COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1852-CR **Cir. Ct. No. 2011CM1147**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH J. VANMETER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Joseph VanMeter appeals a judgment of conviction for third-offense operating while intoxicated (OWI) and disorderly conduct. He

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

argues the arresting officer lacked reasonable suspicion to request that VanMeter perform field sobriety tests. VanMeter also contends the officer lacked probable cause to believe VanMeter was driving intoxicated and, therefore, was not justified in requiring VanMeter to submit to a preliminary breath test (PBT). Finally, VanMeter argues the circuit court erroneously admitted "expert" evidence at trial through the arresting officer's testimony regarding VanMeter's performance on the horizontal gaze nystagmus (HGN) field sobriety test. We reject these arguments and affirm.

BACKGROUND

¶2 Eau Claire police officer Arthur Jaquish testified that on Friday, September 30, 2011, at 8:27 p.m., he was dispatched to investigate reports of a suspicious dark-colored van driving back and forth on Hoover Avenue. Jaquish encountered the vehicle traveling down the street toward him. Jaquish stopped, and the van, being driven by VanMeter, pulled up next to him and stopped. VanMeter rolled down his driver's-side window and Jaquish could hear him shouting into a cell phone. Eventually, VanMeter put down the phone and asked Jaquish to activate his lights so someone named "Angie" could locate him on the street. Jaquish turned on his vehicle's strobe light, and VanMeter resumed his phone conversation, asking Angie to come to the squad car. Angie did not appear.

¶3 Jaquish got out of his squad car, approached the driver's side of VanMeter's vehicle, and asked VanMeter to get "an actual address for Angie." VanMeter provided an address on a different, but nearby, street. While VanMeter was talking to Jaquish, Jaquish detected a "strong odor of intoxicating beverage emitting from his breath." VanMeter provided Jaquish with his driver's license and told Jaquish his license was suspended. Jaquish returned to his squad, ran

VanMeter's license, and confirmed it was suspended. He also learned VanMeter had two prior OWI convictions and was currently on probation.

¶4 Jaquish returned to the van and asked VanMeter whether he had been drinking. VanMeter acknowledged he had consumed one beer with a high percentage of alcohol, but Jaquish believed, based on his experience and the strength of the alcohol odor, that VanMeter had actually consumed more than one drink. Jaquish asked VanMeter to step out of his vehicle to participate in field sobriety testing, certain aspects of which VanMeter failed. Jaquish then administered a PBT, which returned a result of .15. Following the test, he arrested VanMeter for operating while intoxicated.

¶5 Prior to trial, VanMeter sought to preclude the State from introducing any evidence regarding the HGN test VanMeter performed as part of the field sobriety testing. VanMeter asserted the HGN test was an unreliable scientific test and Jaquish's testimony regarding the test, as he used with VanMeter, did not meet the standard for admissibility for expert testimony articulated in WIS. STAT. § 907.02(1). In response, the State argued field sobriety testing was "observational" in nature and expert testimony was not required for an officer to testify regarding his or her observations of a subject performing those tests. The circuit court concluded Jaquish could testify regarding his observations of VanMeter's performance on the field sobriety tests, including the HGN test. After taking Jaquish's testimony, the court also concluded Jaquish possessed reasonable suspicion to detain VanMeter for field sobriety testing and probable cause for his arrest.

¶6 At trial, the State introduced evidence regarding VanMeter's performance during the field sobriety tests, including the HGN test. Jaquish

testified "nystagmus" is an "involuntary jerkiness of the eyes" that becomes increasingly apparent when a person has been drinking. Jaquish requested that VanMeter's eyes follow a "stimulus," which in this case was Jaquish's finger located in front of VanMeter's face. Jaquish testified he would check to make sure the subject's pupils are of equal size and the subject's eyes track together. Then he would move his finger back and forth, watching for "clues" of intoxication such as lack of smooth pursuit, which Jaquish described as "like a marble rolling over a rough surface." Another "clue" is "nystagmus at maximum deviation," in which the subject's eyes twitch while the eyes are watching the object as far as possible to the sides. Finally, Jaquish testified he looks for "nystagmus onset," which is the "same jerky motion, prior to 45 degrees because, based on my training, the sooner the nystagmus kicks in, the higher the blood alcohol level." As to VanMeter, Jaquish testified he observed "all six of the possible clues in HGN."

¶7 The jury found VanMeter guilty on all counts. The circuit court withheld sentence and placed VanMeter on two years' probation. VanMeter's counsel initially filed a no-merit report, which this court rejected after concluding there was a potential issue for appeal regarding "whether the [HGN] test meets the ***Daubert*** standard."[2] We therefore ordered a merit brief to be filed "on that issue."

[2] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). In early 2011, the Wisconsin legislature adopted the ***Daubert*** standard for the admissibility of expert testimony in Wisconsin courts. *See* 2011 Wis. Act 2, § 34m; *see also* WIS. STAT. § 907.02(1).

