STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1555

State of Minnesota,
Respondent,

vs.

Kenny Alan Herold,
Appellant.

Filed August 31, 2020
Affirmed in part, reversed in part, and remanded
Frisch, Judge

Hennepin County District Court
File No. 27-CR-17-29034

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Erik A. Nilsson, Minneapolis City Attorney, David S. Bernstein, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Jeffrey S. Sheridan, Sheridan & Dulas, P.A., Eagan, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Frisch, Judge.

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

FRISCH, Judge

In this direct appeal following guilty verdicts for two counts of impaired driving, appellant seeks a new trial, arguing that the district court (1) erred by denying his motion to suppress evidence of roadside field sobriety tests and (2) abused its discretion in excluding expert witness testimony. We affirm in part, reverse in part, and remand for a new trial.

FACTS

Just after midnight on November 19, 2017, a state trooper observed a vehicle traveling on a highway without illuminated taillights. The trooper stopped the vehicle and identified the driver as appellant Kenny Alan Herold. Herold informed the trooper that he was at a bar earlier in the evening. The trooper observed Herold's bloodshot and watery eyes. The trooper asked Herold how much he had to drink, and Herold responded, "Four beers in five hours." The trooper smelled alcohol emanating from Herold.

The trooper instructed Herold to exit the vehicle and perform field sobriety tests, which revealed multiple clues of impairment. The trooper administered a preliminary breath test (PBT) and arrested Herold. At the jail, the trooper administered a breath test for evidentiary purposes using a DataMaster DMTG with fuel cell option (DMT). The results of the DMT test showed an alcohol concentration of 0.11 within two hours of driving.

The state charged Herold with operating a motor vehicle while under the influence of alcohol, Minn. Stat. § 169A.20, subd. 1(1) (2016), and operating a motor vehicle with

an alcohol concentration over 0.08 within two hours of operating a motor vehicle, Minn. Stat. § 169A.20, subd. 1(5) (2016). Herold moved to suppress evidence of the roadside field sobriety tests and the PBT, arguing that these tests constituted searches in violation of the Fourth Amendment. The district court denied the motion.

Before trial, Herold identified an expert witness to testify regarding the accuracy and reliability of the DMT as it is used in the State of Minnesota. Herold sought to introduce the expert testimony for the purpose of casting doubt on the accuracy of the state's evidence of his alcohol concentration. The state moved in limine to exclude Herold's expert from testifying at trial. The district court granted the motion, in part because the proposed expert witness did not examine the DMT used by the state to test Herold's alcohol concentration. Herold then sought discovery to access information about the state's DMT. The district court denied the discovery requests.

The matter proceeded to trial. After the state introduced evidence of Herold's alcohol impairment and the test result from the DMT, Herold renewed his request to introduce expert testimony regarding the accuracy and reliability of the test result. Following a proffer, or preliminary offer of proof regarding the proposed expert testimony, the state again objected to the testimony. The district court excluded the expert but allowed Herold to examine an employee from the Minnesota Bureau of Criminal Apprehension (BCA) regarding the DMT.

The jury found Herold guilty on both counts, and the district court entered a conviction and sentence. Herold appeals.

D E C I S I O N

I. The district court did not err by denying the pretrial motion to suppress evidence related to the field sobriety and preliminary breath tests.

Herold first argues that the district court erred by denying his pretrial motion to suppress evidence related to the roadside field sobriety tests and the PBT because such tests amount to warrantless searches in violation of the Fourth Amendment. On appeal from a pretrial order on a motion to suppress evidence, we review the district court's factual findings for clear error and legal conclusions de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

We first address the admissibility of evidence related to roadside field sobriety tests. Because a roadside field sobriety test is based on observation and is not a means of gathering evidence, it does not constitute a search within the meaning of the Fourth Amendment. *Vondrachek v. Comm'r of Pub. Safety*, 906 N.W.2d 262, 269 (Minn. App. 2017), *review denied* (Minn. Feb. 28, 2018). Rather, we evaluate a roadside field sobriety test as an investigatory expansion of a traffic stop. *Id.*

Herold argues that the trooper lacked reasonable, articulable suspicion to expand the stop beyond the initial observation of unilluminated taillights. Generally, a field sobriety test must be closely related to the initial justification for the stop. *State v. Klamar*, 823 N.W.2d 687, 696 (Minn. App. 2012). But signs of impairment observed during the course of a stop—such as the smell of alcohol emanating from the person or bloodshot and watery eyes—provide an independent basis to conduct field sobriety tests regardless of the initial purpose of the stop. *Id.* Here, the district court found that the officer observed

numerous signs of impairment before initiating field sobriety tests, including Herold's slow motor movements, his bloodshot and watery eyes, a moderate odor of alcohol emanating from Herold, and Herold's statement that he was traveling from a downtown bar where he had consumed four beers in five hours. We see no error in the district court's findings.

Herold also argues that the district court erred by failing to suppress the PBT results. But we have affirmed the admission of PBT results where (1) the driver consented to the test and (2) the officer had probable cause to arrest the driver even before the administration of the PBT. *See Vondrachek*, 906 N.W.2d at 270.

The record supports the district court's finding that Herold consented to the PBT. Whether consent to search was voluntary is a question of fact reviewed for clear error. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). In determining whether a search was voluntary, district courts consider whether the driver retained the right to refuse to submit to testing, whether the claimed consent was given before arrest, whether the driver was subject to repeated questioning or extended custody that would make it more likely that the driver's "will had been overborne and his capacity for self-determination critically impaired," whether a driver had the opportunity to consult with an attorney before agreeing to take a test, and whether the driver was told that refusal was an option. *Vondrachek*, 906 N.W.2d at 270. Here, the district court found the following facts show consent: (1) Herold was not placed under arrest prior to administration of the PBT; (2) Herold was only detained for approximately 13 minutes before being asked to submit to a PBT; (3) the trooper did not subject Herold to extended questioning, asked only brief investigatory questions, and did not show a weapon or make any threatening gestures; and (4) Herold

cooperated and did not object. In *Vondrachek*, a case involving similar facts, we affirmed a district court's finding of consent. The district court did not clearly err by finding that Herold consented to the PBT.

The record also shows that the trooper had probable cause to arrest Herold before administering the PBT. A PBT is incident to arrest when the results of the test are not the basis for the initial probable cause to arrest and the arrest is contemporaneous with the PBT. *Id.* Here, the trooper observed seven out of eight clues of impairment during the walk-and-turn test, three out of four clues during the one-legged-stand test, and five out of six clues during the horizontal-gaze-nystagmus test. And the squad-car video reveals numerous additional signs of impairment, including obvious stumbling and lack of coordination. The district court did not err by finding that the trooper had a basis for arrest notwithstanding the PBT.

Because the PBT was taken incident to arrest and Herold consented to the PBT, neither the field sobriety tests nor the PBT constituted impermissible searches. The district court did not err by denying Herold's motion to suppress.

II. The district court abused its discretion by excluding Herold's chosen expert witness.

Herold argues that the district court violated his right to due process by excluding the testimony of his chosen expert, Thomas Burr, which Herold presented to challenge the accuracy of the evidentiary breath test. We agree.

Due process requires that every defendant be "afforded a meaningful opportunity to present a complete defense." *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992)

(quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984)); *accord* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. "However, the accused must comply with the established rules of evidence designed to assure both fairness and reliability in ascertaining guilt or innocence." *State v. Wolf*, 605 N.W.2d 381, 384 (Minn. 2000).

The Minnesota Rules of Evidence provide that "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Minn. R. Evid. 702. Any opinion offered by the expert "must have foundational reliability" to be admissible. *Id.* And expert testimony may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403; *see State v. Lopez-Rios*, 669 N.W.2d 603, 611-13 (Minn. 2003) (concluding that expert testimony was more prejudicial than probative because it was duplicative of other testimony, based on hearsay, and expressed an opinion on an ultimate issue).

"Foundational reliability is a concept that looks to the theories and methodologies used by an expert." *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 56 (Minn. 2019); *see also Doe v. Archdiocese of St. Paul & Minneapolis*, 817 N.W.2d 150, 169 (Minn. 2012) (explaining that the "underlying reliability, consistency, and accuracy of the theory" of an expert lie at "the heart of the foundational reliability question"); *Goeb v. Tharaldson*, 615 N.W.2d 800, 816 (Minn. 2000) (requiring a proponent of scientific evidence to show that the "methodology used [by the expert] is reliable and in the particular instance produced reliable results"). In determining the foundational reliability of expert testimony, "a district court must consider both the reliability of the underlying theory, as well as the reliability

of the evidence in the particular case, with a view toward the purpose for which the expert testimony is offered." *Kedrowski*, 933 N.W.2d at 56 (quotations omitted).

To determine whether expert testimony has a reliable factual foundation, the facts upon which the expert relies must be supported by the evidence. *Id.* (citing *Gianotti v. Indep. Sch. Dist. 152*, 889 N.W.2d 796, 801-02 (Minn. 2017)). The factual foundation of expert testimony is inadequate if "(1) the opinion does not include the facts and/or data upon which the expert relied in forming the opinion, (2) it does not explain the basis for the opinion, or (3) the facts assumed by the expert in rendering an opinion are not supported by the evidence." *Mattick v. Hy-Vee Foods Stores*, 898 N.W.2d 616, 621 (Minn. 2017) (quotations omitted).

We review the exclusion of expert testimony for an abuse of discretion. *Kedrowski*, 933 N.W.2d at 45. Although a district court has wide discretion in ruling on expert opinion testimony, that discretion must be "exercised favorably to any honest course capable of eliciting relevant truth." *Id.* at 58 (quotation omitted). "Where a portion of the proffered expert testimony is reliable, wholesale exclusion can constitute an abuse of discretion." *Id.* (quotation omitted).

Herold's proffered expert testimony related to the reliability and accuracy of test results generated by the DMT as it is used by the state. The DMT is capable of using both infrared technology and fuel cells to measure alcohol concentration. In 2012, the BCA decided to turn off the fuel cell capability on all Minnesota DMT devices. Herold sought to introduce expert testimony that, without the fuel cell, the DMT does not adequately measure the presence of interfering chemicals and therefore may produce an inaccurate

result. Herold also sought to introduce expert testimony that, without the fuel cell, the DMT is even less accurate than the breath-testing device previously used—and subsequently discarded—by the state. The district court excluded all testimony from Burr but allowed Herold to call a BCA employee to testify about breath-testing technology.

At various times before and during trial, the district court offered numerous reasons for excluding Burr's testimony: (1) Burr was not at the scene when Herold was stopped; (2) Burr was not at the jail and did not examine Herold when the DMT was administered; (3) Burr did not test or "specifically examine the machine that was used on [Herold's] testing"; (4) the evidence did not show "irregularities or anomalies in the testing methods"; (5) the evidence did not show any indication of "mouth alcohol, burping, vomiting, . . . radio frequency interference, [or] . . . any medical conditions of the defendant which would create an irregularity or anomaly with the testing"; (6) although Burr testified in his proffer that he need not examine a DMT with the fuel cell turned off to support his opinions, the district court found "no indication that he has done any testing or formalized research regarding the effectiveness or the accuracy of the DataMaster with the fuel cell turned off versus the fuel cell activated"; and (7) Burr's training from the DMT manufacturer was inadequate because the manufacturer stated that the coursework would not qualify participants as breath-testing experts. Based upon these findings, the district court concluded that Burr's testimony "would possibl[y cause] confusion of the jury and would prejudice the State." The district court did "not think that the defense had been taken away because [Herold] was able to elicit much if not all the information" from the BCA employee who testified at trial.

Foundational Reliability of the Proffered Expert Witness

As to the qualifications of the chosen expert, the record shows that Burr is a forensic scientist with over 50 years of experience in the public and private sectors. Burr has testified as a breath-testing expert many times,[1] and he has experience with both infrared technology and fuel cells. The district court did not question Burr's expertise as a forensic scientist or his experience with infrared technology—the type of technology employed by the DMT. Rather, the district court found that Burr was not an "expert in the DMT" because the vice president of the DMT manufacturer averred that Burr and other participants in a DMT seminar were advised that their attendance would not make them breath-testing experts. But Herold's offer of proof established that Burr's testimony related

[1] The district court relied on other cases mentioning Burr's opinions to justify the wholesale exclusion of his testimony at trial. These authorities are inapposite. In *State v. Cornish*, Burr testified about the reliability of the Intoxylizer 5000. No. A08-1228, 2010 WL 2035610, at *5 (Minn. App. May 25, 2010). There, we determined that the offer of proof did not establish foundation for Burr to testify regarding a specific error message. *Id.* In *Karo v. Comm'r of Pub. Safety*, an implied-consent proceeding, the district court received Burr's testimony in a bench trial but ultimately did not find the testimony persuasive to establish the facts at issue. No. A13-1866, 2014 WL 3396529, at *4 (Minn. App. July 14, 2014). In *State v. Brazil*, we considered whether a DMT result constitutes direct evidence of alcohol concentration and stated in passing that "Burr admitted that he is not a DMT expert." 906 N.W.2d 274, 277-78 (Minn. App. 2017), *review denied* (Minn. Mar. 20, 2018).

