

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2058**

State of Minnesota,
Respondent,

vs.

Daniel Patrick Brazil,
Appellant.

**Filed December 26, 2017
Affirmed
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CR-16-2585

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

Susan L. Segal, Minneapolis City Attorney, David Bernstein, Assistant City Attorney,
Minneapolis, Minnesota (for respondent)

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota
(for appellant)

Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Reilly,
Judge.

S Y L L A B U S

A DataMaster breath-test result is direct evidence of the alcohol concentration in a person's body, and a conviction based on such a result and report is reviewed under the traditional direct-evidence analysis.

OPINION

RODENBERG, Judge

Appellant Daniel Patrick Brazil, convicted of third-degree driving while impaired (DWI), challenges the sufficiency of the evidence supporting his conviction, arguing that a DataMaster test (DMT) result is circumstantial evidence of alcohol concentration and that there are rational inferences from the circumstances proved that are inconsistent with his guilt. We hold that a DMT result is direct evidence of alcohol concentration and affirm appellant's conviction under a traditional sufficiency-of-direct-evidence analysis.

FACTS

Appellant was arrested on November 8, 2015, after he crashed his car into another car. Appellant consented to a breath test, and the DMT device measured and reported appellant's alcohol concentration as 0.16. Appellant was charged with two counts of third-degree DWI under Minn. Stat. § 169A.20, subs. 1(1) and 1(5), with reference to Minn. Stat. § 169A.26 (2014) (including the aggravating factor of an alcohol concentration of 0.16 or more pursuant to Minn. Stat. § 169A.03, subd. 3(2) (Supp. 2015)). Appellant waived his right to a jury trial, and admitted under oath that he drank enough alcohol to affect his ability to safely drive a motor vehicle before he drove and crashed his car into a parked car. He also admitted that his alcohol concentration was 0.08 or more as measured within two hours of driving. Appellant denied that his alcohol concentration was 0.16 or more, an element necessary to the gross-misdemeanor charges. That element was tried to the court.

The parties stipulated to the following facts at trial: (1) appellant declined to submit to any field sobriety testing; (2) appellant was not wearing perfume and had not used hand sanitizer or hair spray on the day of the incident; (3) appellant did not notify law enforcement of any health conditions; (3) appellant was observed by police officers for 15 minutes before he provided a breath sample for the DMT and did not burp, belch, or vomit during that time; (4) Trooper Ben Olson, a certified DMT operator, properly administered the test; and (5) the DMT results could be admitted into evidence. The only issue for trial was whether the DMT results were sufficient to support the aggravating element of an alcohol concentration of 0.16 or more.

The state presented testimony from Karin Kierzek, a forensic scientist with the Minnesota Bureau of Criminal Apprehension (BCA). Kierzek testified that every DMT device in use in Minnesota comes to the BCA's lab annually for maintenance checks, calibration, and certification. All machines must provide results within the acceptable 0.003 or 3% margin of error in order to pass calibration. Kierzek also testified that DMT devices have a number of internal and external checks to ensure accuracy. These checks begin with having a trained operator administer the test. The operator observes the subject for at least 15 minutes to verify that the subject is not introducing mouth alcohol by burping, belching, or regurgitating. The DMT device tests itself by running a diagnostic test, which includes using air blanks to clear the sample chamber and ensure that there is no residual alcohol or measurable alcohol in the air surrounding the machine. The subject then provides two breath samples a minimum of three minutes apart to safeguard against measuring mouth alcohol, and a control sample runs between the two breath samples to

determine if the instrument is working properly when it evaluates a known alcohol concentration. If the two breath samples from the subject are not comparable, the test results are deemed insufficiently reliable and retesting is suggested.

The DMT results showed that the DMT device used to test appellant's alcohol concentration went through the full sequence of checks and passed all of them. There is no indication of irregularity or malfunction. The air blanks produced readings of zero, meaning that the sample chamber was clear of alcohol. Appellant's first breath sample revealed an alcohol concentration of 0.164. The machine ran another air blank and a control sample with a target of 0.078, which produced a result of 0.077. Kierzek testified that the control sample reading was only 0.001 different than the known sample, which variance she testified was insignificant and meant that the machine was measuring alcohol accurately within tolerable limits. After the control-sample test, the machine ran another air blank, which again tested zero, and then appellant provided a second breath sample, which resulted in an alcohol concentration measurement of 0.175. One final air blank was run to clear the sample chamber and check the room air for any measurable alcohol. It also tested zero. Kierzek testified that appellant's final alcohol concentration was determined by taking the lower of the two reported sample results, 0.164, and dropping the third digit to reach a reported value of 0.16. This method of reporting "give[s] the most benefit to the subject," according to Kierzek's testimony. Based on her review, Kierzek opined that appellant's breath-test results were accurate.