DISCUSSION

¶8 In addition to addressing the evidentiary issue of whether Jaquish's testimony regarding the HGN test was required to satisfy the ***Daubert*** standard, VanMeter resurrects his arguments that his detention for field sobriety testing was unsupported by reasonable suspicion and that Jaquish lacked probable cause to require him to submit to a PBT. These matters were not the subject of our prior order for briefing. In any event, we reject these arguments on their merits. Based on the totality of the circumstances—the date and time of the report of suspicious driving, VanMeter's odd behavior (including his shouting when speaking on his mobile phone), his admission to drinking, and the strong odor of intoxicants—we conclude Jaquish possessed reasonable suspicion to detain VanMeter to perform field sobriety testing. Likewise, these facts, combined with Jaquish's perception of VanMeter's failures during field sobriety testing, gave Jaquish "probable cause to believe" VanMeter had been operating while intoxicated, such that administering a PBT was justified to determine whether an arrest was warranted. *See* WIS. STAT. § 343.303; *see also* ***Jefferson Cty. v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999) ("probable cause to believe" standard under § 343.303 refers to a quantum of proof greater than reasonable suspicion but less than the level of proof required to establish probable cause for arrest).

¶9 Regarding the issue on which we rejected the no-merit report, we conclude the circuit court properly admitted testimonial evidence at trial from Jaquish regarding VanMeter's performance on the HGN test. We review a circuit court's decision to admit or exclude evidence under the erroneous exercise of discretion standard. ***State v. Shomberg***, 2006 WI 9, ¶10, 288 Wis. 2d 1, 709 N.W.2d 370. Under this standard, we will uphold the circuit court's evidentiary ruling if the court examined the relevant facts, applied a proper legal standard,

and, using a demonstrated rational process, reached a reasonable conclusion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

¶10 VanMeter contends the circuit court erroneously exercised its discretion by admitting testimonial evidence because that decision was premised on an incorrect legal conclusion—namely, that an officer's testimony regarding a particular defendant's performance on the HGN test is not subject to the ***Daubert*** standard for admissibility to the extent that standard was adopted in WIS. STAT. § 907.02(1).[3] VanMeter appears to argue the testimony did not meet the requirements of that statute because the "HGN test is not sufficiently reliable to justify continued detention and testing by a police officer," and because "there was no testimony that the officer administered the HGN test in substantial compliance with training manual procedure."

¶11 VanMeter, however, ignores the threshold inquiry under WIS. STAT. § 907.02(1), which is whether Jaquish's testimony regarding the HGN test constituted "scientific, technical, or otherwise specialized knowledge" in the form of expert opinion. We conclude it did not. Jaquish's testimony was not directed at the reason or cause, in a medical or scientific sense, that one's eyes "twitch" when intoxicated. Jaquish also did not testify as to the scientific reliability of the test,

[3] WISCONSIN STAT. § 907.02(1) states in full:

> 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.

either generally or in terms of how he applied it to VanMeter. Nor was he asserting he could determine a precise level of intoxication based on the occurrence of nystagmus.

¶12 Rather, the focus of Jaquish's testimony was his own observations regarding VanMeter's performance on the HGN test. To be sure, Jaquish did reference his training and knowledge regarding application and interpretation of the test. That testimony was permissible in the context of explaining why those observations were significant to him, and they were not meant to educate the jury on the underlying "science" of HGN testing. In substance, Jaquish merely testified that he was trained to do HGN testing, he conducted the testing in accordance with that training, and his observations led him to believe that VanMeter was intoxicated. This testimony did not transform Jaquish's testimony from permissible lay opinion testimony to "expert" testimony under WIS. STAT. § 907.02(1).[4]

¶13 In ***City of West Bend v. Wilkens***, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324, a case that predated Wisconsin's adoption of the ***Daubert*** standard, we held that field sobriety tests "are not scientific tests. They are merely observational tools that law enforcement officers commonly use to assist them in

[4] Similarly, police officers, such as Jaquish, also have specialized training with respect to the other field sobriety tests, in terms of how to administer them and how properly to discern the "clues" of intoxication. For example, the "single-leg-stand" test has standards on which officers are trained so as to evaluate how long a subject must complete the stand and other movements the subject makes while performing the stand. *See* ***Jefferson Cty. v. Renz***, 231 Wis. 2d 293, 297, 603 N.W.2d 541 (1999). Officers are not required to comprehend either the underlying physiology affecting an individual's ability to stand on one leg or why a failure to do so in conformity with the test suggests intoxication in order for him or her to testify as to their observations when administering this test. *See* ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶¶19, 21, 278 Wis. 2d 643, 693 N.W.2d 324.

discerning various indicia of intoxication, the perception of which is necessarily subjective." ***Id.***, ¶1. We also observed "it is not beyond the ken of the average person to understand such indicia and to form an opinion about whether an individual is intoxicated." ***Id.*** However, the field sobriety tests applied in ***Wilkens*** did not involve the HGN test, and we were careful to state that our discussion in that case "should not be read to pass on whether that test has a scientific basis." ***Id.***, ¶18 n.3.

