STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0303

State of Minnesota,
Appellant,

vs.

Steven David Schultz,
Respondent.

Filed August 27, 2018
Affirmed
Bratvold, Judge
Concurring specially, Connolly, Judge

Olmsted County District Court
File No. 55-CR-15-4136

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Assistant County Attorney, Rochester, Minnesota (for appellant)

Daniel J. Koewler, Charles A. Ramsay, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota; and

Austin J. Swisher, Austin J. Swisher Law Office, Rochester, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

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

BRATVOLD, Judge

Appellant State of Minnesota challenges the district court's pretrial decision to exclude evidence of a blood test taken from respondent Steven David Schultz, and raises additional issues in its appellate brief. Because the district court did not abuse its discretion in excluding the blood-test evidence as substantially more prejudicial than probative, and because the other issues raised by the state are not before us, we affirm.

FACTS

At 10:42 p.m. on February 24, 2015, Trooper Bogojevic responded to a motor vehicle collision. According to the accident report prepared by the state highway patrol, Schultz was traveling northbound in his vehicle on Highway 63 and collided with a semi-truck that was blocking both lanes while attempting a left turn. Emergency personnel pulled Schultz from the vehicle and alerted Bogojevic to the smell of alcohol coming from Schultz. As emergency personnel began to transport Schultz on a stretcher, Bogojevic put his "nose down by [Schultz's] face" and could "smell the odor of an alcoholic beverage." The accident report also noted that Schultz's vehicle left no skid marks.

Paramedics then took Schultz to the hospital and Bogojevic obtained a warrant for Schultz's blood, which was drawn at 1:45 a.m., and sent the sample to the Minnesota Bureau of Criminal Apprehension (BCA) for analysis. Forensic scientist Jennifer Setterstrom analyzed the sample and determined the alcohol concentration was 0.14 (the blood test). Several months later, at the county attorney's request, Setterstrom performed a

retrograde extrapolation and determined that Schultz's alcohol concentration was between 0.15 and 0.17 at 12:30 a.m. on February 25, 2015 (the retrograde analysis).[1]

The state charged Schultz with two counts of third-degree driving while impaired, including operating a vehicle while under the influence of alcohol (count I) and having an alcohol concentration of 0.08 or more within two hours of operating a vehicle (count II).[2] *See* Minn. Stat. § 169A.20, subd. 1(1), (5) (2014).

Schultz made a number of pretrial motions. Relevant to this appeal, Schultz moved to suppress the retrograde analysis because the state lacked "foundation to conduct retrograde extrapolation to the point of driving." The district court scheduled an omnibus hearing on June 24, 2016. Because Setterstrom was unavailable for medical reasons, the state asked the district court to reschedule the hearing. The district court scheduled the hearing for December 8, 2016.

At the December hearing, Setterstrom failed to appear. The prosecuting attorney informed the court that the state had subpoenaed Setterstrom in June and learned, during the December hearing, that Setterstrom was still on medical leave. Based on Setterstrom's absence, Schultz argued "there should be a judgment of acquittal, or at least our motion should be granted." The district court took evidence from the available witnesses, recessed

---

[1] "Retrograde extrapolation is a process whereby a person's alcohol level over time is predicated or measured." *State v. Larson*, 429 N.W.2d 674, 676 (Minn. App. 1988), *review denied* (Minn. Nov. 8, 1988).

[2] The state also charged Schultz with failure to drive with due care. *See* Minn. Stat. § 169.14, subd. 1 (2014).

the hearing, and asked the prosecuting attorney to provide additional information about Setterstrom's absence.

In a letter to the district court, the prosecuting attorney stated that Setterstrom had returned an acknowledgement of service for the state's subpoena in June 2016, returned to work briefly, and then took another medical leave in December. Setterstrom's supervisor was "unaware" of the December 8 hearing, according to the prosecuting attorney, but the supervisor advised that Setterstrom would return to work on December 30, 2016. The state asked the district court to continue the omnibus hearing so Setterstrom could testify. The district court denied the state's request for a continuance and asked for briefing on Schultz's motions.

On March 10, 2017, the district court granted Schultz's motion to exclude "the admission of expert testimony regarding the retrograde extrapolation of [Schultz's] blood alcohol concentration" and also granted Schultz's motion to dismiss count II (the March 2017 order). The district court set a trial date, which was later rescheduled to February 14, 2018.

At a pre-trial hearing immediately before trial was to begin, Schultz moved in limine to prohibit the state from introducing the blood test. After a hearing, the district court granted Schultz's motion, concluding that the probative value of the blood test was substantially outweighed by the prejudicial effect (the February 2018 order). The state filed this appeal from the February 2018 order and, in its brief to this court, challenges both the March 2017 and February 2018 orders.

D E C I S I O N

I. The state failed to timely appeal the March 2017 order.

The state argues in its brief to this court that the district court abused its discretion by denying its motion for a continuance after Setterstrom failed to appear for the December omnibus hearing and erred by dismissing count II for lack of probable cause in the March 2017 order. The state seeks a remand for an evidentiary hearing to allow Setterstrom to testify.

We do not consider any of the issues decided in the March 2017 order. The state, as it conceded during oral arguments before this court, did not appeal the March 2017 order within the applicable time constraints. Under Minn. R. Crim. P. 28.04, subd. 2(8) the prosecutor must appeal a pretrial order "within 5 days after the defense, or the court administrator under Rule 33.03, serves notice of entry of the order to be appealed from on the prosecutor, or within 5 days after the district court notifies the prosecutor in court on the record of the order, whichever occurs first." Failure to appeal an order within the applicable timeframe forfeits appellate review of that order. *State v. Schermerhorn*, 379 N.W.2d 660, 663 (Minn. App. 1986) (declining to address the merits of a pretrial order because the prosecutor's appeal was untimely).

Here, the state did not file an appeal until February 21, 2018, long after the district court had issued the March 2017 order.[3] As a result, the state cannot appeal the district

[3] We note that the state does not contend that it failed to receive contemporaneous notice of the March 2017 order. *See* Minn. R. Crim. P. 28.04, subd. 2(8).

court's denial of the motion for a continuance or any of the other issues decided in the March 2017 order.

II. The February 2018 order had a critical impact on the outcome of the trial.

Under the Minnesota Rules of Criminal Procedure, the state has the right to appeal from any pretrial order. Minn. R. Crim. P. 28.04, subds. 1(1), 2. To prevail, the state must show that (1) the district court "clearly and unequivocally" erred and (2) the error "will have a critical impact on the outcome of the trial." *State v. Underdahl*, 767 N.W.2d 677, 681 (Minn. 2009) (quotation omitted); *see also* Minn. R. Crim. P. 28.04, subd. 2(2)(b). The critical-impact test is a "threshold issue," and this court will not review a pretrial order "in the absence of critical impact." *Underdahl*, 767 N.W.2d at 681. "Critical impact" requires the state to show that the error "significantly reduces the likelihood of a successful prosecution," but the state need not show that a "conviction is impossible." *Underdahl*, 767 N.W.2d at 683 (quotation omitted). "Evidence unique in nature and quality is more likely to satisfy the critical impact requirement." *Id.* To determine critical impact, this court examines "all of the state's admissible evidence as a whole." *State v. McLeod*, 705 N.W.2d 776, 785 (Minn. 2005).

Here, the state argues that the district court's decision to exclude the blood test will have a critical impact on the outcome of the trial. We agree. Under count I, the state was required to prove that Schultz was "under the influence of alcohol," not merely that he had consumed some alcohol or driven carelessly. Minn. Stat. § 169A.20, subd. 1a(1). While the state may present other evidence that Schultz drove while under the influence of alcohol, such as the absence of skid marks and the odor of alcohol, this additional evidence

is weak, particularly in light of the absence of any passenger or other eyewitness testimony about Schultz's alcohol consumption or driving conduct.

Schultz argues that the state has not met the critical-impact test for two reasons. First, he argues that the state must prove that the district court's order "prevent[s]" it from prosecuting a charge. Schultz points to two supreme court decisions determining that the state had established critical impact because the district court's order effectively prevented the state from prosecuting a specific charge. *See State v. Stavish*, 868 N.W.2d 670, 674 (Minn. 2015); *Underdahl*, 767 N.W.2d at 684. But this argument fails because neither decision held that an order must prevent the state from prosecuting a charge as a prerequisite to the critical-impact test. *See Stavish*, 868 N.W.2d at 674; *Underdahl*, 767 N.W.2d at 684.

The supreme court's decision in *McLeod* is instructive. There, the state alleged that the defendant sexually abused Child A. *McLeod*, 705 N.W.2d at 779. The state sought to introduce evidence of previous abuse against Child B. *Id.* at 780. The district court excluded Child B's testimony, and the state appealed from the pretrial order. *Id.* The supreme court determined that excluding Child B's testimony would have "significantly reduce[d] the state's chances of a successful prosecution" because, although Child A provided evidence of the defendant's misconduct, Child B's testimony was critical to showing a pattern of conduct and to preserving Child A's credibility. *Id.* at 785-87. Our decision here is consistent with *McLeod*.

Second, Schultz argues that the state's chances of successfully prosecuting Schultz were not significantly reduced because the blood sample was obtained three hours after the

collision and there will be "no expert testimony explaining how to interpret" the blood test. But this argument assumes that the jury will find that the blood test is weak evidence, which is not a foregone conclusion; in fact, a jury could find the blood test highly probative. Similarly, the jury could have disbelieved Child B's testimony in *McLeod*, but excluding the evidence nonetheless had a critical impact on the trial. *Id.*

Schultz also relies on *State v. Hicks*, in which the supreme court stated that blood test evidence was not critical to proving a defendant drove while under the influence of alcohol, but was critical to proving a defendant's alcohol concentration of 0.10 within two hours of driving. 301 Minn. 350, 353, 222 N.W.2d 345, 347-48 (1974). *Hicks* is distinguishable for two reasons. First, the state had greater evidence of Hicks's intoxication, including testimony about Hick's poor balance and slurred speech. *Id.* at 352-53, 222 N.W.2d at 347. In contrast, the state's evidence of Schultz's impairment is Bogojevic's testimony that he briefly smelled alcohol, the absence of skid marks before the collision, and the blood test. Second, since the supreme court decided *Hicks*, it has "relaxed the critical impact standard" so that the state no longer needs to show that the "suppressed evidence completely destroys the state's case," and instead must only show that its trial prospects are significantly reduced. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998).

Accordingly, the state has met its burden in showing the February 2018 order will have a critical impact on its case against Schultz.

III. The district court did not abuse its discretion by excluding the blood test evidence.

The district court excluded the results of Schultz's blood test under Minn. R. Evid. 403, which provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The district court has a "wide range of discretion" in determining the relevance of evidence, and this court reviews the district court's determination under rule 403 for abuse of discretion. *State v. Schulz*, 691 N.W.2d 474, 477 (Minn. 2005).

Determining whether evidence is admissible under rule 403 involves a two-step analysis. First, a district court determines the probative value of the evidence. *Id.* at 478. Schultz appears to concede that the blood test was relevant and probative. Second, the district court balances the probative value of the evidence against the danger of unfair prejudice. *Id.* "Unfair prejudice under rule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *Id.* Overall, rule 403 "favors admission of relevant evidence." *Id.* Rule 403 expressly recognizes that evidence may be excluded to avoid misleading the jury. Minn. R. Evid. 403; *see also State v. Willis*, 364 N.W.2d 498, 500 (Minn. App. 1985) (holding that a district court did not abuse its discretion by excluding evidence under rule 403, in part, because of the risk of "unduly confusing the jury").

In making its decision on Schultz's motion in limine, the district court relied on the state's offer of proof that the "blood was tested by [Setterstrom] at the [BCA] through a gas chromatograph, through the approved process, and that it reported a quantum of alcohol in this case of approximately [0].14." The state also suggested it would offer context evidence to explain the blood test, such as Setterstrom's testimony about (a) "studies showing levels of impairment and when that tends to manifest itself," and (b) scientific information suggesting that Schultz's alcohol concentration "would very likely have been even higher" before the sample was taken.

The district court concluded that, because further context evidence was excluded by the March 2017 order, the blood test was likely to mislead the jury to believe that Schultz's alcohol concentration was 0.14 at the time he was driving. The district court explained that extrapolation testimony is more than a number, it also includes the process of alcohol absorption. The district court reasoned that admission of the blood test would "misrepresent[]" what was in Schultz's system at the time of the accident. It also stated, "We have an order on extrapolation. We're not going to get around it." Finally, the district court concluded that the blood test should be excluded because the probative value of the evidence was substantially outweighed by the potential for misuse by the jury.

On appeal, the state argues that "the blood alcohol test will not be offered out of context." It contends that Setterstrom would lay foundation for the blood test and the March 2017 order did "not prohibit testimony explaining generally how and when alcohol is absorbed and eliminated from the body." Further, the state argues that Schultz could counter with testimony about how the blood test did not prove impairment while driving.

The district court rejected these arguments, noting that the state's proffered context evidence would violate the terms of the March 2017 order.

We discern no abuse of discretion in the district court's conclusion. The March 2017 order excluded "the admission of expert testimony regarding the retrograde extrapolation of [Schultz's] blood alcohol concentration." Because the state's offer of proof relied on expert testimony establishing the significance of the blood test from a sample taken three hours after Schultz stopped driving, and because the March 2017 order excluded the suggested expert testimony, the district court reasonably concluded that the jury was likely to be misled and this concern substantially outweighed the probative value of the blood test. We also recognize that another district court could have properly admitted the blood test.

The state argues that the district court erroneously believed that "expert testimony of retrograde extrapolation" was "necessary to prove impairment." To support its position, the state cites appellate decisions affirming convictions of alcohol impairment at a specific alcohol concentration within two hours of driving as legally sufficient even though the record included no evidence of retrograde extrapolation. *See, e.g.*, *State v. Shepard*, 481 N.W.2d 560, 563-64 (Minn. 1992); *Larson*, 429 N.W.2d at 676-77. We disagree with the state's characterization of the district court's order. Further, the caselaw cited by the state considered the legal sufficiency of evidence of conviction and did not decide a trial court's decision to exclude evidence under rule 403. *See Shepard*, 481 N.W.2d at 563-64; *Larson*, 429 N.W.2d at 676-77.

Lastly, the state claims the district court applied the incorrect standard under rule 403 because it did not find that any relevance is *substantially* outweighed by prejudicial potential. While it is true that the district court did not use the word "substantial," the context of its comments indicate that it was applying the correct standard.

We conclude that the district court did not abuse its discretion by excluding the blood test under rule 403 based on the record in this case.

Affirmed.

CONNOLLY, Judge (concurring specially)

I completely agree with the majority's opinion that the district court did not abuse its discretion by excluding blood-test evidence for being unfairly prejudicial under Minn. R. Evid. 403. I write separately simply to emphasize what the majority has already said.

A different district court could have, within its discretion, admitted the blood-test evidence. Indeed, if I were still on the district court, I likely would have admitted the blood-test evidence. However, what I would have done on the district court is irrelevant, as I am no longer on the district court. I am on the appellate court. Thus, it is essential to remember in a case like this one that as an appellate court, we must not substitute our judgment for that of the district court's, but simply review whether what the district court did was within its discretion. *Arundel v. Arundel*, 281 N.W.2d 663, 667 (Minn. 1979).