IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Donald Francis Dunlap, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080923-CA F I L E D (May 13, 2010) 2010 UT App 122

Fifth District, St. George Department, 051501562
The Honorable James L. Shumate

Attorneys: Margaret P. Lindsay and Douglas J. Thompson, Spanish Fork, for Appellant
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake City, for Appellee

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Before Judges Davis, McHugh, and Roth.

McHUGH, Associate Presiding Judge:

Donald Francis Dunlap appeals his conviction for driving under the influence of alcohol (DUI), a third degree felony,[1] see Utah Code Ann. § 41-6a-502 (2005).[2] Dunlap claims that the trial court erred in denying his Motion in Limine to Exclude Intoxilyzer Results because the intoxilyzer's printer malfunctioned when attempting to produce a printout card, the breath samples were insufficient to generate accurate results, and the operational checklists for the intoxilyzer tests were incomplete. We affirm.

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[1]Dunlap was also convicted for having no evidence of security, a class B misdemeanor, see Utah Code Ann. § 41-12a-303.2 (2005), but does not challenge that conviction on appeal.

[2]Because the relevant provisions of the Utah Code have not changed since Dunlap's trial, we cite to the current version of the code for the reader's convenience.

"In an appeal from a trial court's denial of a motion to suppress evidence, 'we review the trial court's factual findings for clear error[,] and we review its conclusions of law for correctness.'" Salt Lake City v. Bench, 2008 UT App 30, ¶ 5, 177 P.3d 655 (alteration in original) (quoting State v. Tiedemann, 2007 UT 49, ¶ 11, 162 P.3d 1106). However, "[a]n erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful," and this court will find harm only "if it is reasonably likely that the error affected the outcome of the proceedings." Cal Wadsworth Constr. v. City of St. George, 898 P.2d 1372, 1378-79 (Utah 1995).

Because we hold that Dunlap was not prejudiced by the admission of the intoxilyzer results, we do not consider whether the trial court erred in admitting the results. See generally State v. Hamilton, 827 P.2d 232, 240 (Utah 1992) ("[W]e can make an examination of the correctness of the trial court's [admissibility] ruling unnecessary by finding that any error was harmless."). For purposes of our analysis, we assume, without deciding, that the intoxilyzer results were unreliable either because the machine malfunctioned or because it was operated incorrectly. Despite this assumption, any error in admitting the intoxilyzer results was harmless because the other evidence presented at trial provides overwhelming proof that Dunlap was guilty of DUI.

Although a blood or breath alcohol test with a result of .08 or greater may alone be sufficient to support a DUI conviction, see Utah Code Ann. § 41-6a-502(1)(a), (c), evidence of blood or breath alcohol is not required so long as other evidence supports a finding beyond a reasonable doubt that the person was "under the influence of alcohol . . . to a degree that render[ed] the person incapable of safely operating a vehicle," see id. § 41-6a-502(1)(b). Thus, even if Dunlap's intoxilyzer results had been excluded, the jury could have "consider[ed] all of the [other] evidence presented to determine whether his level of impairment was such that it was unsafe for him to drive." State v. Van Dyke, 2009 UT App 369, ¶ 36, 223 P.3d 465, cert. denied, No. 20100061 (Utah Mar. 17, 2010).

Even without the intoxilyzer results, there was overwhelming evidence presented here from which the jury could have found, beyond a reasonable doubt, that Dunlap's level of intoxication was sufficient to make him "incapable of safely operating a vehicle," see Utah Code Ann. § 41-6a-502(1)(b). A bystander witnessed Dunlap driving erratically, initially stopping his truck on a hill facing oncoming traffic, then driving sideways across the road and down an embankment, and eventually stopping in a field. The bystander also reported that Dunlap responded

inappropriately and angrily to an inquiry as to whether he needed assistance.

When a deputy arrived, she found Dunlap lying on the ground next to his vehicle. The deputy could smell a strong odor of alcohol, noticed that Dunlap had urinated in his pants, and also saw that his pants were unzipped. The deputy reported that Dunlap's eyes were red, his speech was slurred and slowed, and he tested positive for alcohol on the portable breath tester. Because Dunlap was incapable of standing on his own, the deputy held him upright to perform a horizontal gaze nystagmus test, which was inconclusive because of Dunlap's inability or refusal to focus on the object used to administer the test. Ultimately, the deputy determined that it would be unsafe for Dunlap to attempt the one-legged stand and the walk-and-turn tests because he could not stand on his own. After being transported to the jail, Dunlap asked to use the restroom, attempted to stand, sat back down, and again urinated in his pants. At trial, the deputy described Dunlap as "the most intoxicated person [she had] ever dealt with."

Thus, even assuming that the intoxilyzer results should not have been admitted, we hold that Dunlap was not prejudiced. Under these facts, it is not "reasonably likely that the [presumed] error affected the outcome of the proceedings." See Cal Wadsworth Constr. v. City of St. George, 898 P.2d 1372, 1378-79 (Utah 1995).

Affirmed.

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Carolyn B. McHugh,
Associate Presiding Judge

WE CONCUR:

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James Z. Davis,
Presiding Judge

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Stephen L. Roth, Judge