

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 23, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-2909-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MILES J. LAUMANN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Reversed and cause remanded with directions.*

WEDEMEYER, P.J.<sup>1</sup> Miles J. Laumann appeals from a judgment entered after a jury convicted him of operating a motor vehicle while intoxicated, contrary to § 346.63(1)(a), STATS. He claims that the trial court erred when it

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2), STATS.

excluded documentation showing that the intoxilyzer 5000, which was used to test Laumann's blood alcohol concentration, had malfunctioned 153 times from January 1, 1995, through May 26, 1998. Because the trial court erroneously exercised its discretion in excluding the proffered evidence, this court reverses the judgment and remands for a new trial.

## I. BACKGROUND

On March 12, 1997, Laumann was driving his motor vehicle at night without its headlights on. Police Officers Scott Geysso and Todd Clementi observed Laumann activate his headlights and change lanes without signaling. Based on this conduct, the officers stopped Laumann. During the stop, the officers observed an odor of an intoxicant, and arrested Laumann for operating a motor vehicle while under the influence of an intoxicant. Laumann was transported to the West Allis Police Department to conduct a blood alcohol test on his breath. Laumann consented to the test. The test result registered a .20 grams of alcohol per 210 liters of breath. Laumann was cited for operating a motor vehicle with a prohibited alcohol concentration.

A jury trial was held in June 1998. Prior to trial, Laumann had provided the State with exhibits he intended to introduce at trial. The State moved to exclude one of the exhibits, a document which indicated that the intoxilyzer 5000 which had been used to test Laumann's breath had malfunctioned 153 times. The trial court granted the motion, ruling that the document was irrelevant and would be confusing without any expert witness to explain it. The trial court did admit into evidence the State's certification reports that assert the intoxilyzer was in perfect working order on January 29, 1997, and on April 22, 1997.

The jury convicted Laumann. He now appeals.

## II. DISCUSSION

Laumann complains about the trial court's ruling relative to admission and exclusion of evidence. He asserts that the trial court erroneously exercised its discretion in excluding as irrelevant a document demonstrating that the intoxylizer used on him had malfunctioned 153 times, even though the trial court found relevant the State's evidence documenting that the intoxylizer used on Laumann was in perfect working order forty-two days before and forty-one days after his arrest.

Admissibility of evidence is a discretionary determination for the trial court. *See State v. Hinz*, 121 Wis.2d 282, 285, 360 N.W.2d 56, 59 (Ct. App. 1984). This court will not reverse a discretionary ruling unless the trial court erroneously exercised its discretion. *See State v. Alsteen*, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982).

After reviewing the record and briefs, this court concludes that the trial court's decision to exclude the document proffered by Laumann constituted an erroneous exercise of discretion.

Relevant evidence is defined as: "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. Wisconsin courts have specifically held that the issue of whether a breath test is reliable is a defense to a drunk driving charge. *See City of New Berlin v. Wertz*, 105 Wis.2d 670, 674, 314 N.W.2d 911, 913 (Ct. App. 1981). The document proffered by Laumann attempted to provide an argument for such a defense. One way to prove whether a breath test is reliable is to challenge the reliability of the intoxylizer. Laumann attempted to offer evidence which showed

the intoxilyzer used on him had malfunctioned 153 times, some before the date of his arrest and some after.

In excluding this evidence, the trial court reasoned that the document did not reflect that the intoxilyzer malfunctioned on the date Laumann was tested and that the malfunctions preceding and following Laumann's test date do not have any tendency to prove that the machine could have malfunctioned on other dates. This, however, is an argument that goes to the weight of the evidence, not its admissibility.<sup>2</sup> Exclusion of the document proffered by Laumann is particularly curious given the admission of the State's certification documents. If the State admits documents asserting the intoxilyzer is reliable because it was tested forty-two days before Laumann's arrest and forty-one days after Laumann's arrest, Laumann must be afforded the same opportunity to admit evidence challenging the reliability of the intoxilyzer.

The State also argues that, even if the evidence is relevant, it should be excluded pursuant to § 904.03, STATS., because it is confusing to the jury. This court disagrees. The document proffered was four pages long and contains four pieces of information: the intoxilyzer serial number, the time of the operational error, the date of the operational error, and the error code, which describes the malfunction. Laumann did not intend to offer the document in a vacuum, but rather intended to use the document in cross-examination of the officer who administered the test.

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<sup>2</sup> Similarly, the other challenges asserted by the State go to the weight of the proffered document; i.e., whether the malfunctions occurred during training, whether the malfunctions are designed to occur to prevent a false reading, and whether the malfunctions occurred while using the intoxilyzer on a subject. The State is free to make these arguments to the jury to challenge Laumann's attempt to attack the reliability of the intoxilyzer.

Based on the foregoing, this court cannot conclude that the “probative value” of the document proffered by Laumann “is substantially outweighed by the danger of ... confusion of the issues.” Section 904.03, STATS. Therefore, this court reverses the judgment and remands for a new trial consistent with this opinion.

*By the Court.*—Judgment reversed and cause remanded with directions.

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

