STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1315

State of Minnesota,
Respondent,

vs.

Jeremy James Pexa,
Appellant.

Filed December 24, 2012
Reversed
Stauber, Judge

Rice County District Court
File No. 66CR093146

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Paul G. Beaumaster, Rice County Attorney, Benjamin Bejar, Assistant County Attorney, Faribault, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget K. Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stauber, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

On appeal from his conviction of criminal vehicular operation while having an alcohol concentration of 0.08 or more, appellant argues that (1) the evidence was insufficient to sustain his conviction because the state failed to prove beyond a reasonable doubt that his alcohol concentration was 0.08 or higher at the time of the accident, and (2) he was denied the effective assistance of counsel because counsel failed to request a jury instruction specifically defining causation. Because the district court granted appellant's motion to exclude the state's expert from testifying about retrograde extrapolation, and such testimony was necessary to establish appellant's alcohol concentration at the time of driving, we reverse.

FACTS

On July 22, 2009, M.L. was severely injured when he was struck by a vehicle driven by appellant Jeremy James Pexa. Appellant was charged with criminal vehicular operation (operating a vehicle in a negligent manner while under the influence of alcohol) in violation of Minn. Stat. § 609.21, subd. 1(2)(i) (2008); criminal vehicular operation (operating a vehicle with an alcohol concentration of 0.08 or more) in violation of Minn. Stat. § 609.21, subd. 1(3) (2008); theft of a motor vehicle in violation of Minn. Stat. § 609.52, subd. 2(17) (2008); third-degree driving while impaired (under the influence of alcohol) in violation of Minn. Stat. §§ 169A.26, subd. 1, 609.20, subd. 1(1) (2008); and third-degree driving while impaired (alcohol concentration of 0.08 or more within two hours of driving) in violation of Minn. Stat. §§ 169A.20, subd. 1(5), A.26, subd. 1 (2008).

The complaint was later amended to add a sixth charge of criminal vehicular operation (operating a vehicle with an alcohol concentration of 0.08 or more within two hours of driving) in violation of Minn. Stat. § 609.21, subd. 1(4) (2008).

On the first day of trial, the district court determined that the state violated the rules of discovery by failing to disclose that its expert would be testifying about retrograde extrapolation of a person's blood-alcohol concentration. The court concluded that because of the discovery violation, the state's expert could not testify on that topic. Evidence and testimony was then presented at trial establishing that on the day of the incident, M.L. had been driving around the neighborhood in his ATV putting up signs advertising a garage sale. At about 9:30 p.m., M.L. proceeded to the intersection of Halstad Avenue and 125th Street to put up another sign. Both Halstad Avenue and 125th Street are rural gravel roads with no lane markings, and as Halstad approaches 125th, it slightly inclines and curves. According to M.L., he parked his ATV on Halstad Avenue, mostly in the ditch, but facing north into oncoming traffic. M.L. then left the ATV's lights on while he pounded the post for the garage-sale sign into the grassy ditch about three feet from the edge of the gravel road.

While M.L. was putting up the garage-sale sign, appellant and his friend K.L. were traveling south on Halstad. As appellant and K.L. approached the intersection with 125th Street, K.L. observed the bright lights from M.L.'s ATV. Appellant then swerved to the right to avoid hitting the ATV. In doing so, appellant drove into the ditch and struck M.L. with the front part of his vehicle. The resulting impact caused M.L. to sustain significant injuries.

After the impact, appellant and K.L. stopped to attend to M.L. K.L. called 911 several times, but she had difficulty making a connection due to poor reception. According to K.L., she was eventually able to contact emergency services, and records indicate that a connection was made about 10:00 p.m.

Officer Todd Franklin arrived at the scene shortly after emergency personnel. According to Officer Franklin, appellant admitted that he was the driver of the vehicle that struck M.L. As Officer Franklin talked with appellant, he observed that appellant had watery and bloodshot eyes, and he detected a slight odor of alcohol coming from appellant. Officer Franklin testified that appellant admitted that he drank "two Captain 100's" about an hour before the accident, but that he had not consumed any alcohol after the accident. Officer Franklin then administered the horizontal-gaze nystagmus test, which resulted in six clues of impairment. Officer Franklin claimed that after field testing, appellant admitted that the cocktails "were big ones." Appellant was then arrested for driving under the influence, and a subsequent blood test, taken at 12:05 a.m., revealed appellant's alcohol concentration to be 0.09.

At the close of the state's case, appellant moved for judgment of acquittal on the three counts that alleged an alcohol concentration of 0.08 or more at the time or within two hours of driving because appellant claimed that the blood draw had to be taken within two hours of driving and the state produced no evidence to relate his alcohol concentration within the permitted time frame. The district court denied the motion, concluding that there was sufficient evidence admitted from which a jury could reasonably infer that appellant had an alcohol concentration of at least 0.08 at or within

two hours of driving. The jury subsequently acquitted appellant of all charges except criminal vehicular operation while having an alcohol concentration of 0.08 or more. The district court then sentenced appellant to 18 months in prison, but stayed execution of the 18-month sentence and placed him on probation for up to five years. As a condition of probation, appellant was ordered to serve 90 days in jail. This appeal followed.

