DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ERICA NICOLE WILLIAMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-59

November 17, 2021

Appeal from the County Court for Pinellas County; Kathleen T. Hessinger, Judge.

J. Jervis Wise of Brunvand Wise, P.A., Clearwater, for Appellant.

Bruce Bartlett, State Attorney, Clearwater, and Kishantevia Carson, Assistant State Attorney, Tampa, for Appellee.

ATKINSON, Judge.

Erica Nicole Williams appeals from a judgment and sentence for driving under the influence, which was entered by the county court following a jury trial. We find error in only one of the issues

Williams raises on appeal. The trial court excluded relevant evidence supportive of her defense by directing the jury to disregard testimony and argument regarding a breathalyzer reading that indicated that Williams's breath alcohol level was below the legal limit and precluding the defense from adducing additional evidence regarding the reading. The trial court accepted the State's nonmeritorious argument that evidence of breathalyzer results is only admissible if it includes two separate results based on a sufficient volume of air. Because it cannot be concluded that this error was harmless, we reverse.

Testimony supported that, after Williams was detained on suspicion of driving while intoxicated, a law enforcement officer took her to the Clearwater Police station. Another officer administered a breath alcohol test using a breathalyzer machine. Three times Williams blew into the breathalyzer machine, two of which did not result in a volume of her breath sufficient to allow the breathalyzer to produce a reading of her breath alcohol level; one of them did result in an adequate volume of breath.

During opening statements, Williams' counsel mentioned the fact that Williams was "not able to provide sufficient air into the

machine to give a good result. But the one result the machine does give is 0.04." *See* § 316.193(1)(c), Fla. Stat. (2018) ("A person is guilty of the offense of driving under the influence . . . if the person is driving or in actual physical control of a vehicle within this state and . . . [t]he person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath."). The State objected, arguing the "reading" could not be discussed because there were not "two valid samples" and asking that the defense be prevented from mentioning the breathalyzer result until the State could support its objection at a later time with applicable case law. The court instructed the jury "to disregard what [defense counsel] just mentioned in regards to the results of the blow," explaining to the jury that "they were not appropriate blows and it was not appropriate for him to get into that."

Later, the State's breath test operator testified that the second sample provided by Williams registered as a .04, although the first and third samples did not have the requisite volume to produce a result. During a recess, the State referred the court to *Department of Highway Safety & Motor Vehicles v. Cherry*, 91 So. 3d 849 (Fla. 5th DCA 2011), upon which the State relied in arguing that the

defense should not be allowed to assert that the defendant had only a .04 blood alcohol level because "you need two samples, and two of the three samples is a value not met, which means she's not blowing a sufficient amount of air into the instrument," which, the State contended, meant that her breath alcohol level "could be higher, but we don't know, . . . and we don't want the jury to be speculating based on the fact that she didn't blow correctly." The court refused to permit the defense to adduce additional testimony about the .04 breathalyzer result.

Later, the jurors asked the following questions:

> If breathalyzer times three wasn't valid, where did the .04 level come from?
>
> Can you . . . remind the jury what alcohol levels equal impairment?
>
> And if a valid sample is two full blows, does that mean both have to measure over the legal limit? If so, did any sample go over the legal limit?

The court responded:

> I have a couple questions here where people are asking about the breath alcohol, the breath sample in this case. You need to understand, and I'm instructing you now, that there was no valid sample that was given in this case, so you are not going to consider at all a breath alcohol content in this case.

The court reiterated: "I'm advising you that there's no valid breath sample, so you all are not going to be considering any issue of breath alcohol content as it relates to this case." The jury found Williams guilty of driving under the influence. *See* § 316.193.

On appeal, Williams correctly contends that the trial court erred by excluding evidence of the .04 breath test result because it was admissible and exculpatory. The "[e]xclusion of exculpatory evidence violates a defendant's fundamental right under the Sixth Amendment to present a defense." *Scott v. State*, 17 So. 3d 766, 769 (Fla. 4th DCA 2009) (citing *Wessling v. State,* 877 So. 2d 877, 879 (Fla. 4th DCA 2004)); *see also Getts v. State*, 313 So. 3d 964, 967 (Fla. 2d DCA 2021) ("Where evidence tends in any way, even indirectly, to establish a reasonable doubt of [the] defendant's guilt, it is error to deny its admission." (quoting *Wagner v. State*, 921 So. 2d 38, 40 (Fla. 4th DCA 2006))). Here, the trial court prevented Williams from cross examining the breath test operator about the .04 test result. Williams was prevented from presenting her defense and adducing evidence to support it. She was prohibited from arguing based on the .04 reading that she was not driving or in

actual physical control of a vehicle while impaired, and she was denied the opportunity to elicit further testimony about the .04 reading that could have shed light on its importance to her case. The evidence was relevant and therefore admissible. *See* § 90.402, Fla. Stat. (2019) ("All relevant evidence is admissible, except as provided by law.").

