



Missouri Court of Appeals
Southern District
Division One

STATE OF MISSOURI,)
)
 Plaintiff-Respondent,)
)
 vs.) No. SD34854
)
 RYAN GABRIEL SALVADOR,) Filed June 1, 2018
)
 Defendant-Appellant.)

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Margaret E. Holden Palmietto

AFFIRMED

Following a bench trial, Ryan Gabriel Salvador (“Defendant”) was found guilty of driving while intoxicated, a class B misdemeanor. *See* section 577.010.¹ The trial court sentenced Defendant to ninety days in the county jail, suspended the execution of the sentence, and placed him on two years’ unsupervised probation. Defendant timely appeals, challenging the admission of alleged hearsay evidence concerning the maintenance of the breath analyzer used to measure his blood alcohol content (“BAC”). Assuming, without so finding, that the challenged evidence was hearsay and erroneously admitted as claimed by Defendant, we

¹ “A person commits the crime of ‘driving while intoxicated’ if he operates a motor vehicle while in an intoxicated or drugged condition.” Section 577.010. References to statutes are RSMo 2000, updated through RSMo Supp. 2014.

determine that Defendant has failed to demonstrate that its admission prejudiced him and therefore affirm the trial court's judgment.

Factual and Procedural Background

Defendant does not challenge the sufficiency of the evidence to support his conviction. In short, the evidence, in the light most favorable to the verdict, *State v. Lammers*, 479 S.W.3d 624, 632 (Mo. banc 2016), was that, early on the morning of October 24, 2014, Greene County Corporal Andrew Webb ("Corporal Webb") initiated a traffic stop of a vehicle operated by Defendant. Corporal Webb observed that Defendant exhibited several indicators of intoxication and placed him under arrest. With Defendant's consent, his BAC was measured at 1:58 a.m. using an Alco-Sensor IV with printer ("the breath analyzer"), which yielded a result of .163 percent—over twice the legal limit.

At trial, Corporal Webb was the State's sole witness. During his testimony, the prosecutor sought to admit two sets of records with affidavits relating to the maintenance of the breath analyzer as State's Exhibit 1. The records reflect that the breath analyzer was inspected and tested on September 20, 2014, at 10:07 a.m. and again on October 24, 2014, at 12:07 p.m. In the attached affidavits, the affiant, a custodian of records for the Greene County Sheriff's Department, identified and purported to lay the foundational requirements to admit the following documents as business records: "AS-IV with printer maintenance report [(collectively referred to as "the Maintenance Reports")], Type II (2) permit, certificate of solution [(“the Certificate of Analysis”)], and AS-IV with printer tickets.”²

Defendant objected to the admission of the Certificate of Analysis. The Certificate of Analysis on its face purports to be a record of "GUTH LABORABORTIES, INC." in

² We refer to "the Certificate of Analysis" in singular form because the two documents included in State's Exhibit 1 matching that description are identical to one another.

Harrisburg, Pennsylvania, signed by its president, certifying testing on “Random Samples of Lot Number 13280 of Alcohol Reference Solution for Simulator[.]” It states further that “[w]hen used in a calibrated Simulator, operating at 34°C +/- .2°C, this solution will give a breath alcohol analysis instrument reading of 0.100 g/210L +/- 3%.” Defendant argued to the trial court that the state was using the Certificate of Analysis

for the truth of the matter asserted because the laboratory tests they have to use -- they have to use that particular solution that is certified to -- to 0.10, and so they are telling you -- or they are -- they are trying to assert that that is a truthful document, and that that is the -- the liquid that they utilized whenever they conducted this particular maintenance.

Defendant asserted that because the Certificate of Analysis was not a record created by the Greene County Sheriff’s Department and, therefore, the affiant could not attest to its mode of preparation or that it was made in the regular course of business, it did not satisfy the business records exception to hearsay inadmissibility.