Kierzek also testified that "[t]here is no perfect measurement" and no measurement can ever be absolutely accurate. She testified that there is an uncertainty-of-measurement

range within which the tester could have confidence that a high percentage of results would fall. Factors that contribute to the uncertainty of measurement include the area in which the tests are performed, the instructions given by an operator, whether the subject is wearing cologne, and whether the subject has certain medical conditions. She testified that the uncertainty-of-measurement value “merely gives you a range of what you would expect to see given repeated samplings.” For appellant’s test in particular, Kierzek testified that, at the 99% confidence interval, the expected range of test results would be 0.1504 to 0.1886. The average from appellant’s two breath-test results was 0.1695, and Kierzek testified that this is the “most likely result,” and that repeated test results “would be symmetric around that point.” She also agreed that, had appellant’s breath been tested a third time, it could have fallen anywhere within the confidence interval that she identified, from 0.1504 to 0.1886, and agreed that a third test falling anywhere within that range is “a distinct possibility” that is not arbitrary or capricious. Appellant’s counsel asked Kierzek whether she could “say that if [appellant’s breath] was measured a third time . . . [the result] would be a .18 or if it would be a .15 . . . [w]ithout speculating,” to which Kierzek responded no.

Thomas Burr, a self-employed forensic-science consultant, testified for appellant. He testified that a “measurement is an estimate of [a] true value” and that a measurement is only complete if it is accompanied by a statement about the uncertainty of measurement. Burr admitted that he is not a DMT expert, and that he does not have any experience operating a DMT device, aside from a training he attended at a DataMaster manufacturing plant, which certified him to operate and run diagnostics on DMT devices. He agreed that

the air blanks from appellant's testing helped to establish that the device was working properly and that the control sample and control target were within acceptable limits. He agreed that he had no reason to believe the DMT device was not operating properly when appellant took the tests. He testified to the effect that he could not say without speculation, based on the available breath-test records, whether appellant's alcohol concentration was 0.16 or more.

The district court found as a fact that appellant's alcohol content was at least 0.16. It therefore found him guilty of the two charged gross-misdemeanor counts of third-degree DWI. In reaching this conclusion, the district court relied on Kierzek's testimony that the DMT device, operating properly, produced a final result of 0.16.

This appeal followed.

ISSUES

- I. Is a DMT result direct evidence of the test subject's alcohol concentration?
- II. Is there sufficient evidence in the record to support appellant's convictions?

ANALYSIS

I. A breath-test result is direct evidence of a person's alcohol concentration.

Appellant argues that the DMT's measurement is circumstantial evidence of his alcohol concentration because it is impossible to know his true alcohol concentration. Therefore, he argues, the circumstantial-evidence review standard applies and the evidence will be considered sufficient to support appellant's conviction only if the state has proven the absence of any rational inference inconsistent with guilt. *See State v. Al-Nasseer*, 788

N.W.2d 469, 473 (Minn. 2010) (specifying the appellate standard of review for appeals challenging the sufficiency of circumstantial evidence).

“Direct evidence is [e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (quotation omitted). Such evidence can be provided in the form of testimony by a person who perceived the fact through her senses or physical evidence of the fact itself. *State v. Williams*, 337 N.W.2d 387, 389 (Minn. 1983). In contrast, circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). “[C]ircumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence.” *Id.*

Whether a DMT result is direct evidence of a person’s alcohol concentration is an issue of first impression. Our decision in *State v. Hughes*, 355 N.W.2d 500 (Minn. App. 1984), provides some guidance. *Hughes* involved a challenge to the sufficiency of the evidence in a DWI prosecution that relied on a blood test for alcohol. 355 N.W.2d 500, 502 (Minn. App. 1984), *review denied* (Minn. Jan. 2, 1985). We applied the circumstantial-evidence standard when reviewing whether the evidence sufficiently proved that the defendant was the driver of the car. *Id.* But in our review of the sufficiency of the evidence concerning blood-alcohol concentration,¹ we characterized the blood-test results as “direct

¹ At the time *Hughes* was decided, Minnesota law used the term “blood alcohol concentration,” and 0.10 was the statutory limit. *See, e.g.*, Minn. stat. § 169A.20, subd. 1(5) (2002); *Hughes*, 355 N.W.2d 500. The version of the statute in effect at the time of the offense here prohibits having an alcohol concentration of 0.08 or more, Minn. Stat. §

evidence.” *Id.* We held that “[t]his direct evidence, together with rational inferences from circumstantial evidence,” sufficed to prove the driver’s blood alcohol concentration was over the statutory limit. *Id.*

Appellant argues that, while the DMT result does contain a reported number representing his alcohol concentration, the factfinder necessarily relies on inference in determining whether that number accurately reflects his true alcohol concentration. Appellant argues that, because the factfinder must infer the subject’s actual alcohol concentration from the DMT reported result, the reported result is not direct evidence.

