STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2048

State of Minnesota,
Respondent,

vs.

Jefferey Mariner,
Appellant.

Filed November 13, 2018
Affirmed
Reilly, Judge

Lyon County District Court
File No. 42-CR-16-465

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

Rick Maes, Lyon County Attorney, Abby Wikelius, Assistant County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

U N P U B L I S H E D O P I N I O N

REILLY, Judge

Appellant challenges his conviction for first-degree driving while impaired, arguing that the district court abused its discretion and denied him his constitutional right to present

a complete defense by excluding an abridged version of the squad-car video recording as cumulative evidence. Appellant also raises three additional pro se arguments. We affirm.

FACTS

On May 7, 2016, a Minnesota State patrol trooper observed a truck traveling southbound on Highway 23, which was crossing over the fog line and speeding. After stopping the truck, the trooper identified appellant, Jefferey Mariner, as its driver. While speaking with appellant, the trooper smelled an odor of alcoholic beverage coming from the truck. Appellant spoke with slurred speech and had glassy, watery eyes. Based upon the trooper's observations and appellant's performance on field sobriety tests, the trooper arrested appellant. After he was read the implied consent advisory, appellant submitted to a DataMaster DMT (DMT) breath test, which indicated that appellant had a 0.13 alcohol concentration. Appellant was charged with two counts of driving while impaired and one count of open bottle.

During the jury trial, appellant's defense counsel argued that the trooper's radio was on and receiving radio traffic during the DMT test, which could have impacted the reliability of the test. Both defense counsel and the prosecutor questioned the trooper about his radio. Additionally, appellant's defense counsel called a forensic scientist from the Minnesota Bureau of Criminal Apprehension as an expert witness to testify to DMT machine safeguards and radio frequency interference. Following the witnesses' testimony, defense counsel requested to play an abridged version of the implied-consent video recording (abridged recording) to demonstrate that there was radio traffic during the DMT test. The district court sustained the state's objection to the abridged recording as

cumulative evidence. At the conclusion of trial, the jury returned guilty verdicts on all counts.

This appeal followed.

D E C I S I O N

I. The district court did not abuse its discretion when it precluded the abridged recording.

A criminal defendant has a constitutional right to a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984); *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992). "But this right is not absolute" as "[c]riminal defendants are bound by the rules of evidence, which are designed to assure fairness and reliability in ascertaining guilt or innocence." *State v. Wilson*, 900 N.W.2d 373, 384 (Minn. 2017) (citations omitted). Even where a criminal defendant alleges that his inability to present a defense violates his constitutional rights, evidentiary questions are reviewed for an abuse of discretion. *Id*. (citing *State v. Henderson*, 620 N.W.2d 688, 698 (Minn. 2001)). The appellant has the "burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

a. The abridged recording was cumulative evidence.

A district court may exclude otherwise relevant evidence "if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. "Cumulative evidence" is "[a]dditional evidence that supports a fact established by the existing evidence." *Black's*

Law Dictionary 675 (10th ed. 2014). After the trooper testified that his radio was on during the DMT test, appellant's defense counsel sought to introduce the abridged recording to establish that the trooper's radio was on and received radio traffic during the DMT test. Given that appellant's rationale for introducing the abridged recording had "already been testified to" by the trooper, the district court's decision to exclude the evidence as cumulative was not an abuse of discretion. *See State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004) (stating that an appellate court will not reverse a district court's evidentiary ruling absent a clear abuse of discretion); *see also State v. Buchanan*, 431 N.W.2d 542, 551 (Minn. 1988) (discerning no abuse of discretion where excluded evidence that "merely duplicated other evidence already presented" was cumulative).

b. The best-evidence rule is inapplicable.

Appellant also asserts that the best-evidence rule required the introduction of the abridged recording. *See* Minn. R. Evid. 1002. Appellant did not present the best-evidence argument to the district court, and therefore this court need not address it on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) ("This court generally will not decide issues which were not raised before the district court."). But in the interests of justice, we will briefly address the issue.

In the absence of an objection, an appellate court may review an issue first raised on appeal for plain error. Minn. R. Crim. P. 31.02; *State v. Kelley*, 855 N.W.2d 269, 273-74 (Minn. 2014). The plain-error standard requires the appellant to show (1) an error (2) that was plain and (3) that the error affects the appellant's substantial rights. *Kelley*, 855 N.W.2d at 273-74. The party asserting plain error has the burden of establishing all

three elements. *Id.* "If these three prongs are met, the court must then decide whether it should address the issue in order to ensure fairness and the integrity of the judicial proceedings." *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001) (quotation omitted).