The trial court overruled Defendant’s objection. State’s Exhibit 1 was admitted into evidence and, thereafter, the breath analyzer result showing Defendant’s BAC was admitted into evidence, subject to Defendant’s “same” objection as to the admissibility of the Certificate of Analysis. Defendant was ultimately found guilty of driving while intoxicated. He timely appeals. Additional background relevant to our analysis is set out, *infra*, as we address Defendant’s point on appeal.

Standard of Review

A trial court has broad discretion to admit or exclude evidence at trial. This standard of review compels the reversal of a trial court’s ruling on the admission of evidence only if the court has clearly abused its discretion. That discretion is abused when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. Additionally, on direct appeal, this Court reviews the trial court for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. Trial court error is not prejudicial unless there is a reasonable probability that the trial court’s error affected the outcome of the trial.

State v. Forrest, 183 S.W.3d 218, 223–24 (Mo. banc 2006) (internal citations and quotations omitted).

Discussion

Defendant’s sole point relied on contends that the trial court erred in admitting the Certificate of Analysis because it was hearsay and no proper business record foundation was laid for its admission per the requirements of section 490.680.³ This argument is unavailing because, assuming without deciding that the Certificate of Analysis was erroneously admitted, Defendant fails to demonstrate that the trial court’s alleged error prejudiced him.

Defendant attempts to make the requisite prejudice showing by arguing that “[h]ad the Certificate of Analysis been excluded, the State could not have proven that the breath analyzer had been calibrated with simulator solutions of the required concentration.” Absent this evidence, he reasons, the trial court would have been required “to exclude the results of the breath analyzer – which was the best evidence the State had to convict [Defendant] of driving while intoxicated.” We disagree.

“To lay a proper foundation for the admission of the breathalyzer test results . . . the State must show that the test was executed: (1) by following the approved methods and techniques of the Department of Health [and Senior Services (“DHSS”)]; (2) by a person holding a valid permit; and (3) on equipment and devices approved by [DHSS].” *State v. Ostdiek*, 351 S.W.3d 758, 772 (Mo.App. 2011) (internal quotation marks omitted); *see also* sections 577.020.4 and 577.037.4. Defendant’s challenge is directed only toward the first requirement.

³ Section 490.680 provides:

A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

This foundational showing may be made by affidavit. Section 490.692.

Defendant cites DHSS regulation 19 CSR 25.30.051(2) for the calibration requirements necessary to lay a foundation for the admission of the breath analyzer results. It provides: “Standard simulator solutions, used to verify and calibrate evidential breath analyzers, shall be solutions from approved suppliers. The standard simulator solutions used shall have a vapor concentration within five percent (5%) of the following values: (A) 0.10%; (B) 0.08%; or (C) 0.04%.” 19 CSR 25.30.051(2).⁴ The regulation also lists the “approved suppliers” of standard simulator solutions, which includes “Guth Laboratories, Inc. Harrisburg, PA 17111-4511[.]” *Id.* (3).

As this is a court-tried case, we assume the trial court ignored inadmissible evidence, unless the appellant can demonstrate that the trial court relied upon it in reaching its decision. *State v. Crews*, 406 S.W.3d 91, 94 (Mo.App. 2013). Here, Defendant cannot so demonstrate because the Maintenance Reports—documents also included in State’s Exhibit 1—were admitted without objection and support compliance with 19 CSR 25.30.051(2). The Maintenance Reports have boxes with check marks indicating that calibration tests were run on the breath analyzer using “SIMULATOR SOLUTION” supplied by “Guth Laboratories” having a solution value of “0.100% STANDARD”⁵ The Maintenance Reports, therefore, support the existence of the breath analyzer calibration requirements of 19 CSR 25.30.051(2). “Generally, prejudice does not exist when the objectionable evidence is merely cumulative of other evidence that was admitted without objection and that sufficiently establishes essentially the same facts.” *State v. Kelly*, 367 S.W.3d 629, 630 (Mo.App. 2012) (quotations omitted).

⁴ All regulatory references are to the Missouri Code of State Regulations in effect as of October 24, 2014.

⁵ The Maintenance Reports and the Certificate of Analysis are reproduced in the appendix to this opinion, *infra*.

