Health, "Mirtazapine is used to treat depression. Mirtazapine is in a class of medications called antidepressants. It works by increasing certain types of activity in the brain to maintain mental balance." Among the side effects mirtazapine may cause are drowsiness, dizziness, anxiousness and confusion. The Am. Soc'y of Health-Sys. Pharmacists, Inc., *PubMed Health-Mirtazapine*, NAT'L CENTER FOR BIOTECHNOLOGY INFO., http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000995 (last visited Aug. 12, 2010).

[4] According to the National Institutes of Health, the generic version of Klonopin is clonazepam:

> Clonazepam is used alone or in combination with other medications to control certain types of seizures. It is also used to relieve panic attacks (sudden, unexpected attacks of extreme fear and worry about these attacks). Clonazepam is in a class of medications called benzodiazepines. It works by decreasing abnormal electrical activity in the Brain.

(continued)

woke up the next morning at around 7:00 a.m., he decided he needed more sleep and took another mirtazapine and clonazepam, along with his normal prescription of Lexapro.[5]

¶5 Selk decided to conduct field sobriety tests (FSTs) with Haynor because of "his physical condition, his inability to focus and answer my questions, the way he was walking around the accident scene." Selk was able to finish administering the horizontal gaze nystagmus test (HGN) before the ambulance personnel arrived to attend to Haynor. Selk testified that Haynor failed the HGN test. Selk did not administer any other FSTs because Haynor was placed on a backboard and EMTs were attending to his injuries. While Haynor was being treated, Selk requested that Officer Jason Moertl, a drug recognition officer with the City of Mequon Police Department, assist in the investigation. Selk placed

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Clonazepam may cause side effects including drowsiness, dizziness, unsteadiness and problems with coordination. The Am. Soc'y of Health-Sys. Pharmacists, Inc., *PubMed Health-Clonazepam*, NAT'L CENTER FOR BIOTECHNOLOGY INFO., http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000635 (last visited Aug. 12, 2010).

Clonazepam is a Schedule IV controlled substance. WIS. STAT. § 961.20(2)(cn).

[5] According to the National Institutes of Health the generic version of Lexapro is escitalopram:

> Escitalopram is used to treat depression and generalized anxiety disorder (GAD; excessive worry and tension that disrupts daily life and lasts for 6 months or longer). Escitalopram is in a class of antidepressants called selective serotonin reuptake inhibitors (SSRIs). It works by increasing the amount of serotonin, a natural substance in the brain that helps maintain mental balance.

Escitalopram may cause side effects including drowsiness, dizziness and excessive tiredness. The Am. Soc'y of Health-Sys. Pharmacists, Inc., *PubMed Health-Escitalopram*, NAT'L CENTER FOR BIOTECHNOLOGY INFO., http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000214 (last visited Aug. 12, 2010).

Haynor under arrest as he was being loaded into the ambulance to be transported to a local hospital.

¶6 At the hospital, Selk read Haynor the Informing the Accused form and then Haynor agreed to submit to an evidentiary chemical test of his blood. Moertl arrived at the hospital, and Selk provided him a rundown on what had occurred. Moertl is a "certified drug recognition" officer and achieved that certification by undergoing eighty hours of training, including "hands on" training in Arizona. Moertl testified that he conducts a twelve-step evaluation of a person suspected to be under the influence of a drug, and this evaluation includes:

> I look for different signs. For every—there's seven different drug categories that an individual could be under the influence of. Within those categories of drugs they affect the body differently. What I do is I run the person through a whole battery of tests which is on our face sheet. The psychomotor tasks out of the field sobriety tasks done on the street, I repeat them, plus additional ones. Plus I take pulses, blood pressures. I check their pupil sizes because different types of drugs affect the body differently. And by doing all those different tests I see, you know, a variety of things that would lead me to determine, in my opinion, what category of drug I believe the person is under.

