

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 99-1230-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LANA LANSER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

¶1 SNYDER, J. Lana Lanser appeals from a conviction of driving with a prohibited alcohol content (BAC), third offense, contrary to § 346.63(1)(b), STATS.¹ Lanser contends that the trial court erred by limiting her cross-

¹ The jury returned a verdict of not guilty to a charge of operating a motor vehicle while intoxicated contrary to § 346.63(1)(a), STATS.

examination of the State's blood alcohol test expert and by admitting the blood alcohol test results into evidence. We disagree and affirm the judgment of conviction.

¶2 Lanser was arrested on August 9, 1997, in the city of Elkhorn by Walworth county sheriff's deputies. She was then transported to the Lakeland Hospital where a sample of her blood was obtained for test purposes. Lanser's blood sample was sent to the Toxicology Department of the Wisconsin State Lab of Hygiene where it was tested by chemist Tracy Fritsch.² Fritsch testified that a gas chromatograph test on August 12, 1997, indicated that Lanser's blood alcohol level was .122 grams per 100 milliliters. We first address Lanser's complaint that the trial court improperly denied her an opportunity to cross-examine Fritsch as to the integrity of the process used to obtain and test her blood sample.

A. Limiting State Expert Cross-Examination

¶3 Lanser contends that she has the right to attack the reliability of the blood alcohol testing process as well as the blood test results. We agree. While "a chemical test specified by a statute may not be deemed unreliable as a matter of law," *City of Madison v. Bardwell*, 83 Wis.2d 891, 900, 266 N.W.2d 618, 622 (1978), a defendant may call witnesses and present evidence to challenge the reliability of the testing procedure used. *See County of Milwaukee v. Gliniecki*, 123 Wis.2d 462, 367 N.W.2d 239 (Ct. App. 1985) (accuracy of breathalyzer test results due to radio frequency interference); *see also State v. McManus*, 152

² Lanser does not contest that Fritsch is qualified as an expert chemist and blood alcohol test analyst employed at the State Lab of Hygiene.

Wis.2d 113, 447 N.W.2d 654 (1989) (accuracy of test results from limited portion of test subject's breath sample).

¶4 However, Lanser did not call an expert witness or present evidence to challenge the reliability of the gas chromatograph process or to challenge Fritsch's testimony. The trial court did not preclude Lanser from cross-examining Fritsch or from presenting a defense, ruling instead on the State's objections as to the relevancy of Lanser's cross-examination questions. Therefore, we address Lanser's concerns by applying the standards of review applicable to a trial court's evidentiary rulings during trial.

¶5 "Evidence which is not relevant is not admissible." Section 904.02, STATS. A defendant does not have a constitutional right to present irrelevant evidence. See *State v. Robinson*, 146 Wis.2d 315, 332, 431 N.W.2d 165, 171 (1988). The decision to admit or exclude evidence is a matter of trial court discretion. See *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). The scope of cross-examination for impeachment purposes is also discretionary with the trial court. See *Rogers v. State*, 93 Wis.2d 682, 689, 287 N.W.2d 774, 777 (1980). An erroneous exercise of discretion will not be found if there is a reasonable basis for the trial court's ruling. See *Pharr*, 115 Wis.2d at 342, 340 N.W.2d at 501.

¶6 Lanser contends that the trial court erroneously exercised its discretion by sustaining the State's objections during cross-examination of Fritsch concerning: (1) the use of cleaning swabs containing alcohol in obtaining blood samples from test subjects; (2) the disapproval of the use of such swabs in other state jurisdictions; and (3) the quality control of gas chromatograph blood alcohol test results in labs other than the lab employing Fritsch as a chemist. We will

sustain a discretionary decision if the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rationale process, reached a conclusion that a reasonable judge could reach. See *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

1. The Test Kit Swab

¶7 The prosecutor, Julie Salvin, raised the issue of the swab used to obtain Lanser's blood sample during her direct examination of Fritsch:

Q You said in the kit there's contained a swab. Could you indicate what that is and what it's for?

A It's like a wet nap. It's used for antiseptic on the arm. It has benzalkonium chloride, and also a small amount of alcohol that the benzalkonium chloride is dissolved in.

Q And is that swab contained in the kit, if that is used, will that in any way affect the results of the test?

A If it's run correctly, no.

Q And have you done any testing in the lab on these swabs?

A We have done some in-house testing on the alcohol content of the swab. If the whole swab was put into the tube with the blood, it would only have an effect of about point 01.

Q And would that increase the amount of alcohol by point 01 if the swab was placed in the tube with the blood?

A Not necessarily. If anything, it would probably dilute the alcohol sample because you are adding a little more volume.

Q So, in other words, would the alcohol sample ... be inaccurate if that swab was misused, is that possible?

A It could be.

Q Is it more likely to dilute the solution or is it more likely to increase the blood alcohol?

A It's probably more likely to decrease, but pretty much a negative amount.

Q So either way, whether it was increased or decreased, it would be almost an immeasurable amount?

A Yes.

