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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2438**

State of Minnesota,
Respondent,

vs.

Franz J. Suber,
Appellant.

**Filed April 8, 2008
Reversed
Minge, Judge**

Chisago County District Court
File No. CR-05-1654

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janet Reiter, Chisago County Attorney, Jessica L. Stott, Assistant County Attorney, 313 North Main Street, Suite 373, Center City, MN 55012 (for respondent)

John M. Stuart, State Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges his conviction of second-degree driving under the influence of a controlled substance, arguing that (a) the district court violated his constitutional

right to confrontation by admitting a Bureau of Criminal Apprehension (BCA) report, when the analyst who prepared the report was not available to testify at trial; and (b) the evidence was insufficient to sustain the conviction. The state concedes that admission of the BCA report violated Suber's right to confrontation, but asserts that Suber is not entitled to a new trial because that error was harmless. Because the evidence was insufficient to support Suber's conviction even with this improperly-admitted evidence, we reverse.

FACTS

At approximately 2:30 p.m. on Saturday, July 9, 2005, an off-duty officer observed appellant Franz Suber drive his vehicle into a ditch, strike a sign, return to the highway with a severely damaged windshield, and continue eastbound on Highway 8 in Chisago County. The officer called 911 to report the incident.

An officer with the Lakes Area Police Department responded to the report and found Suber examining his vehicle at a service station in Chisago City. Suber appeared shaken and jittery, but was otherwise cooperative with the officer. Suber told the officer that he had fallen asleep while driving. Suber also admitted to the officer that he had smoked marijuana between 8 and 9 p.m. the previous evening. The officer decided to perform field sobriety tests. The officer asked Suber if he had any physical limitations that would prevent him from doing the tests, and Suber stated that he did not.¹

Following his poor performance on the field sobriety tests, Suber was taken into custody and transported to the police station, where he underwent approximately one

¹ Suber has Asperger's Syndrome, but was undiagnosed at the time of the accident.

hour of “psycho-physical” exercises, eye tests, and blood pressure checks under the direction of the department’s drug recognition expert (DRE). The DRE concluded that Suber was under the influence of marijuana.

The arresting officer read Suber the Implied Consent Advisory Form and obtained a urine sample that was analyzed by the Bureau of Criminal Apprehension (BCA). The BCA report indicated that Suber had cannabinoids (marijuana) in his system at the time he provided the sample.² However, the report did not indicate the level or amount of cannabinoids present or when the substance had last been used.

The district court found Suber guilty of second-degree driving under the influence of a controlled substance under Minn. Stat. § 169A.20, subd. 1(2) (2004). Suber was sentenced to 365 days, with 305 days stayed and 60 days to be served under house arrest, four years probation, and a \$900 fine. This appeal follows.

² The state introduced the BCA report of the urinalysis at trial, and the district court admitted the evidence pursuant to Minn. Stat. § 634.15 (2004), which allowed the state to introduce the report without calling the BCA analyst who prepared the report to the stand unless the defendant demanded the right to cross-examination at least 10 days before the start of trial. Suber objected to the introduction of the BCA report as a violation of his constitutional right to confrontation. Less than two weeks after the district court sentenced Suber, our supreme court decided *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006), which held that BCA reports are testimonial evidence under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). *Caulfield*, 722 N.W.2d at 310. The supreme court further held that Minn. Stat. § 634.15 violated the Confrontation Clause because the provision did not provide adequate notice to defendants of their constitutional rights. *Id.* at 313. On appeal, the state concedes that the ruling in *Caulfield* applies to this case retroactively under *O’Meara v. State*, 679 N.W.2d 334, 338-39 (Minn. 2004). The state further concedes that admitting the BCA report against Suber violated his constitutional rights, but the state argues that the error was harmless. Because of the result in this case, we do not reach this question.

DECISION

Suber contends that the evidence was insufficient to prove, beyond a reasonable doubt, that he was under the influence of a controlled substance at the time of the accident. Suber's defense at trial was that his poor performance during the field sobriety tests was caused by his Asperger's Syndrome and sleep deprivation and that the evaluation conducted by the drug recognition expert (DRE) was flawed.

When reviewing a sufficiency-of-the-evidence claim, this court engages in a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to permit the district court to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This standard of review is the same for jury and bench trials. *State v. Levie*, 695 N.W.2d 619, 626 (Minn. App. 2005). We must assume that the district court believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the district court, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

But “[w]hen careful scrutiny of the record creates grave doubts as to the guilt of a defendant convicted of a criminal offense, the interests of justice and rights of the accused require that the conviction be reversed.” *State v. Formo*, 416 N.W.2d 162, 165 (Minn. App. 1987) (citations omitted), *order granting review vacated* (Minn. July 28, 1988). And when a conviction is based on circumstantial evidence, the inferences

formed must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988).

State's witnesses

Here, the state's witnesses were the arresting officer and the DRE. They both testified that they believed that Suber was under the influence of a controlled substance. The arresting officer testified that (1) when he came upon Suber examining his vehicle, Suber appeared shaken and jittery, and his eyes appeared glazed, watery, and red; (2) Suber performed poorly during the one-legged stand and walk-and-turn exercises; and (3) Suber admitted that he had smoked marijuana the previous night. But the officer also acknowledged that (1) Suber had explained that he had fallen asleep while driving, had not slept for at least two days, and had not eaten since the previous midnight; (2) no presence of alcohol was detected following a preliminary breath test; (3) Suber passed the Horizontal Gaze Nystagmus (HGN) test; and (4) the officer noticed no odor of marijuana and found no marijuana or drug paraphernalia in Suber's vehicle.

The DRE testified that he conducted four "psycho-physical" tests. During the Romberg test, Suber estimated 30 seconds had passed after 49 seconds, a result that the DRE considered to be "way out of the norm" and showed that Suber's "internal time clock [was] impaired." During the one-legged stand exercise, Suber put his foot down and appeared to be swaying. While doing the walk-and-turn, Suber used slow, deliberate, and "robotic type movements," and he stepped off the line. Finally, Suber failed to touch the tip of his nose with his finger five out of six times.

The DRE further evaluated Suber's eyes, and stated that the whites of Suber's eyes were red and that his pupils were somewhat enlarged. The DRE conducted a dark-room test and found that Suber's pupil dilation was above average for low light conditions (9 rather than 3 to 6.5 millimeters). In addition, the DRE took photos of a heat blister on the back of Suber's tongue and later testified that such blisters are common with crack smokers and sometimes occur with people who ingest marijuana. Finally, the DRE periodically checked Suber's pulse and blood pressure, and testified that both were slightly elevated for someone of Suber's age and physical condition. Based on his observations and evaluation, the DRE concluded that Suber was under the influence of marijuana.

On cross-examination, the DRE testified that although marijuana would be detectable in a urinalysis for seven to ten days after ingestion, "[marijuana] impairment, as far as the driving that we are concerned with [lasts] approximately two to four hours," depending on the amount of the drug ingested and whether other chemicals are present in the marijuana. The DRE testified that he did not know how much marijuana Suber ingested.

Defense witnesses

Suber described the events leading up to his arrest, testifying that he had gone two to three days without sleep and he had last eaten 16 hours earlier, at about midnight on the Friday evening before the crash. Suber testified that he smoked marijuana and drank alcoholic beverages between 8 and 9 p.m. on the previous night and that he then worked the night shift until 6 a.m. on Saturday morning. Suber further explained that he was in

the National Guard and had a medical appointment at Camp Ripley, north of Little Falls, at 9 a.m. that Saturday morning. After finishing the night shift, Suber picked up military clothing at his apartment in Roseville and drove to Camp Ripley. Suber reached the military base in time for his appointment and then, without a break for food or sleep, drove back to his apartment in Roseville, grabbed a change of clothes, and started the drive to Chisago County to attend his aunt's funeral that afternoon. Suber testified that en route to the funeral, he "got sleep deprived and sooner or later . . . came off the road . . . [and] knocked down a sign[.]"

Following this incident, Suber's family arranged for school psychologist Michael Richardson to evaluate Suber. Richardson conducted a standard psychological evaluation, concluded that Suber met the criteria for Autism Spectrum Disorder, and more specifically, Asperger's Syndrome. Richardson testified that Asperger's Syndrome manifests itself by an impairment of eye-to-eye gaze, facial expression, body posture, and ability to interpret and respond to social cues. Richardson testified that Suber's condition causes him to be stiff, wooden, and mechanical—Suber moves "robotically, it's not a fluid, easy style of movement."

On cross-examination, Richardson stated that he was unsure whether autism would affect heart rate and blood pressure, and he was unaware of any research indicating that the condition would affect pupil dilation or blisters. Richardson noted, however, that Asperger's influences motor skills, motor speed, and other cognitive functions. Richardson stated that "coordination . . . [and] athletic abilit[y] . . . can be affected because [Asperger's] affects the central nervous system."

Suber's third witness was Sergeant Paul Gudding, Suber's National Guard commander. Sergeant Gudding testified that Suber was scheduled to attend a fit-for-duty medical appointment at Camp Ripley at 9 a.m. Saturday morning. According to Sergeant Gudding, the appointment was scheduled to examine abnormalities in Suber's character and demeanor that had been noticed by the soldiers around him. Sergeant Gudding stated that Suber was often sleepy, had trouble retaining simple information, exhibited abnormal voice inflection, and tended to move "mechanically . . . not smoothly, like he [wa]s processing stuff a little bit more[.]" Sergeant Gudding testified that Suber appeared tired when he arrived at Camp Ripley that morning and that he told Suber that he could lie down after his appointment to get some sleep before driving again, but Suber did not heed this suggestion. Sergeant Gudding testified that he did not perceive any odor of marijuana on or around Suber's person. Sergeant Gudding testified that, following Suber's fit-for-duty appointment, Suber was informed that he would be discharged as a result of "Autism, a high form of Autism; Asperger's Disease[.]"