¶7 When Moertl started to administer his evaluation, Haynor was strapped to a long board and was wearing a neck brace. In response to one of the initial questions, Haynor told the officer that he had taken mirtazapine, clonazepam and Lexapro. Moertl testified that all three drugs are central nervous system depressants and are either antidepressants or anti-anxiety medications. Moertl administered a HGN test, a vertical gaze nystagmus test (VGN), a convergence test—to look for Haynor's eyes to converge and cross toward a stimulus being used, and a muscle tension test that Moertl interpreted as indicating Haynor's muscle tone was flaccid. Moertl testified that the results he noted were

consistent with someone who has admitted to have ingested central nervous system depressant-type drugs.

¶8 The City called Laura Liddicoat. Since 1997 she has been the supervisor of the forensic toxicology program at the Wisconsin State Laboratory of Hygiene. Prior to the trial, Haynor had filed a motion in limine

> for an order barring Plaintiff's experts from answering any questions or making any references at trial regarding the presence of non-controlled substances in his system, as well as barring them from giving any opinion or testimony on Mr. Haynor's ability to safely operate a motor vehicle on the date in question.

At the beginning of the trial, the court entertained argument from counsel and denied the motion, holding that the testifying officers could testify as to the physical manifestations Haynor exhibited at the time of his arrest. It held that Liddicoat could testify and her opinion would go to the weight the fact finder would assign.

¶9 Throughout Liddicoat's testimony, Haynor's counsel made a series of objections based on a lack of foundation. Specifically, he argued that she was not qualified to give opinion testimony in response to the questions being asked. The core of Haynor's objections was the proposition that, while Liddicoat was trained as a medical technologist, she did not have the skill, training or experience to render an opinion on how the drugs Haynor had ingested would interact with each other and impact Haynor. Haynor argued that only a physician would be qualified to render such an opinion. The court overruled all of the objections. It concluded that Liddicoat had been qualified in other courts in the state, including that court, and had the necessary skill, training and experience to render an opinion on the effect ingested drugs can have on a person.

¶10 After giving general background information on the importance of therapeutic levels of drugs, Liddicoat offered her opinion that the drugs can affect a person's ability to concentrate and stay vigilant to a task and a combination of the drugs in the concentrations ingested could impair a person's judgment. After Haynor's attorney cross-examined Liddicoat, the court adjourned the trial for the day.

¶11 Two more sessions of testimony were held during which Haynor and his wife testified. The heart of Haynor's testimony was that on the day of the accident he was driving in an area with which he was unfamiliar, and he had the accident no more than fifteen seconds after the start of a heavy rain. In response to questions from his attorney, he denied feeling drowsy before the accident or falling asleep behind the wheel. He did report that he felt disoriented after the accident. Haynor's wife, Mary Haynor, testified based on her experience as a nurse and also as the CEO of a home health care company. She was allowed to give her opinion based on the health care records generated as a result of the accident, and she was allowed to testify as to the effect of the drugs Haynor ingested. She testified that, after her son called her at work to inform her of Haynor's accident, she went to the scene. She testified that Haynor was "just standing there" when she arrived, that he told her he hit a pole, and that she "can't remember anything specific beyond that…. The officer might have been there already at that time, so I didn't—[my husband and I] didn't talk a lot." She said that at some point Haynor was taken by ambulance to the hospital. She said that she went to the hospital to be with her husband and arrived about thirty to forty-five minutes after leaving the accident scene. After locating Haynor in the emergency room, she said she talked to him and did not detect any problems with his speech or orientation.

¶12 At the conclusion of testimony, the court asked for written argument from the parties. At a final hearing, the court carefully, accurately and succinctly summarized the evidence, during which it did not question the credibility of any witness. It then posed the central question:

> And the question is was he materially impaired? And I think the burden of proof is clear, convincing and satisfactory evidence to a reasonable certainty. And I'll be the first to say, this is a very, very close case.

¶13 The court weighed the testimony, especially that of Haynor, Selk and Moertl, and asked, "how do you have this unexplained accident?" The court commented that it kept coming back to the officers' testimony, combined with Haynor "taking doses off [his] normal regimen and then driving." The court pointed out that a person cannot take drugs meant to put him into "a more serene state" and "then get behind the wheel of a car and think you can drive." In the end, the court found Haynor guilty. It held that the city had met its burden.

> The question is, is their ability to operate the vehicle impaired? And it's impaired in all circumstances, not just on a perfect day. You run into things that are unexpected. You have downpours and things like that.

¶14 Haynor raises three issues in his appeal. First, he challenges the trial court's qualifying Liddicoat as an expert and allowing her to testify as to an issue of ultimate fact. Second, he questions the trial court's reliance on "inaccurate tests." Finally, he disputes the sufficiency of the evidence.

STANDARD OF REVIEW

¶15 Haynor contends the first two issues are questions of erroneous exercise of judicial discretion and, citing to ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698, he incorrectly states that "[t]his court

reviews contentions of erroneous [exercise of] judicial discretion de novo." Actually, ***Martindale*** establishes that a reviewing court is to give deference to the trial court's evidentiary rulings rather than take a fresh look at the rulings:

> We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. In making evidentiary rulings, the circuit court has broad discretion. This discretion includes whether a witness is qualified as an expert to offer opinion testimony pursuant to WIS. STAT. § 907.02 (1997-98).[6] As with other discretionary determinations, this court will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.
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> Our inquiry into whether a circuit court properly exercised its discretion in making an evidentiary ruling is highly deferential:
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> > The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. The test is not whether this court agrees with the ruling of the trial court, but whether appropriate discretion was in fact exercised.
>
> We will not find an erroneous exercise of discretion if there is a rational basis for a circuit court's decision. For a discretionary decision of this nature to be upheld, however, the basis for the court's decision should be set forth. If the circuit court fails to provide reasoning for its evidentiary decision, this court independently reviews the record to determine whether the circuit court properly exercised its discretion.

Martindale, 246 Wis. 2d 67, ¶¶28-29 (citations and footnotes omitted).

[6] WISCONSIN STAT. § 907.02 (2007-08) is substantively identical to the 1997-98 version of § 907.02.

¶16 Turning to the sufficiency of the evidence to support the OWI-Drugs conviction, we observe that, in order to convict Haynor of OWI-Drugs, the City was required to establish that he was under the influence of a drug "to a degree which render[ed] him incapable of safely driving" at the time he drove a motor vehicle. *See* WIS JI—CRIMINAL 2666. "Our task as a reviewing court is limited to determining whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met." ***City of Milwaukee v. Wilson***, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). The burden of proof in municipal ordinance cases, which involves acts made criminal by statute, is "clear, satisfactory and convincing evidence." ***Id.*** at 22. Finally, an appellate court views facts in the light most favorable to sustain the verdict and where more than one inference might be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the jury. ***State v. Forster***, 2003 WI App 29, ¶2, 260 Wis. 2d 149, 659 N.W.2d 144.

EVIDENTIARY RULINGS

¶17 Haynor has a quarrel with the trial court's conclusion that Liddicoat, a laboratory chemist, was qualified to testify about the physiological effects that medications could have on him. He claims that Liddicoat offered "far-reaching and hyperbolic opinions" that were not supported factually in the record. In support of his argument, he offers summaries of the testimony of his wife and himself, which he claims contradicts Liddicoat's testimony.

¶18 "[A] witness qualifies to testify as an expert [based] on the witness's background, education and experience rather than a particular label." ***Wester v. Bruggink***, 190 Wis. 2d 308, 319, 527 N.W.2d 373 (Ct. App. 1994). Whether Liddicoat had the requisite qualifications is a matter resting in the sound discretion

of the trial court and, unless it is shown that the court misused its discretion, the ruling will stand. ***State v. Donner***, 192 Wis. 2d 305, 317, 531 N.W.2d 369 (Ct. App. 1995).