To justify its exclusion, the trial court erroneously relied on *Cherry*, in which the Fifth District Court of Appeal construed a provision of the Florida Administrative Code to resolve a challenge to a driver's license suspension. *See Cherry*, 91 So. 3d at 855–56; *see also Dep't of Highway Safety & Motor Vehicles v. Berne*, 49 So. 3d 779, 782 (Fla. 5th DCA 2010) (noting that in a formal review hearing, "to be admissible, the Department must establish that the breath test administered to determine the blood-alcohol level was performed substantially according to the pertinent statutes and the methods approved by the Florida Department of Law Enforcement ('FDLE'), which are promulgated in the Florida Administrative Code" (citing § 316.1932(1)(b)2, Fla. Stat. (2005)).[1] The court in *Cherry*

[1] A person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state

applied Florida Administrative Code Rule 11D–8.002(12), which sets forth the standard for administering a breath alcohol test and governs what constitutes refusal to submit to such test:

> Approved Breath Alcohol Test - a minimum of two samples of breath collected within fifteen minutes of each other, analyzed using an approved breath test instrument, producing two results within 0.020 g/210L, and reported as the breath alcohol level, on a single Form 38 affidavit. If the results of the first and second samples are more than 0.020 g/210L apart, a third sample shall be analyzed. Refusal or failure to provide the required number of valid breath samples constitutes a refusal to

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> is, by operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. . . . The refusal to submit to a chemical or physical breath test upon the request of a law enforcement officer as provided in this section is admissible into evidence in any criminal proceeding . . . . An analysis of a person's breath, in order to be considered valid under this section, must have been performed substantially according to methods approved by the Department of Law Enforcement. For this purpose, the department may approve satisfactory techniques or methods. Any insubstantial differences between approved techniques and actual testing procedures in any individual case do not render the test or test results invalid.

§ 316.1932(1)(a)1, (b)2.

> submit to the breath test. Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level.

Fla. Admin. Code R. 11D-8.002(12).

A minimum of two results are required for comparison, with a third being required in the event that the difference between the first two results exceeds a specified margin. *See id.* However, each result can independently "be acceptable as a valid breath alcohol level" if it is "proved to be reliable." *See id.*

It can be inferred from the State's articulation of the purported unreliability of the .04 result that the State was arguing that an accurate test result requires a minimum of 210 liters and two of the three attempts to elicit such a volume from Williams produced less than that amount. By statute, a "breath-alcohol level must be based upon grams of alcohol per 210 liters of breath." § 316.1932. The .04 result from Williams' second sample was based on 210 liters of breath. But the State asserts that one result is not enough.

The State's argument that there must be *more than one* reading based on 210 liters of breath comes not from statute but rather from the Florida Administrative Code, which defines an "Approved Breath Alcohol Test" as including "a minimum of two

samples of breath" registering a percentage of the grams of alcohol per 210 liters of breath. *See* Fla. Admin. Code R. 11D-8.002(12). Presuming for the sake of analysis that the standard set forth in the administrative rule applies in the context of the admissibility of evidence relevant to a defendant's guilt in a criminal proceeding, the rule does not support the State's argument or the trial court's conclusion. While the rule requires a minimum of two samples based on the requisite breath volume to constitute an approved breath alcohol test, it explicitly indicates that failure to meet that criteria does not necessarily render a single result invalid for the purpose of establishing an individual's breath alcohol level: "Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level." *See id.* And the State's own breathalyzer witness testified that the second time Williams blew into the breathalyzer machine it did produce a sample of adequate volume to elicit a grams-per-210 liter result.

In *Cherry*, on which the State and trial court relied, Cherry was stopped by a highway patrol trooper who suspected that she was impaired because of her erratic driving. *Cherry*, 91 So. 3d at

850. Cherry failed to comply with a breath tester's requests for two valid breath samples, biting the mouthpiece and repeatedly failing to supply the requisite amount of breath into the machine. *Id.* at 851. Her lack of compliance was deemed a refusal, and her license was suspended for one year. *Id.*; *see also* § 322.2615(1)(a), Fla. Stat. (2018) ("A law enforcement officer or correctional officer shall, on behalf of the department, suspend the driving privilege of a person . . . who has refused to submit to a urine test or a test of his or her breath-alcohol or blood-alcohol level.").