Accordingly, even assuming, without deciding, that the Certificate of Analysis is inadmissible hearsay, Defendant has failed to demonstrate he suffered any prejudice in its alleged erroneous admission. Defendant's point is denied.

Decision

The trial court's judgment is affirmed.

GARY W. LYNCH, J. – OPINION AUTHOR

MARY W. SHEFFIELD, P.J. – concurs

DON E. BURRELL, JR., J. – concurs

Appendix



MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES
 STATE PUBLIC HEALTH LABORATORY
ALCO-SENSOR IV WITH PRINTER MAINTENANCE REPORT

REPORT #7

Complete this report in duplicate at the time of the regular monthly preventative maintenance check, and whenever instrument is repaired. Send copy to Department of Health and Senior Services; retain original in department file.

ALCO SENSOR IV SN 102473	PRINTER SN 08C.3527.124	DATE OF INSPECTION 09/20/2014
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LOCATION OF INSTRUMENT (STREET AND CITY) 1010 N. Boonville Springfield	TIME OF INSPECTION 10:07 am
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CHECKLIST: Place a mark in the box by each item if found to be satisfactory or if operating within established limits. (Write in observed values where determined.) Unmarked items must be corrected before using instrument.

- DIGITAL READOUT (ALL ELEMENTS OPERATIONAL)
- TEMPERATURE OF ALCO SENSOR (10°C - 40°C)
- PRINTER WORKING PROPERLY
- TIME AND DATE DISPLAYING PROPERLY

BREATH ALCOHOL ACCURACY STANDARDS

- SIMULATOR SOLUTION COMPRESSED ETHANOL-GAS MIXTURE
- STANDARD SUPPLIER Guth Laboratories LOT # 13280 EXP. DATE 10/16/2015
- SIMULATOR TEMPERATURE (34°C ± 0.2°C) 34.0 SIMULATOR SN SD2219 SIMULATOR EXP DATE 04/23/2015

- CALIBRATION CHECK - (ONLY ONE STANDARD IS TO BE USED PER MAINTENANCE REPORT)
 Run three tests using a standard solution. All three tests must be within ±5% of the standard value and must have a spread of .005 or less. Check the box corresponding to the standard solution being used. (PRINTOUT ATTACHED)
 - 0.100% STANDARD - MUST READ BETWEEN 0.095% and 0.105% INCLUSIVE
 - 0.080% STANDARD - MUST READ BETWEEN 0.076% and 0.084% INCLUSIVE
 - 0.040% STANDARD - MUST READ BETWEEN 0.038% and 0.042% INCLUSIVE

TEST 1 \approx .100	TEST 2 \approx .100	TEST 3 \approx .100
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- RFI DETECTOR OPERATING

INDICATE THE NUMBER OF BREATH TESTS IN THE FOLLOWING RANGES SINCE THE LAST MAINTENANCE REPORT:
 (DO NOT INCLUDE SELF-ADMINISTERED TESTS)

REFUSALS	1	(.0-.04)	2	(.05-.09)	2	(.10-.14)	3	(.15-.19)	1	(OVER .19)	2
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List any new parts and describe any alteration or modification that was made to restore the instrument to operate satisfactorily and within established limits (use other side if necessary).

INSPECTING OFFICER:	
SIGNATURE <i>Ronald L. Killingsworth</i>	PRINT NAME Ronald L. Killingsworth
TYPE II PERMIT NUMBER/EXPIRATION DATE 230085 / 05/10/2015	TELEPHONE NUMBER (417) 829-6216

Return completed report to the: Breath Alcohol Program, MO Department of Health and Senior Services, Southeast District Office
 2875 James Boulevard
 Poplar Bluff, MO 63901



MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES
 STATE PUBLIC HEALTH LABORATORY
ALCO-SENSOR IV WITH PRINTER MAINTENANCE REPORT

REPORT #7

Complete this report in duplicate at the time of the regular monthly preventative maintenance check, and whenever instrument is repaired. Send copy to Department of Health and Senior Services; retain original in department file.

ALCO SENSOR IV SN 102473	PRINTER SN 08C.3527.124	DATE OF INSPECTION 10/24/2014
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LOCATION OF INSTRUMENT (STREET AND CITY) 1010 North Boonville Avenue, Springfield (GCSO)	TIME OF INSPECTION 12:07 pm
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CHECKLIST: Place a mark in the box by each item if found to be satisfactory or if operating within established limits. (Write in observed values where determined.) Unmarked items must be corrected before using instrument.

- DIGITAL READOUT (ALL ELEMENTS OPERATIONAL)
- TEMPERATURE OF ALCO SENSOR (10°C - 40°C)
- PRINTER WORKING PROPERLY
- TIME AND DATE DISPLAYING PROPERLY

BREATH ALCOHOL ACCURACY STANDARDS

SIMULATOR SOLUTION COMPRESSED ETHANOL-GAS MIXTURE

STANDARD SUPPLIER Guth Laboratories LOT # 13280 EXP. DATE 10/16/2015

SIMULATOR TEMPERATURE (34°C ± 0.2°C) 34 SIMULATOR SN SD2219 SIMULATOR EXP DATE 04/23/2015

CALIBRATION CHECK – (ONLY ONE STANDARD IS TO BE USED PER MAINTENANCE REPORT)
 Run three tests using a standard solution. All three tests must be within ±5% of the standard value and must have a spread of .005 or less. Check the box corresponding to the standard solution being used. (PRINTOUT ATTACHED)

0.100% STANDARD - MUST READ BETWEEN 0.095% and 0.105% INCLUSIVE
 0.080% STANDARD - MUST READ BETWEEN 0.076% and 0.084% INCLUSIVE
 0.040% STANDARD - MUST READ BETWEEN 0.038% and 0.042% INCLUSIVE

TEST 1 \Rightarrow .098	TEST 2 \Rightarrow .098	TEST 3 \Rightarrow .098
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RFI DETECTOR OPERATING

INDICATE THE NUMBER OF BREATH TESTS IN THE FOLLOWING RANGES SINCE THE LAST MAINTENANCE REPORT: (DO NOT INCLUDE SELF-ADMINISTERED TESTS)

REFUSALS 3 | (0-.04) 0 | (.05-.09) 3 | (.10-.14) 4 | (.15-.19) 4 | (OVER .19) 1

List any new parts and describe any alteration or modification that was made to restore the instrument to operate satisfactorily and within established limits (use other side if necessary).

INSPECTING OFFICER	
SIGNATURE 	PRINT NAME Roger Stewart
TYPE II PERMIT NUMBER/EXPIRATION DATE 240289/06/09/2016	TELEPHONE NUMBER (417) 829-6487

Return completed report to the: Breath Alcohol Program, MO Department of Health and Senior Services, Southeast District Office
 2875 James Boulevard
 Poplar Bluff, MO 63901



GUTH LABORATORIES, INC.

600 NORTH 67th STREET • HARRISBURG, PA 17111-4611 • TELEPHONE: 717-684-6470

CERTIFICATE OF ANALYSIS

Certified Alcohol Reference Solution for Simulator

Random Samples of Lot Number 13280 of Alcohol Reference Solution for Simulator were analyzed by gas chromatography on October 18, 2013, using a Perkin Elmer Gas Chromatograph Autosystem XL S/N: 610N9030209, and found to contain 0.1217% (w/vol) ethyl alcohol. The expiration date for this lot number is October 16, 2015 at 11:59 PM.

When used in a calibrated Simulator, operating at 34°C +/- .2°C, this solution will give a breath alcohol analysis instrument reading of 0.100 g/210L +/- 3%.

The alcohol and water used in this solution were free of test interfering substances.

Ted L. Pauley, President
GUTH LABORATORIES, INC.

NIST Traceability:

Testing was conducted using Cerilliant Reference Standard lot number FN122211-02 whose values are traceable to NIST.

All balances are calibrated annually by an outside agency using NIST traceable weights. Calibration verification is done prior to each use utilizing NIST traceable weights.