¶19 During the trial it was established that Liddicoat held a bachelor of science degree in medical technology from the University of Wisconsin-Madison. In addition, she had attended week-long training sessions at the Armed Forces Institute of Pathology, UCLA, Indiana University's Center for Studies of Laws and Actions. She was first employed in 1977 in the clinical chemistry laboratory of the University Hospitals and Clinics and, in 1986, she transferred to the Wisconsin Laboratory of Hygiene to start her career in forensic toxicology. She was promoted to supervisor in 1997 and was in that position when she testified. As supervisor, she serves as the technical advisor to eleven chemists in the forensic toxicology laboratory and insures that the methods and instruments employed are valid and they follow the proper protocols. She reviews all reports prepared by the chemists to make certain that the analyses were performed correctly and the instruments were in good working order. As part of the training she has participated in, she was trained on the therapeutic range of drugs. In addition, she has received "training in how drugs are absorbed into and eliminated from the body. I've had training in pharmacokinetics on hundreds of different drugs, clonazepam one of them."

¶20 Under WIS. STAT. § 907.02, as long as scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness may give an opinion within her area of expertise if the witness is "qualified as an expert by knowledge, skill, experience, training, or education." Liddicoat has worked as a forensic toxicologist since 1986. Not only has she demonstrated skill in her profession, obviously recognized

when she was promoted to supervisor, she has also continued her training beyond her bachelor of science degree to acquire knowledge of the therapeutic levels of drugs and pharmacokinetics. Liddicoat exhibits such a degree of knowledge, gained from her education, postgraduate training, experience as a forensic toxicologist and supervisor, as to make it appear that her opinion is of some value. *See* ***Tanner v. Shoupe***, 228 Wis. 2d 357, 374, 596 N.W.2d 805 (Ct. App. 1999). We conclude that the trial court properly exercised its discretion in qualifying Liddicoat to testify as an expert witness.

¶21 Haynor argues that the HGN and VGN testing done by Selk and Moertl "is unreliable, has high error rates, and can often result in false positives." One problem with Haynor's argument is that he failed to make a record below. He failed to present any evidence to the trial court to support the assertions he now makes on appeal.

¶22 Like many courts, we remain unconvinced that HGN and VGN are based on science, *see* ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶¶18-21, 278 Wis. 2d 643, 693 N.W.2d 324. However, that does not take away from the fact that HGN and VGN, as well as the other FSTs routinely performed, do serve a purpose, as we observed in ***Wilkens*** when we cited to a federal district court case, ***United States v. Horn***, 185 F. Supp. 2d 530, 558 (D. Md. 2002), which pointed out the tests were

> standardized procedures police officers use to enable them to observe a suspect's coordination, balance, concentration, speech, ability to follow instructions, mood and general physical condition—all of which are visual cues that laypersons, using ordinary experience, associate with reaching opinions about whether someone has been drinking.

¶23 More problematic than the reliability of HGN and VGN tests is the "drug recognition protocol" employed by Moertl. While Haynor does not directly challenge the protocol, it was challenged in ***State v. Klawitter***, 518 N.W.2d 577 (Minn. 1994). In that case, Larry Klawitter was arrested for driving under the influence of marijuana and the state of Minnesota sought to prove this through, among other evidence, "the testimony of a state trooper who performed a 12-step examination of [Klawitter] following what is called the 'Drug Recognition Protocol.'" ***Id.*** at 578. The description of the training that the Minnesota trooper received and the tests the trooper performed on Klawitter parallels the training Moertl received and the tests he performed on Haynor. *See* ***id.*** at 579-81.

¶24 In the Minnesota challenge to the Drug Recognition Protocol, both sides called a number of experts to testify in the trial court to either support or attack the Drug Recognition Protocol evidence.[7] ***Id.*** at 581-84. The trial court

[7] While both sides presented compelling evidence either supporting or attacking the Drug Recognition Protocol, neither presented any evidence on the psychological process called "confirmation bias,"

> which is the tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence. Confirmation bias involves nonconscious information processing rather than deliberate case building. Someone intentionally preparing a one-sided argument, such as a debater preparing for a match, would not be said to display confirmation bias. Rather, it involves unwittingly selecting and interpreting evidence to support a previously held belief.

Barbara O'Brien, *Prime Suspect*: *An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & L. 315, 316 (2009) (citations omitted).

