

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

OCTOBER 25, 1995

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

NOTICE

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No. 95-0851

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF OSHKOSH,

Plaintiff-Respondent,

v.

ROSE M. FORBES,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Affirmed.*

ANDERSON, P.J. Rose M. Forbes appeals from a judgment of conviction of operating a motor vehicle with a prohibited alcohol concentration contrary to § 346.63(1)(b), STATS. We affirm the conviction and conclude that the trial court did not err in limiting the scope and content of Forbes's closing argument.

At the conclusion of trial, Forbes argued that she should be allowed, in closing arguments, to present her defense that the chemical test

result reported by the Intoxilyzer 5000 was unduly enhanced by condensation which accumulated in the machine's mouthpiece. Her argument was based on the inference that when saliva, which has a much higher alcohol concentration than one's breath, is left to accumulate on the mouthpiece, the results are subsequently skewed since the alcohol is picked up when deep lung air passes over it. Forbes contended that the contamination was similar to the contamination which occurs during the calibration check on the machine, in which air bubbles pass through the simulator solution at the back end of the machine and are contaminated by 0.10% of alcohol.

Although the trial court heard Forbes's defense, it would not permit Forbes to make the argument to the jury in closing statements because expert witnesses were needed to establish that the test result was skewed by the saliva. The court reasoned, "You can't testify in your closing arguments as to what may or could have happened, or how the results could be skewed by, by saliva on the mouthpiece." Since no evidence or testimony had been provided about the internal components of the machine to prove the results could have been skewed by saliva on the mouthpiece, the trial court prevented Forbes from arguing facts not included in the evidence.

Instead, the court permitted Forbes to argue the inference that the test results did not correspond to Forbes's driving, in so much that the officer would have noticed by her driving that she was intoxicated if she actually had a 0.19% alcohol content, twice the legal limit.

The jury subsequently convicted Forbes on two counts – operating

a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration. Forbes appeals, arguing that the trial court erred in limiting the scope and content of her closing argument based on the absence of expert testimony to support her theory of how the chemical results were skewed.

Standard of Review

As a general rule, the content, duration and form of closing arguments are within the trial court's sound discretion. *State v. Lenarchick*, 74 Wis.2d 425, 457, 247 N.W.2d 80, 97 (1976). Absent an unreasonable exercise of this discretion, the trial court's ruling will be affirmed on appeal. See *Wingad v. John Deere Co.*, 187 Wis.2d 441, 454, 523 N.W.2d 274, 279 (Ct. App. 1994). Proper exercise of discretion requires the trial court decision to have a reasonable basis, be based upon the facts in the record, and be in accord with accepted legal standards. See *id.* at 454-55, 523 N.W.2d at 279-80. In addition, it is within the trial court's discretion as to whether expert testimony should be admitted. *State v. Hamm*, 146 Wis.2d 130, 142-43, 430 N.W.2d 584, 590 (Ct. App. 1988).

Although Forbes argues that a determination of whether expert testimony is required is a question of law to be reviewed de novo, no case law backs this contention. The cases cited by Forbes deal with issues of res judicata and collateral estoppel as matters of law reviewed de novo, not matters concerning the trial court's requirement of expert testimony.

I. Expert Testimony Requirement

First, it is essential to recognize that expert testimony is required if the matter is “complex and esoteric” and “not within the realm of ordinary experience and lay comprehension.” *White v. Leeder*, 149 Wis.2d 948, 960, 440 N.W.2d 557, 562 (1989); see also *Wingad*, 187 Wis.2d at 456, 523 N.W.2d at 280.

In *T.A.T. v. R.E.B.*, 144 Wis.2d 638, 654, 425 N.W.2d 404, 411 (1988), the supreme court concluded that the validity and reliability of test results should not be argued to the jury in closing statements where there is no basis in the record, in expert testimony or other explanatory evidence to attack the test. Similarly, although juries may draw inferences to reach their conclusions, the inferences must be based on “evidence adduced at trial.” *State v. Fettig*, 172 Wis.2d 428, 448, 493 N.W.2d 254, 262 (Ct. App. 1992).

