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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT III**

April 14, 2026

*To:*

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Daniel Joseph Hellman  
Electronic Notice

Marge Kelsey  
Clerk of Circuit Court  
Sawyer County Courthouse  
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John W. Kellis  
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You are hereby notified that the Court has entered the following opinion and order:

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2025AP654-CR                      State of Wisconsin v. Robert J. Jack (L. C. No. 2020CF331)

Before Stark, P.J., Hruz, and Gill, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Robert Jack appeals from a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration (PAC), as a fifth or sixth offense. Jack contends that the circuit court erroneously exercised its discretion when it barred his expert witness from testifying, which in turn denied Jack a meaningful ability to present a defense. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary

disposition. *See* WIS. STAT. RULE 809.21 (2023-24).<sup>1</sup> We reverse the judgment of conviction and remand for further proceedings.

The State charged Jack with operating a motor vehicle while under the influence of an intoxicant (OWI) and PAC, both as fifth or sixth offenses, following a traffic stop during which Jack performed poorly on two standardized field sobriety tests (SFSTs) and refused to perform a third. The complaint alleged that, following his arrest, Jack provided a breath sample for an Intoximeter EC/IR-II machine that showed Jack had a blood alcohol concentration (BAC) of 0.08%. As the result of four prior OWI convictions, Jack was prohibited from driving with a BAC over 0.02%.

Prior to trial, Jack retained Dr. Steven Oakes, a professor who taught both pharmacology and toxicology classes, as an expert witness. Oakes prepared a report in which he: (1) challenged the arresting officer's conclusions as to how many clues of intoxication Jack exhibited during the SFSTs; (2) noted that the arresting officer had not observed any impaired driving; (3) offered the opinion, based upon scientific literature, that there is no reliable correlation between the odor of intoxicants and any particular BAC level; (4) offered the opinion, based upon scientific literature, that SFSTs are not reliable for predicting BAC levels under 0.08%; (5) offered the opinion, based upon scientific literature, that an individual may fail the horizontal gaze nystagmus test for health reasons unrelated to the consumption of alcohol; (6) offered the opinion, based upon Jack's assertion that he had osteopathic arthritis in his knees, that the results of the walk and turn test were invalid; (7) offered the opinion, based upon alcohol

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2023-24 version.

absorption rates and Jack's assertion that he had a drink immediately before driving, that Jack's BAC would have been higher at the time of the breath test than it was when he was driving; (8) offered the opinion, based upon scientific literature, that breathalyzers such as the Intoximeter can be off by as much as 0.06% when the subject has diabetes, as Jack did; and (9) offered the opinion, based upon all of the above, that there was insufficient evidence to conclude that Jack's BAC was at or above 0.02% when he was driving.

The State moved to exclude Oakes as a witness. The circuit court held a *Daubert* hearing to determine whether Oakes would be allowed to testify. *See generally Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The court determined that Oakes would not be allowed to testify because: (1) Oakes' challenge to the "credibility" of the arresting officer created a danger of confusing the jury; (2) Oakes had "no education, experience, or qualifications relevant to field sobriety testing" or to methods of determining BAC levels related to the Intoximeter; and (3) Oakes' conclusions did not apply "principles and methods reliably to the facts and data of the case" because Oakes did not personally review Jack's medical records or speak with the arresting officer.

On appeal, Jack contends that the circuit court's ruling was based upon a series of clearly erroneous factual findings and erroneous legal premises. First, Jack asserts that Oakes was not challenging the arresting officer's credibility regarding what the officer said he observed. Rather, Oakes was challenging whether the officer's stated observations satisfied the clues of intoxication as they are described in the scientific literature. Second, Jack recounts Oakes' extensive education in the field of toxicology and the specific scientific literature Oakes testified that he had reviewed regarding SFSTs and how breathalyzers—including the Intoximeter used in this case—operate. Third, while the record is incomplete on whether Oakes personally reviewed

Jack's medical records, Jack's trial counsel informed the court that she had discussed the records with Oakes over the phone. Fourth, Jack points to case law holding that an expert may offer opinions based upon proposed scenarios or assumed facts and does not need to have personal knowledge of the facts. See *State v. Giese*, 2014 WI App 92, ¶28, 356 Wis. 2d 796, 854 N.W.2d 687. The accuracy of the assumptions made by the expert then may be an appropriate subject for cross-examination. *Id.* Finally, Jack argues that the court failed to explain how or why any of the peer-reviewed principles or methods described in the scientific literature upon which Oakes relied for his opinions were unreliable.

The State concedes that the circuit court's ruling relied upon at least two clearly erroneous factual findings (including that Oakes was unqualified to offer opinions regarding SFSTs and that he was unqualified to offer opinions regarding how breathalyzer instruments work), and therefore constituted an erroneous exercise of discretion. The State does not defend any of the court's other underlying findings or legal premises. Having reviewed the transcript of the *Daubert* hearing, we accept the State's concession and therefore need not address the basis for the court's ruling further. We conclude that Oakes should have been allowed to testify as to each of the opinions disclosed in his report.

The remaining issue before us is whether the error was harmless. We make that determination de novo, based upon factors such as the frequency of the error; the nature of the State's case and the defense and the importance of the excluded information to either case; the presence or absence of evidence corroborating or contradicting the excluded evidence; and the overall strength of the State's case. *State v. Monahan*, 2018 WI 80, ¶¶31, 35, 383 Wis. 2d 100, 913 N.W.2d 894.

Here, the circuit court excluded Oakes' testimony in its entirety. The ruling therefore encompassed at least nine distinct opinions that Oakes would have offered, rather than one isolated point. Those opinions were critical to the defense's position that neither the Intoximeter result nor the arresting officer's observations before or during the SFSTs provided a sufficient basis to find that Jack's BAC was actually 0.02% or greater while he was driving.

Most significantly, if the jury had accepted Oakes' opinion that that an Intoximeter result may be off by up to 0.06% if the subject is diabetic, it could have found that Jack's BAC was only 0.02% at the time it was tested. If the jury had accepted Oakes' additional opinion that Jack's BAC was higher when his breath was tested than when he was driving, the jury could have found that Jack's BAC was lower than 0.02% when he was driving.

We acknowledge that the jury would not have been required to accept Oakes' opinions or to draw all of the inferences from them that Jack proposes—particularly to the extent that any of those inferences may have been contradicted by the opinions of the State's expert witness. However, it is the State's burden in a harmless error analysis to show beyond a reasonable doubt that the error did not contribute to the verdict. *Id.*, ¶33.

We cannot find beyond a reasonable doubt that a jury would have found Jack guilty if Oakes had been permitted to testify. We therefore conclude that the circuit court's error in excluding Oakes' testimony was not harmless. Accordingly, we reverse the judgment of conviction and remand for further proceedings.

Upon the foregoing,

IT IS ORDERED that the judgment of conviction is summarily reversed and the cause is remanded for further proceedings. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*