(continued)

denied the motion to suppress the trooper's Drug Recognition Protocol evidence, and the Minnesota Supreme Court affirmed that holding with some qualifications:

> We begin our analysis with the proposition that, properly viewed, the protocol followed by [the trooper] is not itself a scientific technique but rather a list of the things a prudent, trained and experienced officer should consider before formulating or expressing an opinion whether the subject is under the influence of some controlled substance.
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> Second, of the twelve steps of the protocol, few of them seem to call for any particular medical or scientific training or skill on the part of the officer. Certainly, the preliminary medical examination to determine whether the suspect needs medical attention, and the taking of pulse, temperature, and blood pressure are all well within the capabilities of [the trooper], who is a certified emergency medical technician.
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> Only the tests for horizontal and vertical nystagmus and for convergence are out of the ordinary, but they can hardly be characterized as emerging scientific techniques. Nystagmus and convergence have long been known and the tests contemplated by the protocol have been in common medical use without change for many years. The tests are simple and do not require the use of complicated equipment—the examiner's pen constitutes a suitable target. Nevertheless, this step—and, perhaps, the step

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"Confirmation bias" is a form of tunnel vision, and it can happen in one or more ways. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291. People seek out evidence to confirm their hypothesis, ***id.*** at 308-09; people search their memories in biased ways, preferring information that tends to confirm a presented hypothesis or belief, ***id.*** at 312; and people also tend to give greater weight to information that supports existing beliefs than to information that runs counter to them; that is to say, people tend to interpret data in ways that support their prior beliefs. ***Id.*** at 312-13. Empirical research demonstrates that people are "incapable of evaluating the strength of evidence independently of their prior beliefs." ***Id.***

In this case, Moertl knew from his briefing by Selk and from Haynor's own admissions that Haynor had taken three different CNS depressants before driving. "Confirmation bias" suggests that when Moertl performed the Drug Recognition Protocol, he would nonconsciously look for evidence to support his hypothesis that Haynor was operating under the influence of drugs.

> calling for an examination for muscle rigidity as well—is "scientific" in the sense that we use the term when deciding whether to scrutinize evidence to ascertain if it has gained sufficient acceptance in scientific circles. The admissibility of evidence based on the use of nystagmus testing is not a question that we have previously addressed directly, but the issue has been under scrutiny in other courts. It is, of course, obvious that the effectiveness of a nystagmus test as an element of an evaluation to determine drug impairment is not universally accepted. Indeed, had the experts been in agreement, there would have been no reason for the hearing.

Id. at 584 (citations omitted).

¶25 The Minnesota Supreme Court went on to explain the purpose of the Drug Recognition Protocol:

> [F]ollowing the protocol does not involve any significant scientific skill or training on the part of the officer. Drug recognition training is not designed to qualify police officers as scientists but to train officers as observers. The training is intended to refine and enhance the skill of acute observation which is the hallmark of any good police officer and to focus that power of observation in a particular situation. For example, the protocol requires the officer to observe the suspect's performance of motor skill tests designed to reveal motor skill deficiencies of the kind one would expect to find if the subject were "under the influence" of or impaired by the presence of some drug.

Id. at 585. Without the benefit of a record contradicting the comprehensive record developed in Minnesota, we see no reason to reject the Minnesota Supreme Court's grudging acceptance of the Drug Recognition Protocol. However, we add the strong caveat that the Drug Recognition Protocol is not based on any science. Rather, it only improves a police officer's observational skills.[8]

[8] We enthusiastically endorse the Minnesota Supreme Court's warning and suggestion:

(continued)

¶26 In fact, we have expressed the same skeptical acceptance of FSTs:

> Other than the bare assertion that the recommended standardized tests are both scientifically reliable and valid, the record contains no indication that they are based on science. Any scientific explanation for *why* the standardized procedures yield any particular result is completely absent. Standardization may lead to reliability in the sense that where examiners look for the same "clues" to shape their observations of the subject, their observations are likely to be more similar. Similarity does not equate to more correct observations, however. "The mere fact that the NHTSA studies attempted to quantify the reliability of the field sobriety tests in predicting unlawful [blood alcohol contents] does not convert all of the observations of a person's performance into scientific evidence." ***State v. Meador***, 674 So.2d 826, 831-32 (Fla. Dist. Ct. App. 1996). The evidence before us simply does not allow us to conclude that following the NHTSA protocol yields scientifically correct results.

