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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0259**

State of Minnesota,
Respondent,

vs.

Jacob Arland Koosmann,
Appellant

**Filed November 24, 2014
Affirmed
Stoneburner, Judge***

Hennepin County District Court
File No. 27-CR-13-15984

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

Paul D. Baertschi, Steven M. Tallen, Assistant Maple Grove City Attorneys, Tallen and
Baertschi, Minneapolis, Minnesota (for respondent)

Stephen V. Grigsby, Minneapolis, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and
Stoneburner, Judge.

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

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the admissibility and sufficiency of the evidence supporting his conviction of being in physical control of a motor vehicle with an alcohol concentration of .08 or more. Because the district court did not abuse its discretion in admitting evidence of field sobriety tests and did not err in denying appellant's motion to suppress test results, and because the evidence is sufficient to support appellant's conviction of being in physical control of a motor vehicle with an alcohol concentration of .08 or more, we affirm.

FACTS

Maple Grove police officer Angela Sellman responded to a report of a suspicious, occupied car parked at a Taco Bell parking lot for several early morning hours. Sellman saw a vehicle with the motor running, the windows closed and steamy, and a man apparently sleeping in the driver's seat.

After Sellman knocked several times on the window, the person in the driver's seat, later identified as appellant Jacob Arland Koosmann, rolled the window down. Sellman immediately smelled the odor of an alcoholic beverage coming from inside the vehicle. She noted that Koosmann seemed "pretty out of it" and that his eyes were bloodshot and glassy. Sellman was concerned that there might be a medical issue, but Koosmann told her that there was not and that he had driven to the parking lot a couple of hours earlier to sleep. He admitted that he had consumed alcohol before driving to the lot.

Sellman asked Koosmann to step out of the vehicle whereupon she smelled the odor of an alcoholic beverage coming from him. She had him perform field sobriety tests and a preliminary breath test (PBT). Based on her preliminary observations and Koosmann's performance on the tests and the PBT, Sellman concluded that Koosmann was under the influence of alcohol and arrested him.¹ Sellman took Koosmann to the police station and read the implied-consent advisory to him. Koosmann said he understood the advisory, did not want to consult with an attorney, and agreed to take a breath test.

Sergeant Daniel Wilson, who is certified to conduct Intoxilizer tests and who is experienced on the use of the department's DataMaster DMT, an instrument approved by the commissioner of public safety for breath testing, administered the breath test. Koosmann's alcohol concentration measured .09.

Koosmann was charged with (1) being in physical control of a motor vehicle while under the influence of alcohol and (2) being in physical control of a motor vehicle with an alcohol concentration of .08 or more.² Koosmann moved to suppress evidence of the breath-test results, asserting that the warrantless search of his breath violated his constitutional rights and that Minn. Stat. § 634.16 (2012), providing for admission of breath-test results without antecedent expert testimony about the reliability of the testing

¹ Koosmann does not challenge probable cause for his arrest.

² Koosmann was also charged with, but found not guilty of, an open-bottle offense.

instrument, is unconstitutional. After giving the parties an opportunity to brief these issues, the district court denied Koosmann's motion.³

Koosmann waived his right to a jury trial. At his court trial, the district court overruled Koosmann's objection to admission of evidence about the field sobriety tests. The district court found Koosmann guilty of both control-of-vehicle charges and sentenced him for being in control of a motor vehicle with an alcohol concentration of .08 or more. This appeal followed.

D E C I S I O N

1. Evidentiary rulings

"[E]videntiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Griffin*, 834 N.W.2d 688, 693 (Minn. 2013) (quotation omitted). "A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). Appellant has the burden to establish that an evidentiary ruling was an abuse of discretion that resulted in prejudice to the appellant. *Griffin*, 834 N.W.2d at 693.

a. Field sobriety tests evidence

Koosmann argues that because many variables other than alcohol impairment can affect performance on field sobriety tests, evidence of such tests is inadmissible without

³ The district court made its ruling at the conclusion of the court trial, holding that Koosmann's consent to testing was voluntary, Minn. Stat. § 634.16 is not unconstitutional, and the probative value of the testing evidence outweighed any prejudice to Koosmann.

evidence of “control” tests showing the person’s performance when not impaired by alcohol. Koosmann asserts that without such control tests, any conclusion that his performance on the tests was caused by alcohol impairment is “pure speculation.” We disagree: Koosmann’s objection plainly goes to the weight and credibility to be given to such evidence and not to its admissibility. Weight and credibility issues are for the fact-finder to determine. *See State v. Klawitter*, 518 N.W.2d 577, 585-86 (Minn. 1994) (holding that a police officer should be allowed to give an opinion of drug impairment based on the officer’s training, experience, and observations following a 12-step drug-recognition protocol, noting that the real issue is not the admissibility of the evidence but the weight it should receive, a matter for the fact-finder to decide).

The state laid the appropriate foundation for evidence about the field sobriety tests through Sellman’s testimony describing the training she received to administer field sobriety tests, explaining how the tests Koosmann performed were conducted, and identifying the signs of impairment that she looked for and observed as Koosmann performed the tests. *See State v. Ards*, 816 N.W.2d 679, 683 (Minn. App. 2012) (holding that a police officer’s opinion-of-intoxication evidence is not “expert” testimony and is subject to same foundational requirements as such testimony from lay witnesses and citing *State v. Simonsen*, 252 Minn. 315, 328, 89 N.W.2d 910, 918 (1958), in which the supreme court described the necessary foundation for layperson opinion-of-intoxication testimony as “observation of manner of walking and standing, manner of speech, appearance of eyes and face, and odor, if any, upon such person’s breath”). In *Klawitter*, the supreme court stated that training in drug-recognition “is intended to refine and

enhance the skill of acute observation which is the hallmark of any good police officer and to focus that power of observation in a particular situation.” 518 N.W.2d at 585. The district court did not abuse its discretion by admitting evidence of the field sobriety tests or by admitting Sellman’s opinion, based in part on those tests, that Koosmann was impaired by alcohol.

b. Constitutionality of Minn. Stat. § 634.16

One of Koosmann’s objections to admission of the breath-test results is based on his assertion that Minn. Stat. § 634.16 is unconstitutional. The constitutionality of a statute is a question of law that is reviewed de novo. *State v. Ness*, 834 N.W.2d 177, 181-82 (Minn. 2013) (stating that appellate courts exercise their power to declare laws unconstitutional “with extreme caution and only when absolutely necessary” and that a statute will be upheld “unless the challenging party demonstrates that it is unconstitutional beyond a reasonable doubt”) (quotations omitted)).

Minn. Stat. § 634.16 provides for introduction of breath-test results without antecedent expert testimony about the reliability of a testing instrument when the test is performed by a person fully trained in the use of the instrument and the instrument has been approved by the commissioner of public safety. *See* Minn. Stat. § 169A.03, subd. 11 (2012) (“‘Infrared or other approved breath-testing instrument’ means a breath-testing instrument that employs infrared or other technology and has been approved by the commissioner of public safety for determining alcohol concentration.”). Koosmann asserts that the statute violates the separation-of-powers provision in Article III of the Minnesota Constitution because it is a legislative intrusion into the court’s inherent and

exclusive authority “to regulate the pleadings, practice, procedure and forms thereof in criminal actions in all the courts of this state,” citing *State v. Johnson*, 514 N.W.2d 551, 553 (Minn. 1994).

Although the admissibility of evidence is a matter delegated exclusively to the courts, the courts “may apply and enforce statutory rules of evidence as a matter of comity.” *State v. McCoy*, 682 N.W.2d 153, 160 (Minn. 2004). In *State v. Willis*, the supreme court refused to declare unconstitutional as a separation-of-powers violation a statute providing for admission of evidence of the absence of blood, breath, or urine tests because “[d]ue respect for the coequal branches of government requires the court to exercise great restraint before striking down a statute as unconstitutional” and because the statute “in no way interferes with the judiciary’s function of ascertaining facts and applying the law to the facts established.” 332 N.W.2d 180, 184 (Minn. 1983) (concluding “[a]s a matter of comity we will enforce this statute”). Similarly, in *State v. Pearson*, a case rejecting a separation-of-powers challenge to a statute relating to admissibility of evidence for blood testing, we noted that “[t]he legislature may enact laws that shift the burden of proof by allowing certain things to constitute prima facie evidence or create a rebuttable presumption.” 633 N.W.2d 81, 85 (Minn. App. 2001). In *Pearson*, we declined to hold the statute unconstitutional, in part because we concluded that it “does not interfere with or impair the judicial functions of ascertaining the facts and applying the law” because a defendant may still challenge, and a court may still determine, the reliability and probative value of blood-test evidence. *Id.* at 85-86.

Minn. Stat. § 634.16 has been in effect since 1984. *See* 1984 Minn. Laws ch. 430, § 9, at 92. The statute requires the proponent of admission of the test results to prove that the instrument is approved and the person performing the test has been fully trained in the use of the instrument. Minn. Stat. § 634.16.⁴ In *State v. Underdahl*, 767 N.W.2d 677, 685 n.4 (Minn. 2009), the supreme court, citing Minn. Stat. § 634.16, stated that the Intoxilizer at issue in that case “is statutorily presumed reliable, but Minnesota law permits this presumption to be challenged by drivers charged with DWI-related offenses.” We conclude that the statute is enforceable as a matter of comity, and accordingly, we decline to declare the statute unconstitutional. The district court did not err by enforcing the statute.

c. Constitutionality of search

Koosmann also objected to admission of the breath-test results as the fruit of a warrantless search, asserting that no exigent circumstances prevented the officers from obtaining a warrant prior to testing and that Koosmann’s consent to testing was not voluntary. “When the facts are not in dispute, the validity of a search is a question of law subject to de novo review.” *Haase v. Comm’r of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004). We review the facts independently to determine whether evidence resulted from the search should be suppressed. *Id.*

The district court held that, considering the totality of the circumstance, Koosmann freely and voluntarily consented to the test. Our review of the record

⁴ Koosmann does not challenge the adequacy of the foundation for admission of the breath-test results under the statute.

confirms that there is no evidence to support a claim that Koosmann's consent was coerced or otherwise not voluntarily and freely given. Koosmann's argument is based on his strong disagreement with the supreme court's holding in *State v. Brooks*, 838 N.W.2d 563, 570 (Minn. 2013), *cert. denied*, 134 S. Ct. 799 (2014), that criminalization of test refusal does not per se amount to coercion of consent and voluntariness of consent is determined by examining the totality of the circumstances. We conclude that *Brooks* is controlling, and we find no merit in Koosmann's argument that we are constitutionally obligated to ignore this precedent.

Affirmed.