

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2012

Diane M. Fremgen
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. 2011AP2959

Cir. Ct. No. 2011TR1684

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF MARATHON,

PLAINTIFF-RESPONDENT,

V.

PAUL R. DEBUHR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY B. HUBER, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Paul DeBuhr appeals a judgment of conviction for operating while intoxicated, first offense. DeBuhr argues the circuit court erroneously permitted expert testimony on retrograde extrapolation. We affirm.

BACKGROUND

¶2 Deputy Eric Heggelund found DeBuhr and his vehicle in a ditch at approximately 6:30 a.m. Heggelund observed DeBuhr's vehicle was not running and the hood was not warm. An Intoximeter test was administered to DeBuhr at approximately 7:50 a.m. The result indicated DeBuhr's alcohol concentration was .12 grams of alcohol per 210 liters of breath.

¶3 Marathon County charged DeBuhr with operating while intoxicated and operating with a prohibited alcohol concentration, both as first offenses. DeBuhr filed a motion in limine, asserting the Intoximeter test result was not admissible at trial because the test was taken after three hours of any alleged driving. *See* WIS. STAT. § 885.235(1g) (“evidence of the amount of alcohol in the person's breath ... is admissible ... if the sample was taken within 3 hours after the event to be proved”). Specifically, DeBuhr argued he last operated his vehicle around midnight and the test was administered at 7:50 a.m.

¶4 The County conceded DeBuhr's driving took place outside the test's three-hour time limitation. However, it asserted that, pursuant to WIS. STAT. § 885.235(3), the evidence would be admissible if expert testimony established its probative value. The County argued it would prove the probative value of the test result through expert testimony on retrograde extrapolation.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 DeBuhr objected, asserting retrograde extrapolation was “not proper science.” DeBuhr argued that, because the Wisconsin Legislature had recently amended WIS. STAT. § 907.02 to adopt the *Daubert*² reliability standard for expert testimony, the County would need to qualify its expert under *Daubert* before trial.

¶6 The court ordered the County to submit documentation and analysis as to why it believed its expert’s testimony on retrograde extrapolation would satisfy WIS. STAT. § 907.02. The court gave DeBuhr time to respond, and it determined it would “make my decision based on the paper work I receive from you two.”

¶7 In its circuit court brief, the County argued the evidence was reliable and admissible because “retrograde extrapolation has been successfully used in Wisconsin courtrooms for decades” and it “is firmly established as scientific law.” The County cited *State v. Fonte*, 2005 WI 77, ¶18, 281 Wis. 2d 654, 698 N.W.2d 594, as an example of where the court allowed the state’s expert to use retrograde extrapolation to show the defendant’s alcohol concentration at the time of the accident. The County also cited cases from other jurisdictions that have recognized the scientific validity of retrograde extrapolation. Finally, the County asserted it would call Susan Hackworthy, who is the Wisconsin Department of Transportation’s chemical test section chief, as an expert witness to testify about retrograde extrapolation. It outlined Hackworthy’s education, training, and work

² *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993). Effective February 1, 2011, the legislature amended WIS. STAT. § 907.02 to adopt the *Daubert* reliability standard as embodied in Federal Rule of Evidence 702. See 2011 Wis. Act 2, § 34m; see also *260 N. 12th St., LLC v. State of Wisconsin DOT*, 2011 WI 103, ¶55 n.5, 338 Wis. 2d 34, 808 N.W.2d 372.

experience, and argued she was qualified to testify and offer an opinion about retrograde extrapolation.

¶8 DeBuhr did not file a response to the County’s brief. At the admissibility hearing, the court determined Hackworthy would be permitted to offer an opinion based on retrograde extrapolation. It found retrograde extrapolation was “an accepted and valid scientific theory in Wisconsin and that it has been around for many years and both defendants and prosecutors rely on it.” It also determined that, after reviewing Hackworthy’s credentials, “she has the experience, skill, training, [and] education to qualify her to testify.”

¶9 At trial, Hackworthy testified that, given DeBuhr’s 7:50 a.m. alcohol concentration of .12, she was able to use average person alcohol absorption and elimination rates to extrapolate that DeBuhr’s alcohol concentration at 12:30 a.m. was between .23 and .25. The jury found DeBuhr guilty of operating while intoxicated. He was acquitted of operating with a prohibited alcohol concentration.

DISCUSSION

¶10 On appeal, DeBuhr argues the court erroneously exercised its discretion by permitting Hackworthy to testify and offer an opinion about retrograde extrapolation. Historically, Wisconsin circuit courts have had broad discretion to admit expert testimony. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. There is no basis to conclude that this standard changed after WIS. STAT. § 907.02 was amended, and DeBuhr does not argue the discretionary standard no longer applies. We review a circuit court’s discretionary determination under the clearly erroneous standard. *Id.* We 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.” *Id.*

¶11 WISCONSIN STAT. § 907.02 governs the admissibility of expert testimony. That statute provides, in relevant part:

(1) 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.