Q And it would not be statistically significant to change your opinion about any particular blood sample?

A No. It would not.

¶8 During cross-examination, Lanser's counsel, Richard L. Kaiser, explored Fritsch's swab testimony as follows:

Q Just a few questions about that swab by the way. There is in fact some alcohol that's been detected in those swabs, correct?

A Yes.

Q Now, your department wasn't always so quick to admit that, correct?

A I have only been there four years. I don't know some of the past history.

Q You do not know the history of that swab?

MS. SALVIN: Object as to relevance.

THE COURT: Sustained.

Q Your department has always taken the position—

MS. SALVIN: Objection.

THE COURT: Sustained.

MR. KAISER: I don't understand the objection.

THE COURT: Objection is sustained. It's not relevant.

¶9 Later, in an offer of proof, Kaiser argued that the history of the swab was relevant to the Lanser blood alcohol test results:

I did want to introduce the fact that the Department of Transportation had been on the record Judge for years, and the basis for this is testimony by other experts from their same lab in the past, that this swab contained no alcohol, these kinds of swabs contain no alcohol at all, and that any swab containing any alcohol was off limits. That's why the directions say, do not use a swab with alcohol in it. That they only learned some years after using this swab, that it did contain alcohol, and then their position changed. It's okay to use a swab as long as there's only a little alcohol in

it. The jury ought to be aware of the terrible inconsistency that I believe the State took in that regard, and that their position flipfopped.

The trial court responded, “I know what you want to do, and I don’t think it’s relevant, as far as the issues, as to whether this test was administered properly.”

¶10 “‘Relevant evidence’ means evidence having 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.” Section 904.01, STATS. The fact of consequence here was the impact, if any, of the swab used to obtain Lanser’s blood sample on the blood alcohol test results. We do not believe that the history of the benzalkonium chloride swab and the Department of Transportation’s alleged past position concerning its use were relevant to Lanser’s blood alcohol test results. We are therefore satisfied that the trial court did not erroneously exercise its discretion in making its ruling.

2. *Use of the Cleaning Swab in Other States*

¶11 During Fritsch’s cross-examination, Lanser attempted to impugn the use of the benzalkonium chloride swab by reference to the lack of use of those swabs in other states. We again examine the record to determine the context and the merits of the trial court’s ruling:

Q You have stated, Ms. Fritsch, that part of the quality control that’s suppose[d] to be built into the system, is that you don’t want alcohol introduced into the sample that didn’t come from the driver of the car, correct?

A Right.

Q Now, you have admitted though that the very swab that was used to wipe Ms. Lanser’s arm, as far as you know, had alcohol in it, correct?

A Yes.

Q You are aware of the fact, are you not, that other states do not use this swab for that reason?

MS. SALVIN: Objection, relevance.

THE COURT: Sustained.

Q Well, there is agreement—

MS. SALVIN: Objection.

MR. KAISER: Judge, she has been characterized as an expert. She should know whether there's disagreement in the scientific community about whether these kinds of swabs should do—

MS. SALVIN: What other states do is not relevant.

¶12 The trial court then allowed Kaiser to rephrase his question as follows:

Q You understand, do you not Ms. Fritsch, that there is disagreement in the scientific community among those people who perform these kinds of tests, whether or not this kind of swab should be used?

A I would assume there probably is disagreement. There are studies that show if it's drawn correctly, no matter what the swab is, it should not contaminate the sample.

Q But you agree that there are experts in this field, with as much as, or more training than you, that disagree with whether these swabs should be used?

A I do not know of any personally, but it could be possible.

¶13 During his later offer of proof, Kaiser contended that he wanted to question “the differences among other experts in this field in other states’ alcohol testing programs who say, don’t use the swab because it has alcohol in it” and that it was relevant. The trial court ruled that Fritsch had answered the defense’s question as to a disagreement in the scientific community about the use of such swabs and that Lanser was stuck with that testimony. The trial court properly applied Wisconsin law to the blood test procedure in this case, and its refusal to allow Lanser’s attempt to place the procedure of other states before the jury was not an erroneous exercise of discretion.

3. *Quality Control of Blood Tests in Wisconsin Labs*

¶14 Lanser complains that she was denied the opportunity to ask Fritsch about required quality control tests and the results of such tests in licensed blood testing labs throughout Wisconsin. Again, we look to the trial record to place her complaint in context:

Q [T]his quality control system tests people in different labs to make sure they are getting the results they are suppose[d] to get, right?

A Right.

Q And they do that once a month?

A Wisconsin'[s] program is five times a year, I believe.

Q ... [N]ot everybody doing these kinds of alcohol tests in the lab are tested for quality control purposes each year, are they?

A Everybody in our lab does them at least twice a year.

Q In your lab—I'm talking about around the state.

MS. SALVIN: Objection as to relevance.

THE COURT: Sustained.

Q Well, have you, or have you not, looked at the results of these quality control procedures around the state?

MS. SALVIN: Objection.

Q That you get in on a month to month basis?

MS. SALVIN: Objection as to relevance.

THE COURT: Sustained.

