

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 2009

David R. Schanker
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. 2008AP2125-CR

Cir. Ct. No. 2007CT574

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM P. MEIXELSPERGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
PATRICK TAGGART, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ A jury found William Meixelsperger guilty of operating a motor vehicle while intoxicated as a third offense. Meixelsperger

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.

appeals the resulting judgment of conviction. He argues that the circuit court erred by admitting blood test evidence showing that he had a blood alcohol content above the legal limit. The person who drew his blood did not testify at trial. Meixelsperger challenges the admissibility of the blood test evidence under WIS. STAT. § 343.305(5)(b) and on constitutional grounds. For the reasons that follow, I affirm the circuit court's judgment.

Statutory Challenge

¶2 Meixelsperger challenges the admissibility of the blood test result based on WIS. STAT. § 343.305(5)(b). That statute provides, in pertinent part, that a blood draw must be performed “by a physician, registered nurse, medical technologist, physician assistant or a person acting under the direction of a physician.” Meixelsperger argues that the State failed to establish who actually drew his blood and also that the person who drew his blood was a qualified person under the statute. I disagree.

¶3 The arresting officer testified that he observed Meixelsperger's blood being drawn in the Sauk Prairie Memorial Hospital lab and that he saw the person who drew Meixelsperger's blood filling out the necessary paperwork. A document admitted into evidence showed the date of the blood draw along with the name and signature of the person who performed it, Christina Wuerker. The director of the lab testified that Wuerker was employed as a medical technologist with the lab at the time. Taken together, this evidence was sufficient to establish that Wuerker was the person who drew Meixelsperger's blood and that she was a qualified person under the statute. Meixelsperger points to no evidence to the contrary.

¶4 Meixelsperger apparently interprets WIS. STAT. § 343.305(5)(b) as also requiring Wuerker to appear in person and testify to the particular procedures she used to draw the blood, at least in situations like the one here, where the officer observing the blood draw was inexperienced in such matters. However, nothing in § 343.305(5)(b) imposes such a requirement for the *admissibility* of the blood test result. Meixelsperger of course remained free to attack the *weight* of that result by, for example, attempting to elicit evidence of some flaw in the procedure or arguing to the jury that the State’s failure to produce Wuerker cast doubt on the result.

Constitutional Challenge

¶5 For his constitutional argument, Meixelsperger relies on *Crawford v. Washington*, 541 U.S. 36 (2004).

The [*Crawford*] Court determined that the Confrontation Clause bars admission of an out-of-court-testimonial statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine the declarant with respect to the statement....

The Court, unfortunately, did not spell out a comprehensive definition of what “testimonial” means.... The Court ... noted that “testimony” is typically a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”

State v. Jensen, 2007 WI 26, ¶¶15-16, 299 Wis. 2d 267, 727 N.W.2d 518 (citations omitted). Meixelsperger asserts that Wuerker’s name and signature, which both appeared on the document referenced above, are “testimonial” within the meaning of *Crawford*. He argues that the blood test result, without Wuerker’s in-person testimony, was inadmissible hearsay that violated his right to confront witnesses.

¶6 I decline to address the merits of Meixelsperger’s right-to-confront argument because I agree with the State that Meixelsperger waived this argument by failing to raise it in the circuit court. *See Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶15, 273 Wis. 2d 76, 681 N.W.2d 190 (issues not preserved in the circuit court, even constitutional ones, generally are not considered on appeal). Meixelsperger did not draw the circuit court’s attention to *Crawford* or otherwise apprise the circuit court of a challenge to the blood test evidence based on his constitutional right to confront witnesses. *See* WIS. STAT. § 901.03(1)(a) (“Error may not be predicated upon a ruling which admits ... evidence unless ... a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context”); *see also Zeller v. Northrup King Co.*, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985) (“Without a specific objection which brings into focus the nature of an alleged error, a party does not preserve its objections for review.”).

¶7 Moreover, Meixelsperger’s failure to respond to the State’s waiver argument provides an additional, independent ground for declining to reach the merits of his right-to-confront argument. *See Fischer v. Wisconsin Patients Comp. Fund*, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 (an argument asserted by the respondent and not disputed by the appellant in the reply brief is taken as admitted).

By the Court.—Judgment affirmed.

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