WIS. STAT. § 907.02(1).

¶12 DeBuhr argues the circuit court erred by admitting Hackworthy’s retrograde extrapolation testimony because it never determined whether Hackworthy’s testimony was based on sufficient facts or data or the product of reliable principles and methods, and it never considered whether Hackworthy applied the principles and methods reliably to the facts of the case. DeBuhr also argues Hackworthy was not qualified to testify about retrograde extrapolation and her opinion was not based on sufficient facts or data.

¶13 At the outset, we observe that DeBuhr was given the opportunity to raise his concerns about Hackworthy’s testimony and retrograde extrapolation in the circuit court but failed to do so. DeBuhr never responded to the County’s brief in support of admitting the testimony and never offered any argument in support of his earlier assertion that he believed retrograde extrapolation was “not proper science.” As a result, the circuit court’s admissibility determination was made without any input from DeBuhr. The County, in its appellate brief, argues DeBuhr’s failure to raise his arguments before or during the admissibility hearing

constituted a concession that the testimony was admissible. On appeal, DeBuhr failed to file a reply brief in response to this argument. Therefore, it is conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶14 However, even on the merits, we conclude the circuit court properly exercised its discretion by admitting the testimony. As the County argued in the circuit court and on appeal, when determining the reliability of expert testimony, a court is permitted to take judicial notice of scientific methods, techniques, and theories that are firmly established. *See Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 592 n.11 (1993). Here, the circuit court determined retrograde extrapolation was reliable, and therefore admissible, because it had been used by litigants in Wisconsin courtrooms for decades. *See, e.g., Fonte*, 281 Wis. 2d 654, ¶18. We conclude the circuit court offered a reasoned explanation as to why it determined retrograde extrapolation was reliable and admissible pursuant to WIS. STAT. § 907.02.³

¶15 As to DeBuhr's arguments that the court failed to determine Hackworthy was qualified to give expert testimony, we first observe that DeBuhr stipulated to Hackworthy's expert qualifications at trial. *See Siegel v. Leer, Inc.*, 156 Wis. 2d 621, 628, 457 N.W.2d 533 (Ct. App. 1990) ("A party will not be heard to maintain a position on appeal inconsistent with that taken in the trial court."). Further, DeBuhr never objected to Hackworthy's ability to testify about

³ Although the court explained it determined retrograde extrapolation was reliable because it has been used in Wisconsin courtrooms for decades, we note that when used in past cases, retrograde extrapolation's evidentiary admission was based on relevancy instead of reliability. However, DeBuhr does not argue the court improperly took judicial notice of past courtroom use.

retrograde extrapolation; his objection was only to retrograde extrapolation itself—specifically, that it was “not proper science.”

¶16 In any event, at the admissibility hearing, the court determined Hackworthy was qualified to offer an opinion about retrograde extrapolation because the credentials submitted by the County showed she had “the experience, skill, training, [and] education to qualify her to testify.” Although DeBuhr points out that these credentials do not list any specific retrograde extrapolation expertise and that the circuit court never explicitly stated why these credentials permitted Hackworthy to testify about retrograde extrapolation, we conclude Hackworthy’s testimony at trial established her expertise in this area. *See Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493 (appellate court will independently review record to determine whether facts support court’s determination). At trial, in addition to offering a detailed explanation about retrograde extrapolation and how she used the method in this case, Hackworthy testified on cross-examination about other experts’ writings and opinions on retrograde extrapolation. She was qualified to give expert testimony about retrograde extrapolation.

¶17 Finally, DeBuhr objects to the admission of Hackworthy’s trial testimony because he asserts it was “not predicated on sufficient facts and data” as required by WIS. STAT. § 907.02(1). He points out that Hackworthy’s retrograde extrapolation testimony used average person alcohol absorption and elimination rates, did not take into account other factors that could impact an individual’s alcohol concentration, and was not specifically tailored to DeBuhr.

¶18 DeBuhr’s arguments, however, go to the weight and credibility of Hackworthy’s testimony as opposed to its admissibility. First, Hackworthy’s

testimony was based on sufficient facts and data. She testified she used the average person alcohol absorption and elimination rates to extrapolate that, given DeBuhr's 7:50 a.m. alcohol concentration of .12, his probable alcohol concentration at 12:30 a.m. was between .23 and .25.

¶19 On cross-examination, Hackworthy conceded that she did not know DeBuhr's alcohol absorption and elimination rates and that she could not state with precision DeBuhr's alcohol concentration at the time of driving. She also agreed other factors could affect an individual's alcohol concentration, such as hydration or body fat, and conceded that, because she used average rates, none of these factors were specifically considered in her calculations. DeBuhr properly cross-examined Hackworthy on her opinion.

By the Court.—Judgment affirmed.

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