Q Ms. Fritsch, your lab is not the only lab who does this testing, correct?

MS. SALVIN: Objection, relevance.

¶15 Lanser argued to the trial court that the inquiry about the other labs addressed the general reliability and success rate of gas chromatograph testing in Wisconsin and was therefore a relevant inquiry. The State responded that the inquiry had to be limited to Lanser's test as performed by Fritsch in her lab of employment. The trial court sustained the State's objection as to relevance. Later,

during the offer of proof, Lanser asserted her “right to cross examine [Fritsch] about her knowledge about quality control results that her Department receives from labs around the State.” When Kaiser was asked by the trial court to cite to precedent in support of his position that the evidence was relevant and admissible, he responded, “I have come to assume that this kind of evidence is admissible, because I have done it in other cases.”

¶16 Lanser does not cite in her appellate brief to any authority that evidence of quality control test results in labs other than the lab of her testing is relevant evidence. An issue raised but inadequately briefed is deemed abandoned. *See State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). In addition, while Lanser submits that quality control records of other Wisconsin labs are kept in Fritsch’s lab and that “[t]hese records, generated by the State’s own proficiency testing program established that some labs using gas chromatography produce results well outside acceptable limits,” those records are not in the appellate record. Assertions of fact that are not part of the record will not be considered on appeal. *See Jenkins v. Sabourin*, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981).

¶17 We conclude that the trial court did not erroneously exercise its discretion in ruling that Lanser’s questions to chemist Fritsch about the use of benzalkonium chloride swabs and the quality control of tests in Wisconsin labs in general were not relevant inquiries.

B. Admissibility of Blood Alcohol Test Results

¶18 Lanser contends that the blood alcohol test results were not admissible into evidence because the State failed to comply with § 343.305(5)(b), STATS., which reads in relevant part:

Blood may be withdrawn from the person arrested [for an operating while intoxicated (OWI)] violation ... to determine the presence or quantity of alcohol ... in the blood only by a physician, registered nurse, medical technologist, physician assistant or a person acting under the direction of a physician.

¶19 Lanser maintains that a proper foundation for the admissibility of her test results (State's exhibit 3) was lacking because the person who drew Lanser's blood at Lakeland Hospital was not called to testify. Whether § 343.305(5)(b), STATS., requires the person drawing the OWI evidentiary blood to appear and personally testify that he or she is qualified to do so presents a question of statutory interpretation. We review such questions of law de novo. See *State v. Wilson*, 170 Wis.2d 720, 722, 490 N.W.2d 48, 50 (Ct. App. 1992). We consider matters outside of the statutory language only if the statute is ambiguous. See *State v. Kenyon*, 85 Wis.2d 36, 49, 270 N.W.2d 160, 166 (1978).

¶20 While § 343.305(5)(b), STATS., unequivocally requires that the blood be drawn by a qualified person, it does not specifically address the manner of establishing that qualification. Here, the status of the person drawing the blood was established by the arresting officer, Deputy Alan Gorecki, who testified that he was present at the hospital and observed Lanser's blood being drawn by a technician. State's exhibit 3 was identified by Fritsch as the blood and urine analysis form contained in the blood alcohol kit, and Fritsch recorded Lanser's blood alcohol result of .122 grams per 100 milliliters on the exhibit and signed it.³ The exhibit indicates that the blood specimen was collected by "Jill M. Johnson, MT." We are satisfied that Gorecki's uncontested testimony, corroborated by the blood drawer's entry and signature on the exhibit, sufficiently authenticates that

³ Tracy Fitsch signed the blood analysis report as "Tracy Hanke," Fritsch's name prior to trial.

Lanser's blood sample was drawn by a qualified person as required by § 343.305(5)(b).

¶21 In addition, the admission of Lanser's blood test results evidence is supported by case law. In *State v. Disch*, 119 Wis.2d 461, 470, 351 N.W.2d 492, 497 (1984), our supreme court held that a "blood test derived from a properly authenticated sample by legislative fiat is admissible." A blood analysis is judicially recognized as a scientific method, the result of which carries a prima facie presumption of accuracy. See *id.* at 473-74, 351 N.W.2d at 498-99. When a chemical test result is challenged on the basis of noncompliance with underlying procedures, the result nonetheless carries a "prima facie presumption of accuracy" and is admissible. See *City of New Berlin v. Wertz*, 105 Wis.2d 670, 674, 314 N.W.2d 911, 913 (Ct. App. 1981). Lanser's challenge goes to the weight of the blood alcohol evidence and not to its admissibility. See *id.* at 675 n.6, 314 N.W.2d at 913.

¶22 In sum, we conclude that the trial court did not erroneously exercise its discretion in its evidentiary rulings during Fritsch's cross-examination. Further, we conclude that the evidence is sufficient to establish that a qualified person drew Lanser's blood sample for OWI evidentiary purposes, and that under the law established in *Disch* and *Wertz*, the trial court properly admitted Lanser's blood alcohol test results into evidence.

By the Court.—Judgment affirmed.

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