Wilkens, 278 Wis. 2d 643, ¶19.

> In general it seems to us misleading for the state to present the officer as a "Drug Recognition Expert." That appellation suggests that there is something scientific about the officer's testimony, thus requiring the court to determine whether the scientific underpinnings of the testimony are adequately accepted in scientific circles. We are of the opinion, however, that the protocol in question does not demand the kind of scrutiny required for the presentation of some novel scientific discovery or technique. The real issue is not the admissibility of the evidence but the weight it should receive, and that is a matter for the jury to decide without being led to believe that the evidence is entitled to greater weight than it deserves. Therefore, in the courtroom the officer shall not be called a "Drug Recognition Expert." Perhaps the officer can be called a "Drug Recognition Officer" or some other designation which recognizes that the officer has received special training and is possessed of some experience in recognizing the presence of drugs without suggesting unwarranted scientific expertise.

State v. Klawitter, 518 N.W.2d 577, 585 (Minn. 1994).

¶27 However, despite our skepticism, we reject Haynor's argument that the tests administered by Selk and Moertl are unreliable and the court erred in considering them. Our rejection of Haynor's argument is based primarily on the fact that the general standard for admissibility in Wisconsin is "very low." ***Id.***, ¶14. The keystone is simply relevancy. ***Id.*** The evidence is admissible 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. The reliability of the evidence is a "question of weight and credibility for the trier of fact to decide." ***Wilkens***, 278 Wis. 2d 643, ¶23.[9]

SUFFICIENCY OF THE EVIDENCE

¶28 Haynor's final assault on his conviction is a challenge to the sufficiency of the evidence. He argues that the judge's assertion of the case being "very, very close" indicates that the City did not show by clear, satisfactory and convincing evidence that Haynor was incapable of driving safely on the morning

[9] This court recognizes that it is bound by precedent. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). If it was not, it would abandon the current relevancy test for the admission of scientific, technical and other specialized evidence. ***State v. Peters***, 192 Wis. 2d 674, 687-88, 534 N.W.2d 867 (Ct. App. 1995). The problem with the relevancy test is that it does not require the reliability of the underlying scientific evidence be established. ***Id.*** at 688. It would adopt some form of a reliability test embodied either in ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923), or the combination of ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), and ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137 (1999).

The reason for this change in thinking is that we instruct our jurors, "you are to search for the truth." WIS JI—CRIMINAL 140. And it has become a truism in Wisconsin jurisprudence that "[t]he administration of justice is and should be a search for the truth." ***Garcia v. State***, 73 Wis. 2d 651, 655, 245 N.W.2d 654 (1976). A fact finder cannot search for truth if it is overwhelmed with "junk science." In the search for the truth, especially in the criminal context with its constitutional implications and liberty interests, it is not too much to require that expert testimony be accurate, valid and reliable.

of his accident. And he offers an alternative explanation for the accident: "the unfamiliar nature of the road, the deluge of rain, wet driving conditions and low visibility, combined with [his] speed."

¶29 As we earlier pointed out in ¶16, *supra*, this court accords great deference to the trier of fact and must examine the record to find facts that uphold the fact finder's decision to convict. *See* ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. Should the record support more than one inference, we must accept the inference the fact finder drew unless the evidence upon which it is based is incredible as a matter of law. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). We may not overturn the conviction even if we believe the fact finder should not have found guilt if there exists any possibility that the fact finder could have reasonably drawn the inferences appropriate to a finding of guilt. ***Id.*** at 507.

¶30 We are satisfied from the evidence we previously summarized that, at the time of the accident, Haynor was under the influence of one or more drugs to a degree which rendered him incapable of safely driving at the time he drove his Honda sedan into the power pole.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.