Forbes contends that the single inference to be drawn by the jury to accept her argument as valid could be made without scientific knowledge, based solely on testimony of how the Intoxilyzer 5000 functions. However, it is our belief that expert testimony is needed since breath sample contamination is beyond a lay person's everyday knowledge and comprehension.

Differences may exist between the condensation found in the machine's mouthpiece and a laboratory-prepared testing sample, especially if the saliva contained other contaminants. Additionally, no evidence has been provided to support Forbes's contention that the front and back of the machine work in the same way. The officer contended that there were baffles in the mouthpiece to prevent saliva from entering the machine, but use of the baffles in the back end was never established by Forbes. Therefore, many questions

remain concerning the design of the machine and the safeguards used to prevent contamination that cannot be left for the jury to infer.

According to Forbes, six different parts of the officer's testimony, when linked together, are sufficient for the jury to draw the inference that her breath sample was contaminated.¹ Based on *T.A.T.*, there must be some explanatory evidence or expert testimony to verify a conclusion argued in closing arguments. See *T.A.T.*, 144 Wis.2d at 654, 425 N.W.2d at 411. However, the testimony alluded to by Forbes essentially builds inference upon inference leading to a conclusion that was never presented during trial.

¹ Forbes contended in her appellate brief that the six following excerpts from Officer Wilson's testimony are a foundation to her conclusion that saliva in the mouthpiece contaminated the lung sample:

- (1) Officer Wilson agreeing that the gathering of a breath test sample is a "critical stage" in breath analysis because "if [the gathering] procedures are not followed properly and error gets in, it can throw off the test result...."
- (2) Officer Wilson admitting that when an individual exhales into the Intoxilyzer, the mouthpiece "fogs up" with "a concentration that comes from the moisture in [the subject's] air that they breathe out."
- (3) Officer Wilson discussing the design of the mouthpiece and acknowledging that it is designed with "baffles" which serve the purpose of keeping "contaminants like saliva" out of the machine.
- (4) Based upon the information in the State of Wisconsin's breath test operator's training manual, Officer Wilson acknowledging that "saliva has a twelve percent higher concentration of alcohol in it than blood ...," and "that blood has twenty-one hundred times more alcohol in it than [a] sample of breath."
- (5) When discussing how the Intoxilyzer 5000 performs a calibration check, Officer Wilson stating that the machine tests a sample of air which has bubbled up through a solution of water containing 0.10% ethanol.
- (6) Officer Wilson acknowledging that it is the *air* bubbling up through the solution and *not* the solution itself which is used to perform the calibration check. [Citations omitted.]

Based on the inferences needed to be drawn from the testimony and lack of evidence concerning the interworkings of the Intoxylizer 5000, the argument Forbes wanted to make needed to be supported by expert testimony. Therefore, we affirm the trial court's decision to require expert testimony and find that the trial court did not use its discretion unreasonably by requiring expert testimony to verify Forbes's argument.

II. Scope and Content of Closing Arguments

Closing arguments are limited to fair comment on the facts of the record; however, the introduction of new evidence or arguing facts not found in the evidence, is inappropriate. *State v. Richardson*, 44 Wis.2d 75, 83, 170 N.W.2d 775, 780 (1969) (citing *Flamme v. State*, 171 Wis. 501, 507, 177 N.W. 596, 598 (1920)).

The court, during jury instructions, requested the jury to “Consider carefully the closing arguments of the attorneys, but [recognize] their arguments and conclusions and opinions are not evidence. Draw your own conclusions and own inferences from evidence received and decide upon your verdict according to the evidence under the instructions given to you by the Court.”

Although the trial court instructed the jury to make its own conclusions, allowing Forbes to make her contamination argument would have enabled Forbes to argue facts not included in the evidence—facts that the court found could only be provided by expert testimony.

We conclude that the trial court properly limited the scope and content of Forbes's closing argument. Therefore, the trial court did not unreasonably exercise its discretion in limiting Forbes's closing argument.

By the Court. – Judgment affirmed.²

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

² Since the trial court's decision is affirmed, we do not need to reach the City's contention that the error, if any, in this case is harmless and the record contains other sufficient evidence to sustain Forbes's conviction.