The best-evidence rule requires that the original recording be produced to prove its contents. Minn. R. Evid. 1002. Generally, secondary evidence about the contents of the original cannot be admitted where the original is available. *State v. DeGidio*, 152 N.W.2d 179, 180 (Minn. 1967). However, the best-evidence rule is inapplicable in this situation. Here, appellant did not seek to introduce the abridged recording to prove the contents of the recording, but, rather, to demonstrate the presence of radio transmissions. At trial, the trooper was not asked specifically about the content of the radio traffic during the DMT test and appellant's counsel did not raise any objection to the trooper's ability to remember detailed information about the radio traffic. This case is analogous to *State v. Bauer*, where the supreme court held that it was not an error to permit the officer to testify about the contents of a recorded conversation, in lieu of a video recording, because the defendant did not object to any discrepancies between the testimony and recordings or provide any evidence that the officer's testimony was misleading. 598 N.W.2d 352, 368 (Minn. 1999). Accordingly, because there is no plain error, we reject appellant's best-evidence argument.

II. The exclusion of the abridged recording did not affect the jury's verdict.

Even if we determined that the district court abused its discretion in making its evidentiary ruling, this court will reverse only if the exclusion of the evidence was not harmless beyond a reasonable doubt. *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn.

2017). An "error is harmless if the jury's verdict is surely unattributable to the error." *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009).

Appellant argues that his defense was to "attack the test results by establishing that the testing procedures were flawed because of radio interference." To that end, appellant's defense counsel questioned both the trooper and the BCA expert regarding potential radio interference. The trooper testified that "from [his] training and knowledge of the operating machine, it was functioning properly and resulted in a correct test" and the BCA expert testified that "this test was completed without issue." When a jury hears a wealth of evidence on a topic, the exclusion of other evidence on that same topic is unlikely to be prejudicial. *Zumberge*, 888 N.W.2d at 696; *see also State v. Martin*, 773 N.W.2d 89, 109 (Minn. 2009) (failure to admit video evidence was harmless in part because it was "largely redundant").

In addition, this court may consider the strength of each party's evidence when determining whether admitting excluded evidence would have led to a different result. *State v. Turner*, 359 N.W.2d 22, 24 (Minn. 1984). Here, besides the DMT test results—which revealed appellant had a 0.13 alcohol content—the state presented evidence that appellant displayed signs of intoxication, failed field-sobriety tests, and admitted to drinking. Therefore, even if the district court erroneously excluded the abridged recording, that decision was harmless error. *See Zumberge*, 888 N.W.2d at 697 (weighing the strength of the state's case when making a harmless-error evaluation).

III. Appellant's pro se arguments.

Appellant raises three additional pro se arguments, but because appellant failed to support these arguments with citations to relevant facts or legal authority, we deem them forfeited. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (considering arguments forfeited when they are unsupported by facts in the record and contain no citation to relevant legal authority). Nevertheless, in the interests of justice, we analyze appellant's arguments below.

Trooper's Driving Conduct

First, appellant asserts that his convictions should be overturned because the district court erred in its factual determinations regarding the trooper's driving conduct. "We give great deference to a district court's findings of fact and will not set them aside unless clearly erroneous." *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008). "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted).

Minnesota Statutes provide that the driver of a motor vehicle shall not follow another vehicle more closely than is "reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the conditions of the highway." Minn. Stat. § 169.18, subd. 8 (2016). Appellant argues that the trooper was a "road-rage driver that came up upon him at a very high speed, tailgating him" and was "illegally too close," which caused appellant to cross the fog line and speed resulting in the traffic stop. Based upon its review of the evidence, the district court determined that "Trooper Schuelke's driving

conduct did not cause the [appellant] to weave over the fog line or exceed the speed limit." The district court did not clearly err in making this factual determination because the evidence in the record supports it.

Alternative Test

Second, appellant asserts that a blood test should have been offered in addition to the DMT test administered by the trooper. Minnesota Statutes provide that a person has "the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer," however, "[t]he failure or inability to obtain an additional test or tests by a person does not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer." Minn. Stat. § 169A.51, subd. 7(b) (2016). Again, the district court did not clearly err in its factual determination that the trooper "did not hamper or interfere with any attempt by [appellant] to obtain a blood test."

Expert Testimony Regarding Ketones

Third, appellant asserts that the district court erred when it precluded appellant's expert witness, Dr. Enrico Ocampo, M.D., from testifying about ketones. Appellant sought to introduce evidence that ketones—chemicals produced by the body that are found in greater amounts in individuals with uncontrolled diabetes or who are on starvation diets—could have rendered a positive DMT test result in this case.

Here, the district court determined that, in order to satisfy the relevance requirement for evidence, "[e]vidence regarding ketones' effect on the breath test result may only be admitted if Dr. Ocampo testifies to a reasonable degree of medical certainty that on May

7, 2016, ketones were present in the [appellant's] breath and that the presence of the ketones affected the DMT test results in this case." Moreover, the district court found that, because there was no evidence that there were ketones in appellant's system on the date of the offense, the evidence was speculative, "confusing and misleading." The district court's ruling on evidentiary issues will not be disturbed absent "a clear abuse of discretion." *Amos*, 658 N.W.2d at 203. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced. *Id.* (citation omitted). Appellant has not met this burden.

Because the district court did not abuse its discretion in its evidentiary determination that the abridged recording was cumulative, nor did it violate the best-evidence rule, and appellant's additional pro se arguments are not persuasive, we affirm.

Affirmed.