¶14 Although ***Wilkens*** left open the possibility that facts surrounding HGN testing might require expert testimony in order to be admissible, this notion was rejected in a subsequent authored one-judge opinion, which we find persuasive. In ***State v. Warren***, No. 2012AP1727-CR, unpublished slip op. (WI App Jan. 16, 2013), the arresting officer testified at trial that "the HGN test alone is sufficient to detect an alcohol concentration over .08." ***Id.***, ¶5. Yet even the officer's association of failure on the HGN test with a range of blood alcohol concentrations was insufficient to establish that the testimony required scientific, technical or other specialized knowledge. Judge Brown held that the ***Wilkens*** rationale applied equally to claims that an officer was prohibited from testifying regarding the HGN tests without first satisfying the requirements of the newly adopted WIS. STAT. § 907.02(1). ***Warren***, unpublished slip op. ¶¶7-8. Field sobriety tests, including the HGN test, are merely observational tools, "not litmus tests that scientifically correlate certain types or numbers of 'clues' to various blood alcohol concentrations." ***Id.***, ¶8 (quoting ***Wilkens***, 278 Wis. 2d 643, ¶17).

¶15 As Judge Brown stated, "Allowing a jury to consider an officer's subjective opinion that the defendant was impaired, based on his observations of the defendant (including observations made during field sobriety tests) that the officer considered to be reliable indicators, is not error." ***Id.***, ¶8 (citing ***Wilkens***,

278 Wis. 2d 643, ¶13). We agree, as have other courts whose decisions the State cites. *See* ***City of Fargo v. McLaughlin***, 512 N.W.2d 700, 705-06 (N.D. 1994) (no expert interpretation required where an officer, based upon training, "observes the objective physical manifestations of intoxication"; collecting cases); ***State v. Nagel***, 506 N.E.2d 285, 286 (Ohio Ct. App. 1986) (HGN testing, like other field sobriety testing, "requires only the personal observation of the officer administering it.").[5] The HGN test was merely one tool used by the officer in

[5] VanMeter primarily relies on ***United States v. Horn***, 185 F. Supp. 2d 530 (D. Md. 2002), in which the court concluded that an officer

> certainly may testify about his or her observations of a defendant's appearance, coordination, mood, ability to follow instructions, balance, the presence of the smell of an alcoholic beverage, as well as the presence of exaggerated HGN, [but] … should not, however, be permitted to interject technical or specialized comments to embellish the opinion based on any special training or experience he or she has in investigating DWI/DUI cases.

Id. at 560.

(continued)

reaching his lay opinion that VanMeter was intoxicated. Indeed, VanMeter, on appeal, readily admits that application of the HGN test is "necessarily subjective." We agree, and such subjectivity in a lay opinion, as well as the officer's lack of knowledge regarding the underlying scientific bases or reliability of the HGN test, are valid subjects for cross-examination. This subjectivity, however, does not transform the officer's lay opinions and other testimony regarding the HGN test into evidence subject to the ***Daubert*** standard for admissibility. We therefore conclude the circuit court did not erroneously exercise its discretion by permitting Jaquish's testimony regarding the HGN test given to VanMeter.

By the Court.—Judgment affirmed.

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

VanMeter acknowledges the ***Horn*** holding "cannot be deemed the majority rule," but argues it is consistent with numerous other decisions of foreign courts. However, the foreign cases VanMeter cites (including ***Horn***) do not clearly compel a different result than the one we reach. For example, in ***State v. Taylor***, 694 A.2d 907 (Me. 1997), the court concluded as a matter of law that HGN testing "is sufficiently reliable [under ***Daubert***] to be admitted as evidence in future cases," but not for the purpose of precisely quantifying blood alcohol content. ***Id.***, ¶¶11, 13; *see also* ***State v. Dahood***, 814 A.2d 159, 168 (N.H. 2002) (holding similarly to ***Taylor***). In this case, Jaquish did not associate VanMeter's performance during the HGN test with a specific blood alcohol content. In another case VanMeter cites, the Montana Supreme Court concluded HGN tests are not "***novel*** scientific evidence" and therefore are not subject to the ***Daubert*** standard for admissibility, but they are subject to a lower standard of admissibility requiring a foundation demonstrating special training or education because the scientific principle underlying HGN testing is "still beyond the range of ordinary training or intelligence." *See* ***Hulse v. Montana, Dep't of Justice, Motor Vehicle Div.***, 961 P.2d 75, ¶69 (Mont. 1998). Here, VanMeter concedes Jaquish adequately testified as to his training regarding the administration of HGN testing. The remaining authorities VanMeter cites are not helpful to his arguments. *See, e.g.*, ***People v. McKown***, 924 N.E.2d 941, 955 (Ill. 2010) (HGN test is "generally accepted in the relevant scientific fields" and testimony regarding a defendant's performance is admissible for purpose of proving the defendant consumed alcohol); ***White v. Miller***, 724 S.E.2d 768, 805-06 (W. Va. 2012) (HGN test, like other field sobriety tests, are admissible as evidence that driver consumed alcohol based upon officer's foundational testimony regarding training and compliance with standard protocol, but cannot be used to estimate a driver's blood alcohol concentration).