Whether Burr—or any other expert witness for that matter—possesses the requisite foundational reliability to testify in a given case is an individualized inquiry based on the particular circumstances and proffers in that case. Like the district court, we have no record from the cited cases. Whether another court at one time exercised its discretion to exclude or limit particular expert testimony is not a recognized criterion for determining the admissibility of expert testimony in a different case. The district court abused its discretion by substituting the judgment of other courts, based on separate records, for its own assessment of the foundational reliability of the proffered testimony in this particular case.

to chemicals that interfere with breath-test results when infrared technology is used alone, a matter well within his expertise.[2] The record established that Burr possessed sufficient qualifications to testify about breath-testing technology.[3]

Because Burr's proffered testimony is based upon reliable underlying theories and methodologies in view of the purpose for which the testimony was offered, the district court abused its discretion in concluding that Burr was not a qualified expert.

Foundational Reliability of the Proffered Expert Testimony

Turning to the foundation for Burr's opinion, the district court did not conduct the required analysis to determine whether the proffered opinion was supported by the evidence. The district court did not find that the proffered opinion omitted facts or data upon which the expert relied in forming his opinion, that the expert did not explain the basis for the opinion, or that the facts assumed by the expert were not supported by the

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[2] The district court's reliance on *State v. Wolf*, 592 N.W.2d 866 (Minn. App. 1999), is misplaced. In *Wolf*, where the district court allowed expert testimony of a limited scope, we noted that "[t]estimony of possible theories of malfunction for which no evidence exists in the record would not assist the trier of fact in resolving the factual issue" of the defendant's alcohol-concentration level. 592 N.W.2d at 869. The supreme court affirmed on different grounds, focusing on the lack of an offer of proof in the record. *Wolf*, 605 N.W.2d at 384-85. The supreme court did not hold in *Wolf* that theoretical testimony must be excluded outright and has since recognized the relevance and propriety of other broad challenges to testing methods. *See State v. Underdahl*, 767 N.W.2d 677, 687 (Minn. 2009) (affirming order that required state to produce Intoxylizer source code).

[3] The district court's finding regarding the DMT coursework is irrelevant to Burr's qualification as a breath-testing expert. We note that Burr's coursework was at least equivalent to the coursework received by BCA employees authorized to operate the DMT, with the exception that part of the BCA employee training related to DMT repair. That Burr did not take coursework related to DMT repair is not germane to his qualification to testify as to the proffered opinions, which have nothing to do with the repair of the DMT.

evidence. *See Mattick*, 898 N.W.2d at 621. Instead, the district court constructed and then applied exclusionary criteria that no independent expert could meet and that finds no basis in Minnesota law.

The district court found that Burr lacked a sufficient factual basis to testify because he had not examined or tested a DMT device with the fuel cell turned off. But Burr testified that he need not examine a DMT to opine about theories and methodologies grounded in forensic science. Even so, the record shows that Herold and Burr attempted to close this informational gap. Because the state's contract with the DMT manufacturer contains unique specifications, Burr was unable to purchase a state-approved DMT without assistance from the state. Herold therefore attempted to obtain through discovery access to a DMT configured with Minnesota specifications. The state opposed the discovery request, citing the BCA's internal policy that only "qualified experts" may examine the DMT and arguing that because "Burr is not an expert" and the state was not obligated to assist him in acquiring the required expertise, he could not access or examine the DMT. The district court accepted these artificial constructs and denied Herold's discovery request. In other words, the district court denied the discovery request to enable inspection of a DMT, then excluded the expert from testifying because the expert did not inspect a DMT. These rulings effectively prevent *any* expert from evaluating, let alone challenging, the state's evidence. By erecting an insurmountable barrier to Herold's ability to challenge the state's evidence, and in particular the state's testing mechanism and results, the district court stacked the deck in favor of the state and denied Herold a fair trial. This was an abuse of discretion.

We are also troubled that the district court's ruling essentially directed Herold to elicit expert testimony from a BCA employee in lieu of his chosen expert. The district court permitted this testimony even though the BCA employee did not satisfy the same criteria the district court used to exclude Burr. Like Burr, the BCA employee was not present to observe the administration of the DMT on Herold or any possible interfering factors. And the district court's reasoning that the evidence did not show "irregularities or anomalies in the testing methods" or indicate interference is equally applicable to the BCA employee as it is to Burr.

Accordingly, the reasons cited by the district court to exclude Burr prove hollow because the same alleged foundational deficiencies applied to the BCA employee. That the district court applied exclusionary criteria to Herold's chosen expert but not the expert employed by the state is inequitable and amounts to an abuse of discretion.

Even assuming that Burr needed specific information regarding Herold's tests or the DMT used in this case, that factual gap is not a legal basis to exclude Burr's testimony outright. Alleged deficiencies in the factual basis of an expert opinion "go more to the weight of the expert's opinion than to its admissibility." *Kedrowski*, 933 N.W.2d at 60 (quotation omitted). Although the district court's observations regarding the absence of factual details may have some merit, the testimony "is properly the subject of a detailed cross-examination and argument to the jury, rather than a foundational-reliability determination under Rule 702." *Id.* (citing *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374, 382-83 (Minn. 1978) (stating that "any deficiencies" in an expert's testimony "could have been brought out by defendant on cross-examination"). To exclude the testimony outright

deprived the fact-finder of the ability to weigh the credibility of any challenge to evidence submitted by the state in deprivation of Herold's right to due process.

Balance of Probative Value Against Danger of Unfair Prejudice

Finally, the district court abused its discretion by summarily concluding that Burr's proffered testimony would result in jury confusion and prejudice to the state. Under Minnesota Rule of Evidence 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The district court made no finding that the proffered testimony would be *unfairly* prejudicial or that the danger of unfair prejudice substantially outweighed the probative value of the testimony. In fact, the district court conducted no assessment of the probative nature of Burr's testimony at all. The district court also did not explain why Burr's testimony would lead to jury confusion but the testimony from the BCA employee would not. The district court therefore abused its discretion by failing to apply the standard set forth in rule 403.

Harmless Error

The state argues that even if exclusion of Burr's expert testimony was improper, any error was harmless. When the erroneous exclusion of evidence deprives a defendant of a constitutional right, we review whether the exclusion was harmless beyond a reasonable doubt. *State v. Munt*, 831 N.W.2d 569, 583 (Minn. 2013). In that analysis, we "must be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

The error was not harmless beyond a reasonable doubt. Herold was forced to rely on the testimony of a BCA employee—who works for the state agency that made the decision to turn off the fuel cell capability of the DMT—to challenge key evidence offered by the state. That testimony is not comparable to the proffered testimony of an independent expert who would opine that the state's decision to turn off the fuel cell interfered with the reliability of the DMT and the ultimate accuracy of testing results. We cannot overlook the conflict of interest that arises from requiring the defense to rely on the testimony of a state employee regarding a decision that the employee has an inherent interest in affirming.

The very purpose of the proffered expert testimony was to challenge the reliability and accuracy of the testing mechanism used by the state to secure an impaired-driving conviction. We are not satisfied beyond a reasonable doubt that if the proffered testimony had been admitted and the damaging potential of the evidence fully realized, an average jury would have reached the same verdict.

The district court relied on impermissible factors in lieu of analyzing the proffered testimony in light of the purpose for which the testimony was presented. All of the concerns expressed by the state regarding Burr's testimony can be addressed by allowing Herold access to a DMT device and by subjecting Burr to cross-examination at trial. The district court abused its discretion through the wholesale exclusion of Burr's expert

testimony and deprived Herold of his right to a fair trial. Because the error was not harmless, we reverse and remand for a new trial.[4]

Affirmed in part, reversed in part, and remanded.

[4] Herold also raises allegations of prosecutorial misconduct that we need not address given our decision to remand. We do note, however, that pejorative descriptions of Herold's defense as a "conspiracy theory" are not proper. *See State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993) (explaining that a prosecutor commits misconduct by labeling an argument as a "common defense tactic").