Testimony provided by a witness, concerning what the witness saw or heard, is considered direct evidence. *Williams*, 337 N.W.2d at 389. Such evidence “is based on personal knowledge or observation and . . . if true, proves a fact without inference or presumption.” *Harris*, 895 N.W.2d at 599 (quoting *State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007)). But even with eyewitness testimony, the factfinder must make some inferences in considering the testimony, such as whether the witness’s memory is accurate, whether the witness accurately perceived the subject of the testimony, and even whether the witness is telling the truth. That some inference is required for the factfinder to interpret the evidence does not render otherwise direct evidence circumstantial. Evidence is direct when it directly addresses the fact in dispute. *Williams*, 337 N.W.2d at 389. Evidence is circumstantial when it does not directly address the fact in dispute and proof of the fact in dispute requires an additional inference from the evidence. *Id.*

169A.20, subd. 1(5) (2014), with an alcohol concentration of 0.16 or more being considered an aggravating factor, Minn. Stat. § 169A.03, subd. 3(2).

Here, the fact in dispute is appellant's alcohol concentration. The DMT device, operated by an appropriately credentialed police officer, measured appellant's alcohol concentration by breath testing and reported the results of that measurement. The end result was a reported alcohol concentration. The DMT printout is a report of the measurement and directly addresses the question of appellant's alcohol concentration.

While no measurement is perfect, that does not mean that all measurements are circumstantial evidence. If a person uses a ruler to measure the length of a thing, the measurement is direct evidence of length. If a person uses a caliper to measure the thickness of a thing, the measurement is direct evidence of thickness. That a measurement is imperfect does not render it a mere circumstance. We hold that a DMT result is direct evidence of a person's alcohol concentration.

II. The record evidence is sufficient to support appellant's convictions.

Having concluded that the DMT-reported result is direct evidence of appellant's alcohol concentration, we next evaluate whether the record evidence is sufficient to prove beyond a reasonable doubt that appellant's alcohol concentration was 0.16 or more. Appellant argues that the evidence is not sufficient, because the uncertainty-of-measurement range includes values below 0.16, meaning that some tests of appellant's breath—if enough were done—would be expected to fall below 0.16.

In considering the sufficiency of the evidence supporting a conviction, we thoroughly analyze the record “to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the [factfinder] to reach the verdict which [it] did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must

assume that the factfinder “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 [factfinder], acting with due regard for the presumption of innocence and for the necessity of overcoming it by 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). We have referred to this as the “traditional standard of review.” *State v. Olson*, 887 N.W.2d 692, 700 (Minn. App. 2016).

The district court received a DMT printout, reporting the results of two measurements of appellant’s breath as an alcohol concentration of 0.16. Appellant agrees that the test was administered correctly and that the DMT device functioned properly. The district court received no evidence that the test result was incorrect. The record contains no measurement of appellant’s alcohol concentration lower than 0.16. While appellant argues that the state is required to prove his alcohol concentration within the uncertainty-of-measurement range, our case law has consistently rejected this argument when framed in terms of margin of error. *See Barna v. Comm’r of Pub. Safety*, 508 N.W.2d 220, 222 (Minn. App. 1993) (“[T]he implied consent statute does not require that the margin of error be considered.”); *Loxtercamp v. Comm’r of Pub. Safety*, 383 N.W.2d 335, 336-37 (Minn. App. 1986) (discussing that the implied-consent statute does not require alcohol concentration to be proved “within an alleged margin for potential error”), *review denied* (Minn. May 22, 1986); *Dixon v. Comm’r of Pub. Safety*, 372 N.W.2d 785, 786 (Minn. App. 1985) (same). While these earlier decisions were made in the context of implied-consent cases, they hold that the proponent of a breath test need not prove the measurement to have

been absolutely and precisely correct. The proponent must show that “the necessary steps have been taken to ensure reliability,” and after that “it is incumbent on the driver to suggest a reason why the [breath] test was untrustworthy.” *State v. Nelson*, 399 N.W.2d 629, 632 (Minn. App. 1987), *review denied* (Minn. Apr. 17, 1987) (citing *State v. Dille*, 258 N.W.2d 565, 568 (Minn. 1977)). Here, the parties agreed that the test was administered correctly by a qualified DMT operator, and there was no mouth alcohol that rendered the test result suspect. The district court accepted the test result as adequate proof of appellant’s alcohol concentration. It did so despite testimony that it is possible that a third test of appellant’s breath might have revealed a reported result under 0.16. The record supports the district court’s factual finding concerning appellant’s alcohol concentration. The evidence is sufficient to support appellant’s conviction of third-degree DWI.

D E C I S I O N

A DMT result is direct evidence of a subject’s alcohol concentration. Applying the direct-evidence standard of review to the record before us on appeal, the evidence is sufficient to support the district court’s finding that appellant’s alcohol concentration was 0.16 or more.

Affirmed.