Suber's last witness was his stepfather, who testified that Suber received special education planning beginning in elementary school and that Asperger's Syndrome was discussed as a possible diagnosis late in his high school career. He also noted that Suber was "stiff" and used "robotic type" movements.

Sufficiency of evidence to support conviction

In order to convict Suber, the state had to prove that he drove his vehicle "while under the influence of a controlled substance." Minn. Stat. § 169A.20, subd. 1(2) (2004). The standard jury instructions indicate that "[t]here is no set standard as to the quantity of

a controlled substance a person must ingest before [he] is regarded as being ‘under the influence.’” 10A *Minnesota Practice* CRIMJIG 29.04 (2006). Rather, a person is considered to be under the influence “[w]hen [he] is so affected by a controlled substance that [he] does not possess that clearness of intellect and control of [himself] as [he] otherwise would have.” *Id.* The statute is violated if, “as a result of consuming a controlled substance, the person’s ability or capacity to [drive] a motor vehicle is impaired.” *Id.* “Ordinarily, the state proves its case by showing the amount of [controlled substance] consumed (either by witnesses or chemical tests), or by evidence of outward manifestations of [impairment], or by a combination of both methods.” *State, City of Eagan v. Elmourabit*, 373 N.W.2d 290, 293 (Minn. 1985).

Here, the state lacked direct proof of actual consumption except for Suber’s admission that he consumed marijuana some 17 hours before his arrest and the BCA report, which indicated that Suber had marijuana in his system. Even assuming we can consider the BCA report, which the state concedes was inadmissible, the DRE testified that marijuana would be detectable in a urinalysis for seven to ten days after ingestion, but that “[marijuana] impairment, as far as the driving that we are concerned with [lasts] approximately two to four hours,” depending on the amount of the drug ingested and whether other chemicals are present in the marijuana. The DRE admitted that he did not know how much marijuana Suber ingested, the state presented no evidence that Suber ingested any drugs within the two to four hours prior to his arrest, and police found no marijuana or drug paraphernalia on Suber’s person or in his vehicle at the time of his arrest.

Consequently, the state's case relied primarily on outward manifestations of impairment, which were observed after Suber was approached by the arresting officer and during his evaluation by the DRE. As in *Elmourabit*, however, “[t]he inferences to be drawn from this evidence . . . are in somewhat uneasy equilibrium.” 373 N.W.2d at 293. While the arresting officer and the DRE concluded that Suber was impaired because of his slow, robotic, and uncoordinated movements, other witnesses who knew Suber described these movements as characteristic of him or as illustrative of someone with Asperger's. The arresting officer and the DRE also described Suber's eyes as bloodshot, watery, and glassy, observations that are indicative of impairment but are just as easily explained by the generally uncontroverted evidence that Suber had not slept in two days and was tired. The DRE further testified that Suber had a heat blister on the back of his tongue, which is sometimes consistent with the ingestion of marijuana, but the DRE admitted that he did not know exactly what caused the heat blister or when it formed. Suber, finally, exhibited other physical symptoms, including slightly elevated pulse and blood pressure rates, poor performance on tests to calculate the passage of time and coordination, and pupil dilation. But the DRE acknowledged that Suber's slightly elevated pulse and blood pressure did not conclusively indicate the influence of a controlled substance. And difficulty with coordination or estimating the passage of time are not surprising or unexpected given the circumstances presented here of a person with Asperger's or a person who has not slept in two days.

The district court did not reference Suber's Asperger's Syndrome or lack of sleep in either its findings of fact or conclusions of law. Although both officers were aware

that Suber had been diagnosed with Asperger's Syndrome at the time of trial, neither officer was asked, and neither officer stated, how Suber's condition would affect their evaluation of Suber's performance during the field sobriety tests and subsequent drug evaluation. Rather, at trial, the officers simply related Suber's performance and the conclusions drawn from his drug evaluation at the time the tests were administered without reference to the potential effects of his autism on their ultimate conclusions. Furthermore, there is no direct evidence in the record, only the district court's speculation from the bench, that Suber had consumed marijuana within less than four hours of his arrest.

The state's evidence must be inconsistent with any rational hypothesis of the defendant's innocence. *Bias*, 419 N.W.2d at 484. Here, the facts and circumstances, including evidence of Suber's Asperger's Syndrome and sleep deprivation, as well as the lack of any evidence of marijuana use in the hours leading up to the time of the accident, point to an innocent explanation of Suber's observed behavior and suspected indicia of impairment. Even when the evidence is viewed in a light most favorable to the verdict, the evidence is consistent with the hypothesis that Suber's outward manifestations of impairment were caused, not by his consumption of marijuana, but by his Asperger's and/or sleep deprivation. We therefore conclude that the evidence is insufficient to convict Suber of driving while under the influence of a controlled substance.

Reversed.

Dated: