STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0632

Michael Thomas Palke, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed January 27, 2020
Affirmed
Johnson, Judge

Anoka County District Court
File No. 02-CV-18-356

Rory P. Durkin, Giancola-Durkin, Anoka, Minnesota (for appellant)

Keith Ellison, Attorney General, Stephen D. Melchionne, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and Florey, Judge.

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

JOHNSON, Judge

The commissioner of public safety revoked Michael Thomas Palke's driver's license for one year after he was arrested for driving while impaired and a breath test indicated that his alcohol concentration was 0.16. He petitioned to rescind the revocation and, in doing so, sought to introduce expert evidence concerning the reliability and

accuracy of his breath-test results. The commissioner moved *in limine* to exclude Palke's expert evidence. The district court granted the commissioner's motion and sustained the revocation of Palke's driver's license. We conclude that the district court did not err by excluding Palke's expert evidence. Therefore, we affirm.

FACTS

On January 12, 2018, Palke was arrested for driving while impaired. A law-enforcement officer administered a breath test to Palke using a DataMaster DMT-G with Fuel Cell Option instrument. Palke submitted two breath samples, and the instrument reported an alcohol concentration of 0.16.[1] Consequently, the commissioner of public safety revoked Palke's driver's license for one year.

Palke petitioned the district court for judicial review of the revocation. In May 2018, Palke notified the commissioner that he intended to offer the testimony of a "BCA Breath Testing Expert" concerning the reliability and accuracy of his breath-test result in light of "the uncertainty of measurement values that apply to . . . breath test results, the metrological traceability of these test results, and the ultimate accuracy of the results." The commissioner promptly filed a motion *in limine* to exclude Palke's expert evidence, arguing primarily that the evidence would be irrelevant.

In December 2018, the district court conducted an implied-consent hearing, which focused on the commissioner's motion *in limine*. The district court did not rule on the

[1]The record does not include any evidence of the instrument's two measurements of the two breath samples. At oral argument, the commissioner's attorney stated that the two measurements were 0.165 and 0.167. Palke's attorney did not disagree.

motion *in limine* but, rather, asked counsel to file memoranda of law. Thereafter Palke filed a memorandum of law opposing the commissioner's motion, arguing that the expert witness's testimony would be relevant to the reliability of the DataMaster instrument and the "interpretation, accuracy, and probative value of this particular set of tests." The commissioner declined to file a reply memorandum.

In January 2019, the district court filed an order granting the commissioner's motion *in limine*. The district court applied rule 702 of the rules of evidence by considering whether the proffered expert testimony would be helpful to the district court as factfinder. The district court concluded as follows:

> Petitioner has failed to proffer sufficient information regarding the expert testimony beyond his allegation that the administration of Petitioner's test was biased and there is a chance Petitioner was below the legal threshold of 0.16. The limited information proffered regarding expert testimony concerning bias would not be helpful to the court and must be excluded.

In April 2019, the district court reconvened the implied-consent hearing. In light of the district court's decision to grant the commissioner's motion *in limine*, Palke effectively conceded that the revocation should be sustained. The district court later filed an order sustaining the revocation. Palke appeals.

D E C I S I O N

Palke argues that the district court erred by granting the commissioner's motion *in limine*, thereby preventing him from introducing expert evidence.

A.

A law-enforcement officer may require a person to submit to a chemical test of the person's blood, breath, or urine if the officer has probable cause to believe that the person was driving while impaired and the officer has arrested the person for that offense. Minn. Stat. § 169A.51, subds. 1(b)(1), 3 (2018). A breath test must be administered using an approved breath-testing instrument. *Id.*, subd. 5(a); Minn. R. 7502.0425 (2019). The breath-testing instrument must produce "one adequate breath-sample analysis, one control analysis, and a second, adequate breath-sample analysis." Minn. Stat. § 169A.51, subd. 5(a). A breath sample "is adequate if the instrument analyzes the sample and does not indicate the sample is deficient." *Id.*, subd. 5(b). A breath test is "acceptable" if it "consist[s] of two separate, adequate breath samples within 0.02 alcohol concentration." *Id.*, subd. 5(d).

If the results of a breath test indicate an alcohol concentration of 0.08 or more, the results must be reported to the commissioner of public safety and to the authority responsible for prosecuting impaired-driving offenses in that jurisdiction. Minn. Stat. § 169A.52, subd. 2(a) (2018).

> Upon certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired) and that the person submitted to a test and the test results indicate an alcohol concentration of 0.08 or more . . . , then the commissioner shall revoke the person's license or permit to drive . . . .

Id., subd. 4(a). The duration of the revocation ordinarily is 90 days, but "if the test results indicate an alcohol concentration of twice the legal limit or more," the revocation is for "not less than one year." *Id.*, subd. 4(a)(1).

A person whose driver's license has been revoked pursuant to section 169A.52, subdivision 4, may petition a district court for judicial review of the revocation. Minn. Stat. § 169A.53, subd. 2(a) (2018). The petition must "state with specificity the grounds upon which the petitioner seeks rescission of the order of revocation." *Id.*, subd. 2(b)(3). The district court must conduct a hearing on the petition. *Id.*, subd. 3(a); Minn. R. 7409.4600, subp. 1 (2019). "The scope of the hearing is limited to" one or more of twelve issues that are identified by statute. Minn. Stat. § 169A.53, subd. 3(b). The tenth issue identified by the statute is: "Was the testing method used valid and reliable and were the test results accurately evaluated?" *Id.*, subd. 3(b)(10). Regardless of the issue, "the commissioner must demonstrate by a preponderance of the evidence that license revocation is appropriate." *Axelberg v. Commissioner of Pub. Safety*, 831 N.W.2d 682, 684 (Minn. App. 2013), *aff'd*, 848 N.W.2d 206 (Minn. 2014).

"[T]he results of a breath test" are, as a matter of law, "admissible in evidence without antecedent expert testimony that an infrared or other approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath," so long as the breath test was "performed by a person who has been fully trained in the use of an infrared or other approved breath-testing instrument . . . pursuant to training given or approved by the commissioner of public safety or the commissioner's acting agent." Minn. Stat. § 634.16 (2018). If the requirements of section 634.16 are satisfied, the results of a

breath test "are admissible into evidence without antecedent expert testimony establishing that the instrument provides a trustworthy and reliable measure of alcohol concentration." *In re Source Code Evidentiary Hearings in Implied Consent Matters*, 816 N.W.2d 525, 528 n.3 (Minn. 2012); *State v. Norgaard*, 899 N.W.2d 205, 207-08 (Minn. App. 2017). In addition, if the requirements of section 634.16 are satisfied, the results of a breath test are "presumed trustworthy and reliable." *In re Commissioner of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). "But section 634.16's presumption of reliability may be challenged in a proceeding under section 169A.53, subdivision 3(b)(10), which specifically permits a driver to challenge the reliability and accuracy of his or her test results." *Id*.; *see also State v. Underdahl*, 767 N.W.2d 677, 685 n.4 (Minn. 2009).

A hearing on a petition for rescission "must be conducted according to the Rules of Civil Procedure." Minn. Stat. § 169A.53, subd. 2(d). In addition, the Rules of Evidence apply. *See In re Source Code*, 816 N.W.2d at 539-43; *Hayes v. Commissioner of Pub. Safety*, 773 N.W.2d 134, 136-38 (Minn. App. 2009). A district court may admit relevant evidence and may exclude evidence that is not relevant. *In re Source Code*, 816 N.W.2d at 540. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. With some exceptions, "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." Minn. R. Evid. 402. Furthermore, 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." Minn. R. Evid. 403. This court applies an abuse-of-discretion standard of review to a district court's evidentiary rulings at a hearing on a petition to rescind the revocation of a driver's license. *Wilkes v. Commissioner of Pub. Safety*, 777 N.W.2d 239, 245 (Minn. App. 2010).

If a party seeks to introduce expert evidence at an implied-consent hearing, the district court may admit the evidence if the expert's specialized knowledge will help the factfinder "understand the evidence or to determine a fact in issue." Minn. R. Evid. 702; *see also Hayes*, 773 N.W.2d at 136. "The basic consideration in admitting expert testimony under Rule 702 is the helpfulness test—that is, whether the testimony will assist the [factfinder] in resolving factual questions presented." *State v. Grecinger*, 569 N.W.2d 189, 195 (Minn. 1997).

> If the subject of the testimony is within the knowledge and experience of a [factfinder] and the testimony of the expert will not add precision or depth to the [factfinder's] ability to reach conclusions about that subject which is within their experience, then the testimony does not meet the helpfulness test.

State v. Helterbridle, 301 N.W.2d 545, 547 (Minn. 1980). This court applies an abuse-of-discretion standard of review to a district court's ruling on the admissibility of expert testimony. *State v. Bird*, 734 N.W.2d 664, 672 (Minn. 2007); *Hayes*, 773 N.W.2d at 136-37.

B.

Palke acknowledges that the district court excluded his proffered expert evidence on the ground that it would not be helpful to the factfinder. Palke contends, however, that "the expert testimony would have been helpful to the district court judge, as the testimony

would have explained the difference between bias, uncertainty of measurement, and margin of error," which Palke asserts are "distinct and separate issues,"[2] and that "the expert testimony would show how bias specifically affected the test results at the .16 level."

In response, the commissioner argues primarily that Palke's expert evidence is "insufficient as a matter of law," and thus irrelevant, on the ground that the commissioner "is not required to prove an alcohol concentration within some alleged margin of potential error."[3] The commissioner also argues that the district court correctly analyzed the helpfulness of Palke's expert evidence on the ground that Palke's proffer related merely to "the general concept of bias and how it could or might affect a test result" but did not include "anything specific to *this test* or *this instrument*."

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[2]Palke argued to the district court that "the metrological concept of 'measurement uncertainty' is not the same concept as 'margin of error.'" In support of that argument, he cited a scientific compliance guide that, he asserts, explores the question whether "estimation of measurement uncertainty [is] the same as error rate" and concludes that it is not. But that resource, insofar as it is summarized and quoted in Palke's memorandum of law, does not mention, and does not appear to refer to, the concept of "margin of error." The commissioner argues that the district court "correctly understood" that the concept of uncertainty of measurement is "conceptually identical to" the concept of margin of error. This court has treated the two concepts as functionally equivalent. *See State v. Brazil*, 906 N.W.2d 274, 279-80 (Minn. App. 2017), *review denied* (Minn. Mar. 20, 2018); *see also State v. King Cty. Dist. Court*, 307 P.3d 765, 769 (Wash. Ct. App. 2013).

[3]The commissioner is correct in stating that this court has held that, at a license-revocation hearing, a breath-test result need not be established within any particular margin of error. *See Barna v. Commissioner of Pub. Safety*, 508 N.W.2d 220, 222 (Minn. App. 1993); *Loxtercamp v. Commissioner of Pub. Safety*, 383 N.W.2d 335, 336-38 (Minn. App. 1986), *review denied* (Minn. May 22, 1986); *Dixon v. Commissioner of Pub. Safety*, 372 N.W.2d 785, 786 (Minn. App. 1985); *Hrncir v. Commissioner of Pub. Safety*, 370 N.W.2d 444, 445 (Minn. App. 1985); *Schildgen v. Commissioner of Pub. Safety*, 363 N.W.2d 800, 801 (Minn. App. 1985); *Grund v. Commissioner of Pub. Safety*, 359 N.W.2d 652, 653 (Minn. App. 1984).

To determine whether expert testimony would be helpful to a factfinder, we begin by identifying the issue in dispute. Palke identified only one issue for resolution at the implied-consent hearing: "Was the testing method used valid and reliable and were the test results accurately evaluated?" *See* Minn. Stat. § 169A.53, subd. 3(b)(10).

Palke's proffered expert witness, an unidentified employee of the BCA (which is a division of the department of public safety), was not retained or employed by Palke but, rather, was subpoenaed.[4] Thus, the expert did not prepare and sign a written report, which would have allowed the district court to evaluate the helpfulness of the expert's testimony by reading the expert's own words. *See* Minn. R. Civ. P. 26.01(b)(2). An expert witness's report is valuable in the process of determining the helpfulness of expert testimony because the report must include, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them." *See* Minn. R. Civ. P. 26.01(b)(2)(A), (B). In the absence of an expert report, Palke was required to disclose less information: "the subject matter on which the witness is expected to present evidence" and "a summary of the facts and opinions to which the witness is expected to testify." Minn. R. Civ. P. 26.01(b)(3). Nonetheless, the issue for the district court was the same as it would have been if the expert

[4] *Cf. Anderson v. Florence*, 181 N.W.2d 873, 874 (Minn. 1970) (holding that trial court could compel defendant, when qualified as expert witness, to answer cross-examination questions calling for expert opinion); *Bush v. Winter*, 402 N.W.2d 229, 230-31 (Minn. App. 1987) (declining to answer question whether party may use subpoena to compel unwilling non-party expert to give expert-opinion testimony).

had prepared an expert report: whether the expert's testimony would "assist the [factfinder] in resolving factual questions presented." *Grecinger*, 569 N.W.2d at 195.

Palke's proffer of expert evidence may be found in the record in three places: a letter that his attorney sent to the commissioner's attorney, which refers to the general concept of "uncertainty of measurement" and related concepts; his attorney's oral summary at the first implied-consent hearing; and a memorandum of law that his attorney filed in opposition to the commissioner's motion *in limine*. Palke's memorandum of law contains the most expansive explanation of the proffered evidence. In the memorandum, Palke asserted that the expert witness would "explain that bias, an instrument's tendency to consistently skew a measurement result either too high or too low, has an impact on the evaluation of test results" and that the impact of bias on all DataMaster test results is "significant." Palke also asserted that the expert witness would testify "that there is a certain, calculated, and quantified percent chance that Petitioner's true alcohol concentration was actually below" 0.16.

The district court's ruling on the admissibility of Palke's expert evidence appropriately considered the general nature of Palke's proffer. The district court reasoned that Palke had "failed to proffer sufficient information regarding the expert testimony beyond his allegation that the administration of [his] test was biased and that there is a chance [he] was below the legal threshold of 0.16." The district court further reasoned that "[t]he limited information proffered . . . would not be helpful to the court."

The district court's reasoning is supported by the record. Palke's proffer was general in nature and somewhat speculative about the testimony that the expert witness

would give. There is no indication that the expert testimony would have helped the district court resolve the disputed factual issues in this particular case, such as whether Palke's test results "were . . . accurately evaluated," *see* Minn. Stat. § 169A.53, subd. 3(b)(10), or whether Palke's alcohol concentration actually was 0.16 or more,[5] *see* Minn. Stat. § 169A.52, subd. 4(a), 4(a)(1). Palke argues on appeal that the expert witness would have testified about the probability that his "true alcohol concentration" was less than 0.16, but he does not state that probability, and there is no such information in any version of the proffer that he presented to the district court.

The district court's reasoning also is consistent with the caselaw. For example, in *State v. Mosley*, 853 N.W.2d 789 (Minn. 2014), the defendant sought to introduce expert testimony concerning the accuracy of eyewitness identifications. *Id.* at 798-99. The district court ruled that the proffered evidence was inadmissible, stating, "I don't believe that that expert can assist me in this trial or has anything to add." *Id.* On appeal, the

[5]*See, e.g.*, *McIntyre v. Commissioner of Pub. Safety*, No. A16-1968, 2017 WL 3469740 (Minn. App. Aug. 14, 2017). In *McIntyre*, an employee of the Bureau of Criminal Apprehension testified that "there was an 81.92 percent possibility that [McIntyre's] test result was over 0.08." *Id.* at *1. The district court sustained the revocation of the petitioner's driver's license, reasoning that the implied-consent statute did not require consideration of the margin of error for breath-test results, that the driver had provided two breath tests exceeding 0.08 alcohol concentration, and that the test was properly administered with an approved instrument. *Id.* at *2. This court affirmed, concluding that the commissioner of public safety is not required to prove an alcohol concentration within any particular range of uncertainty and that, in any event, the testimony regarding the "81.92 percent possibility" was sufficient to meet the preponderance-of-the-evidence standard of proof. *Id.* at *3-5. The *McIntyre* opinion is unpublished and, thus, not precedential. *See Vlahos v. R & I Constr., Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004); *State v. Porte*, 832 N.W.2d 303, 312 n.1 (Minn. App. 2013). We mention it in this opinion not as legal authority but only to illustrate how expert evidence of the type proffered by Palke might be more tailored to the facts of a particular case.

supreme court concluded that the district court did not abuse its discretion, in part because the defendant's "proffer was very general and nonspecific to his case" and "the proposed testimony did not go to the particular circumstances" of that case. *Id.* at 800. Similarly, in *State v. Barlow*, 541 N.W.2d 309 (Minn. 1995), in which the district court also excluded expert testimony concerning eyewitness identifications, the supreme court concluded that the district court did not abuse its discretion because "the proffered testimony did not go to the reliability of any particular witness or the particular circumstances of the identification, and its potential for helpfulness was minimal at best." *Id.* at 313. In this case, the expert evidence proffered by Palke is relatively unhelpful for essentially the same reasons. Consequently, the district court did not abuse its discretion when it reasoned that the "limited information proffered . . . would not be helpful to the court."

Thus, the district court did not err by granting the commissioner's motion *in limine* and by denying Palke's petition to rescind the revocation of his driver's license.

Affirmed.