D E C I S I O N

Appellant argues that the state presented insufficient evidence to prove beyond a reasonable doubt that his alcohol concentration was 0.08 or higher when his vehicle struck M.L. As the state points out, appellant's "argument on appeal essentially resurrects his motion" for a judgment of acquittal. A defendant may move for judgment of acquittal at the close of evidence for either party if the evidence is insufficient to sustain a conviction. Minn. R. Crim. P. 26.03, subd. 18. On review, an appellate court asks if the evidence was sufficient to support a conviction, an independent inquiry, that considers whether "the facts in the record and any legitimate inferences that can be drawn from them" support a reasonable conclusion that the defendant was guilty of the offense charged. *State v. Tscheu*, 758 N.W.2d 849, 857 (Minn. 2008) (quotation omitted).

Appellant was convicted of criminal vehicular operation in violation of Minn. Stat. § 609.21, subd. 1(3). This statute requires the state to prove that appellant caused injury to another as a result of operating a motor vehicle "while having an alcohol concentration of 0.08 or more." Minn. Stat. § 609.21, subd. 1(3).

Appellant argues that because his alcohol concentration was shown to be 0.09 more than two hours after he struck M.L., and because the state did not introduce any

retrograde-extrapolation evidence, the jury could not infer that appellant's alcohol concentration was at least 0.08 at the time his vehicle struck M.L. We agree. The record reflects that as a sanction for the state's discovery violation, the district court would not allow its expert to testify about retrograde extrapolation of a person's alcohol concentration. As a result, the only evidence to support a conclusion that appellant's alcohol concentration was 0.08 at the time of the accident consisted of: (1) evidence that appellant's alcohol concentration was 0.09 as measured more than two hours after the accident; (2) testimony that appellant stopped drinking approximately an hour before the accident; (3) a deputy's testimony that, based on his experience in investigating over 100 DWIs in his career, the effects of alcohol diminish as time passes without further alcohol consumption; and (4) appellant's admission that he did not consume any alcohol after the accident. There was, however, no evidence or testimony presented relating appellant's alcohol concentration at the time he was tested to his alcohol concentration two-and-a-half-to-three hours earlier when he was driving.

The state argues that the evidence was sufficient to sustain his conviction because a jury could reasonably infer from the evidence presented that appellant had an alcohol concentration of at least 0.08 at or within two hours of driving. But disputes about alcohol consumption are different from alcohol concentration. Assuming sufficient foundation, a lay witness could testify that a person seems "drunk" based on any commonly observed indicia of drinking. Thus, factual disputes about alcohol consumption could be resolved by a jury hearing such a lay witness. But specific numerical alcohol concentration is a scientific matter. In order to determine alcohol

concentration, specific levels of alcohol concentration are introduced through experts who have specific knowledge of anatomy, chemistry, physiology, and timing. This is a scientific matter that is not within the general knowledge of a lay jury. For example, what may not be commonly known is that an individual's alcohol concentration may actually rise for a short time *after* the individual has stopped drinking. *See State v. Favre*, 428 N.W.2d 828, 831 (Minn. App. 1988) ("Because it takes time for alcohol to reach the blood stream, blood alcohol concentration typically peaks some time after drinking."). And there are countless variables and scenarios apart from the amount of alcohol consumed that affect a person's alcohol concentration at any given time. Therefore, it would be impossible for a lay jury to infer a precise level of alcohol concentration at a specific point in time—here the exact time of the accident—without the aid of qualified expert testimony.

Here, the district court, at the time that it granted appellant's motion to disallow the science-based testimony from the state's extrapolation expert, should have contemporaneously dismissed Count 2 (criminal vehicular operation—operating a vehicle with an alcohol concentration of 0.08 or more—in violation of Minn. Stat. § 609.21, subd. 1(3)) because the testimony of the expert was necessary to establish appellant's alcohol concentration as of a specific time through scientific evidence. The lack of such evidence precluded the jury from inferring a specific alcohol concentration at the time of the accident, which, in this case, occurred some two-and-a-half-to-three hours before testing. The expert testimony was necessary, based in whole or in part on extrapolation science, which would educate and assist the jury in determining appellant's specific

alcohol concentration at the time of driving. After the scientific evidence was ruled to be inadmissible due to the state's discovery violation, the state cannot substitute a nebulous inference standard for the proof-beyond-a-reasonable-doubt standard. And, we further note that there would have been no critical impact on the state's case due to the dismissal of the charge because five of the six charges in the complaint remained. *See State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987) (Critical impact can be shown when "the lack of the suppressed evidence completely destroys the state's case.").

Finally, although not cited by either party, we acknowledge this court's 1988 decision in *State v. Larson*, which held that there is always some "lag time" between an arrest and the testing, and extrapolation testimony is unnecessary to prove alcohol concentration at the time of driving "as long as the delay between apprehension and testing is reasonable." 429 N.W.2d 674, 676-77 (Minn. App. 1988), *review denied* (Minn. Nov. 8, 1988). But in *Larson*, the delay between apprehension and testing was 77 minutes. *Id.* at 675. In contrast, the delay between apprehension and testing in this case was almost 120 minutes. And the delay between driving and testing was about two-and-a-half hours. Moreover, there was no claim in *Larson* that the defendant's alcohol concentration had not yet peaked at the time of driving. But here, appellant contends that his alcohol concentration had not yet peaked at the time of driving, making it impossible for the jury to infer his alcohol concentration without scientific extrapolation evidence. Therefore, we conclude that *Larson* is distinguishable and decline to follow it.

Because the district court granted appellant's motion to exclude the state's expert from testifying about retrograde extrapolation, and because such testimony was necessary

to establish appellant's alcohol concentration at the time of driving, we reverse appellant's conviction of criminal vehicular operation while having an alcohol concentration of 0.08 or more. And because we reverse appellant's conviction, we need not address appellant's claim that he received ineffective assistance of counsel.

Reversed.