Cherry engaged in the administrative review process and eventually sought certiorari review in the circuit court of the agency's decision to suspend her license. *Id.* After the Department of Highway Safety and Motor Vehicles sought second-tier certiorari review in the district court of appeal, that court granted the agency's petition and quashed the circuit court's order overturning the Department's suspension. *Id.* at 849. The court reasoned, that "[d]espite her evasion, the BATA [(Breath Alcohol Test Affidavit)] did report two breath alcohol readings; however, the same BATA also registered that these two readings were unreliable for purposes of determining breath alcohol level due to Ms. Cherry's failure to

supply sufficient breath volume during each of her sample submissions." *Cherry*, 91 So. 3d at 855. As a result, it concluded that Cherry "had refused to submit to a breath test" because "neither of Ms. Cherry's breath samples met the minimum requirements for volume; therefore, neither was reliable, and neither was valid." *Id.* (citing Fla. Admin. Code R. 11D–8.002(12)).

Unlike the *Cherry* case, in which the driver never supplied sufficient breath volume to produce a valid breath sample under rule 11D-8.002(12), testimony supported that one of the breath samples provided by Williams rendered a result based on at least the minimum volume. Within that sample the machine detected .04 grams of alcohol per 210 liters of breath—half the amount required to prove driving under the influence by way of breath alcohol level. *See* § 316.193(1)(b).

Mistaking *Cherry* and the administrative rule as having established a categorical bar on admissibility, the State and trial court misperceived the import of the breath test operator's testimony regarding Williams' failure to provide adequate volume for at least two samples. While that testimony might have been relevant to the *weight* that the jury ought to accord the .04 test

result, it had no significance to the evidence's *admissibility*. *Cf. Torrez v. State*, 294 So. 3d 390, 403 (Fla. 4th DCA 2020) (finding cadaver dog expert testimony sufficiently reliable and noting that "[c]hallenges to an expert's measurements, methods and determinations do not render inadmissible an expert opinion based on them but goes to the weight of the evidence, raising factual questions to be determined by the jury").

Through its questioning of the breath test operator, the State elicited testimony casting doubt on the accuracy of a single result. While one of the "three samples" provided by Williams was "complete" with "a sufficient volume" of air, the breath test operator explained that "two valid samples" are required "for the machine reading to be accurate." On the other hand, the operator also testified that "[in] more times than not, when they produce two samples, the readings are pretty close to each other," affirming that while "it could fluctuate a little bit," "[w]ith this machine, generally speaking, . . . you're not getting wildly different samples between the two samples."

The fact that the breath test operator lacked another valid breath sample against which to compare the sample that produced

the .04 result could conceivably cast doubt on whether that .04 result was an accurate indication of Williams' breath alcohol level. *See* Fla. Admin. Code R. 11D–8.002(12) (requiring "two results within 0.020 g/210L" of each other for comparison in order to determine whether a third sample must be analyzed). But the very rule that establishes the protocol requiring more than one result expressly contemplates that a *single* result *could be* an indication of the subject's breath alcohol level; indeed, the rule provides that one or more results "*shall be* acceptable as a valid breath alcohol level," "if proved to be reliable," even when the "required number of valid breath samples" has not been provided by the subject. *See id.* (emphasis added). Neither the State nor the trial court provide any explanation for why the single .04 result was unreliable—other than that it was the only one. But the rule language unequivocally establishes that an inadequate number of results cannot be grounds for unreliability: if one or more "result(s)" can "be acceptable as a valid breath alcohol level" if they prove "reliable," then having less than two results cannot itself constitute indicia of *unreliability*. *See id.* In other words, the State had the opportunity to cast whatever doubt on the .04 reading that could be attributed

to the failure to obtain more than one result, but the denial of the defendant's opportunity to present that one result as evidence in her defense was not justified by any valid grounds for exclusion of relevant evidence. *See* § 90.402 ("All relevant evidence is admissible, except as provided by law.").

Contrary to the State's argument, this error was not proven harmless. Although the jury did hear evidence regarding the .04 result during the breath test operator's testimony, the court repeatedly and emphatically instructed the jury not to consider it, reiterating its insistence that it be disregarded after receiving several jury questions on the subject.

Given that the criminal statute itself bases an element of the crime on a specified breath alcohol level, *see* § 316.193(1)(b), it would be difficult to discount the possibility that the results of a breath alcohol test contributed in some way to the jury's verdict. Proving "beyond a reasonable doubt" that the exclusion of a test result indicating only half the legal limit "did not contribute to the verdict" is a heavy burden indeed. *See State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986) ("The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond

a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."). Even with the introduction of other evidence that could constitute indicia of being under the influence,[2] the State failed to meet its burden to prove harmlessness, because the possibility that the jury would have perceived the .04 test as giving rise to a reasonable doubt cannot be eliminated in a case in which the State's theory was based at least in part on the specter of alcoholic intoxication. As such, we must reverse.

Reversed and remanded.

CASANUEVA and LUCAS, JJ., Concur.

Opinion subject to revision prior to official publication.

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[2] *See* § 316.193(1) (including as an alternative element that "the person is driving or in actual physical control of a vehicle" and "is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired").