

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2018

Sheila T. Reiff
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. 2017AP1510-CR

Cir. Ct. No. 2012CT751

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL E. AYALA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. HANRAHAN, Judge. *Affirmed.*

¶1 BRASH, J.¹ Paul E. Ayala appeals from his judgment of conviction, entered upon a jury's verdict, for operating a motor vehicle while intoxicated (OWI) as a third offense. Ayala argues that the trial court erred in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

excluding the testimony of Ayala's expert witness relating to a medical diagnosis that Ayala intended to use in his defense. The trial court determined that because the expert was a pharmacologist, and not a medical doctor capable of making such a diagnosis, that his testimony in that regard was inadmissible. The State contends that this was a proper exercise of the trial court's discretion. We agree and affirm.

BACKGROUND

¶2 In March 2011 at approximately 4:00 a.m., a Greendale Police Officer observed a vehicle stopped with its engine running, facing westbound in the eastbound traffic lane. The officer spoke with the driver of the vehicle, identified as Ayala, noting that Ayala's speech was slurred and that he seemed confused. The officer also saw that Ayala's vehicle was damaged: a flat tire, two damaged mirrors, and dents in the bumper. When Ayala exited the vehicle, his balance was unsteady, and he performed poorly on the field sobriety tests. Based on those observations, the officer believed that Ayala was intoxicated, and he was arrested for OWI.

¶3 A blood sample taken from Ayala was analyzed. Ayala had no alcohol in his system, but the sample tested positive for zolpidem,² a sedative, in an amount that was over three and one-half times the normal therapeutic range. Ayala also had two over-the-counter antihistamines in his system.

¶4 The case proceeded to trial. Ayala intended to base his defense on a theory of involuntary intoxication. He hired Dr. Esam Dajani, a pharmacologist and toxicologist, as his expert. Dr. Dajani prepared a report indicating that in his

² Zolpidem is commonly known as Ambien.

opinion, Ayala suffered from a medical condition that could have affected his body's ability to absorb the zolpidem, causing it to remain in his stomach for two to three days. Dr. Dajani opined that this issue had caused the build-up of zolpidem in Ayala's system and that, coupled with the antihistamines that Ayala had taken, had caused his impairment at the time he was arrested.

¶5 The State objected to Dr. Dajani's testimony. It argued that Ayala had not been diagnosed with the condition upon which Dr. Dajani had based his opinion, and further, that Dr. Dajani was not qualified to testify regarding this condition since he is a pharmacologist as opposed to a medical doctor trained to make this diagnosis or discuss it.

¶6 The trial court held a *Daubert*³ hearing regarding Dr. Dajani's testimony. In its ruling, the court took issue with the fact that Dr. Dajani's opinion was based on the assumption that Ayala's doctor must have diagnosed him with that particular stomach condition because of another prescription medication that Ayala was taking at the time. However, the court pointed out that this diagnosis was not in Ayala's medical records. Furthermore, the court noted that even if that assumption were correct, there was no proof offered to show that the doctor who prescribed the other medication—an oncologist—was qualified to make that diagnosis. Therefore, the court held that because Dr. Dajani was not qualified to make the diagnosis about Ayala's purported stomach condition, he was precluded from testifying with regard to any opinion "that would flow from that proposed diagnosis[.]"

³ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

¶7 The jury trial was held on April 18th and 19th, 2016. Ayala was the only witness for the defense, and testified that he had not taken any Ambien on the night of his arrest. The jury convicted Ayala of OWI, and the trial court sentenced him to five months in the House of Corrections. This appeal follows.

DISCUSSION

¶8 The sole issue on appeal is whether the trial court properly exercised its discretion when it precluded any testimony by Dr. Dajani relating to a diagnosis of Ayala's alleged stomach condition. "When reviewing a question on the admissibility of evidence, an appellate court must determine whether the [trial] court exercised its discretion in accordance with accepted legal standards and with the facts of record." *State v. Brecht*, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). This court will uphold a discretionary decision "if the [trial] court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Hefty v. Strickhouser*, 2008 WI 96, ¶28, 312 Wis. 2d 530, 752 N.W.2d 820 (citation omitted).

¶9 The admissibility of expert testimony is determined according to the provisions of WIS. STAT. § 907.02. That statute, which is based on the *Daubert* standard, provides:

(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Sec. 907.02(1).

¶10 Under this standard, the trial court acts as a “gate-keeper” to “ensure that the expert’s opinion is based on a reliable foundation and is relevant to the material issues.” *State v. Giese*, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687. The goal of the trial court is to “prevent the jury from hearing conjecture dressed up in the guise of expert opinion.” *Id.*, ¶19. Indeed, in making its assessment of a proposed expert, the trial court enjoys “the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.” *Seifert v. Balink*, 2017 WI 2, ¶64, 372 Wis. 2d 525, 888 N.W.2d 816 (emphasis and citation omitted).

¶11 Here, the trial court effectively utilized its gatekeeper function, explaining very thoroughly the reasoning for its determination that Dr. Dajani was not qualified to testify regarding a purported medical diagnosis that was not included in Ayala’s medical records. In sum, the trial court found that there was no foundation for this assumed diagnosis, and therefore precluded any testimony by Dr. Dajani relating to that issue. *See Giese*, 356 Wis. 2d 796, ¶18; *see also Seifert*, 372 Wis. 2d 525, ¶64. This determination was based on the relevant facts of the case and the proper standard of law for allowing expert testimony. It was therefore not an erroneous exercise of the trial court’s discretion. *See Hefty*, 312 Wis. 2d 530, ¶28. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

