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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROCHELLE ANN DAIN, Appellant.	)	2 CA-CR 2008-0353 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20081154

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, Rochelle Dain was convicted of four counts of aggravated driving under the influence of an intoxicant (DUI). The trial court suspended imposition of sentence, placed her on three years' probation, and ordered her to serve four months in prison as a condition of probation. On appeal, Dain argues the court erred by precluding her expert witness from testifying about an audit report concerning the crime laboratory where her blood samples had been analyzed. For the reasons discussed below, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On December 14, 2007, a Pima County sheriff's deputy stopped the car Dain was driving after observing her driving erratically. Dain admitted she had been drinking and her driver's license had been revoked. The deputy conducted a series of field sobriety tests and arrested Dain for DUI. Another deputy drew a sample of her blood, which was sent to the Arizona Department of Public Safety (DPS) Southern Regional Crime Laboratory for analysis. Subsequent testing of the sample revealed an alcohol concentration of .098. Dain was charged with four counts of aggravated DUI, as follows: count one, DUI while her driver's license was revoked; count two, DUI with an alcohol concentration of .08 or more while her license was revoked; count three, DUI with two or more prior DUI convictions; and, count four, DUI with an alcohol concentration of .08 or more with two or more prior DUI convictions.

¶3 One of the state's witnesses at trial was Seth Ruskin, the DPS criminalist who had analyzed Dain's blood sample. Dain cross-examined Ruskin about a report issued by the Laboratory Accreditation Board of the American Society of Crime Laboratory Directors (ASCLD), detailing the findings of its audit of the crime laboratory, and about other reports and materials DPS had produced for the purpose of persuading the state legislature of the need for a new laboratory. Ruskin testified that ASCLD and DPS had identified problems with the air conditioning and with toxic fumes in sections of the laboratory where evidence was stored but that the laboratory had ultimately passed the ASCLD audit.

¶4 Dain also called an expert, John Lombardi, to give his opinions on the possibility that her blood sample had become contaminated, based on the presence of unexplained spikes in the testing results for the sample. He further testified that the gray test-tube stopper used by the laboratory was permeable by different types of solvents and thus susceptible to contamination. However, when defense counsel questioned Lombardi about the contents of the ASCLD report, the state objected, and the trial court sustained the objection, ruling the report was hearsay. The court also questioned the report's relevance, given that it related to conditions at the laboratory in 2003, five years before Dain's blood was analyzed. The jury found Dain guilty on all four charges, and the court placed her on probation as noted above. This appeal followed.

Discussion

¶5 Dain argues the trial court erred in precluding Lombardi from testifying about the contents of the ASCLD report. We review a trial court's exclusion of evidence for an abuse of discretion and will not reverse on appeal absent clear error and resulting prejudice "sufficient to create a reasonable doubt about whether the verdict might have been different had the error not been committed." *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994).

¶6 Hearsay testimony is generally not admissible. *See* Ariz. R. Evid. 802. But an expert may discuss otherwise inadmissible evidence if it is of the type reasonably relied upon by experts in the same field and forms the basis of his opinion. *See State v. Lundstrom*, 161 Ariz. 141, 145-47, 776 P.2d 1067, 1071-73 (1989); *see also* Ariz. R. Evid. 703. The facts relied upon are admissible not for their truth but for "the limited purpose of showing the basis of the expert's opinion." *State v. Tucker*, 215 Ariz. 298, ¶ 58, 160 P.3d 177, 194 (2007). When used for this limited purpose, "[s]uch testimony is not hearsay." *State v. Smith*, 215 Ariz. 221, ¶ 23, 159 P.3d 531, 538 (2007).

¶7 Here, the trial court found the report was hearsay and precluded Dain from using it to question Lombardi about the evidence-contamination issues in the laboratory.[1] Dain argues the contents of the report were admissible under Rule 703, because they formed

[1]Dain neither moved for the report's admission at trial nor disputed the court's finding that it was hearsay. We therefore do not consider whether it was independently admissible.

the basis of Lombardi's opinions. However, Lombardi's opinions, based on his review of the blood test results and his experience working with the type of test-tube stoppers used by the crime laboratory, were limited to his conclusions that the spikes shown on analysis of Dain's blood sample indicated the sample could have been contaminated and that the stoppers could have admitted such contamination. But Lombardi did not conduct any independent testing of Dain's blood sample, the test-tube stopper, the refrigerator where the sample had been kept, or the ambient air in the laboratory. And he would not speculate about whether contamination had affected the test results in Dain's case. Under these circumstances, the trial court's ruling did not in any way inhibit Dain's ability to elicit Lombardi's opinions.

¶8 Even if we assumed the trial court's ruling was improper, Dain has failed to establish she was prejudiced by the ruling. Ruskin acknowledged the ASCLD report's findings that there had been problems with air conditioning at the laboratory. And he testified that he believed the building had previously been used as a warehouse for helicopter parts and that toxic fumes were still a problem in some areas where evidence was stored. During the bench conference on the state's objection to Lombardi's use of the ASCLD report, Dain stated the contamination issues she intended to ask Lombardi about were "already in evidence" from Ruskin's testimony. The trial court consequently tailored its ruling to permit Dain to "ask [Lombardi] about what . . . Ruskin said. That there are issues that may exist in the laboratory today. Or at the time of this analysis." And pursuant to—or

despite—the court's ruling, Lombardi stated, in reference to Ruskin's prior testimony, that the ASCLD report and the DPS materials had found "issues regarding possible contamination," including an odor of marijuana fumes, a lack of air conditioning in the evidence-storage area, and the possibility of solvent fumes from the building's prior use as a warehouse for storing aircraft parts. We therefore find no merit in Dain's contention that Lombardi's testimony would have been "very different . . . if he had been permitted to rely on the report" or in her assertion that the court's ruling "prevented the jury from properly evaluating the evidence." *See State v. Bass*, 198 Ariz. 571, ¶ 40, 12 P.3d 796, 806 (2000) (error harmless where clear beyond reasonable doubt tainted evidence was "superfluous" and could not have affected verdict).

¶9 To the extent Dain claims the trial court's ruling excluded portions of the report relating to additional sources of contamination and procedures that were not covered by Ruskin's testimony, we are unable to review such a claim because there is nothing in the record to indicate what, if anything, the report said about such additional sources and procedures.[2] Dain did not make an offer of proof as to any such additional findings, the report was not offered in evidence at trial, and the record on appeal does not contain a copy of it. *See State v. Gulbrandson*, 184 Ariz. 46, 59, 906 P.2d 579, 592 (1995) (issue of

[2]Indeed, Dain's failure to question Ruskin about any other possible sources of contamination and her comment that the contamination issues she wished to raise were "already in evidence" from Ruskin's testimony suggest the report identified no additional sources of contamination and no questionable procedures, despite her contention on appeal.

excluded evidence not preserved for appeal in absence of offer of proof); *State v. Herrera*, 174 Ariz. 387, 396, 850 P.2d 100, 109 (1993) (appellate court cannot reverse for prejudicial error without record of excluded evidence); *see also* Ariz. R. Evid. 103(a)(2). Moreover, we presume that matters not included in the record support the trial court's actions. *State v. Miller*, 120 Ariz. 224, 226, 585 P.2d 244, 246 (1978).

Disposition

¶10 For the reasons stated above, we affirm Dain's convictions and sentences.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge