

FILED: December 12, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

GREGORY ALLEN BECK,
Defendant-Appellant.

Marion County Circuit Court
09C42378

A146280

John B. Wilson, Judge.

Submitted on October 31, 2012.

Peter Gartlan, Chief Defender, and Morgen E. Daniels, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, and Jamie K. Contreras, Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Brewer, Judge, and Duncan, Judge.

BREWER, J.

Affirmed.

1 BREWER, J.

2 Defendant appeals a conviction, following a trial to the court, for driving
3 while under the influence of intoxicants (DUII). ORS 813.010. Defendant assigns error
4 to (1) the trial court's denial of his motion *in limine* to exclude evidence of his marijuana
5 consumption and its effects and (2) the court's denial of his motion for a judgment of
6 acquittal on the ground that there was insufficient evidence that he operated his vehicle
7 under the influence of a controlled substance. We reject the latter challenge with limited
8 discussion, and we conclude that the court did not err in admitting the evidence
9 concerning his marijuana use and its effects. Accordingly, we affirm.

10 Marion County Sheriff's Deputy Clarke is a trained and certified drug
11 recognition expert (DRE) who has conducted hundreds of DUII investigations. On April
12 9, 2009, Clarke was on patrol near State Street and Lancaster Drive in Salem. At about
13 1:00 a.m., Clarke saw a vehicle leave the parking lot of a tavern and turn west onto State
14 Street, crossing a median curb placed there to keep cars from turning in that direction.
15 Clarke followed the vehicle and pulled it over in the parking lot of a business a few
16 blocks away. Clarke introduced himself to defendant, who was the driver. Clarke
17 smelled a "light" odor of alcohol and noticed that defendant's eyes were bloodshot,
18 watery, and that he had droopy eyelids. Defendant also had dexterity problems; it took a
19 few attempts before he was able to retrieve his license and registration and present them
20 to Clarke. Defendant presented an Oregon identification card rather than a driver's
21 license and told Clarke that his license was suspended for a previous DUII. He also told

1 Clarke that "he had a couple drinks while at the bar." When he checked defendant's
2 driving status, Clarke learned that defendant's license was suspended and that he was
3 required to have an ignition interlock device on his vehicle.

4 At that point, Clarke asked defendant to perform field sobriety tests (FSTs).
5 Defendant agreed, and after asking him some medical history questions, Clarke
6 administered the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, the one-
7 leg stand test, and the modified Romberg internal clock test. Clarke did not complete the
8 HGN test, but he nevertheless noted nystagmus in both of defendant's eyes. Clarke also
9 noticed that defendant's pupils appeared to be dilated. On the walk-and-turn test,
10 defendant exhibited two out of eight possible clues for impairment. On the one-leg stand,
11 defendant exhibited one clue--a side-to-side sway--out of four possible clues for
12 impairment. On the modified Romberg test--wherein the officer has the subject tilt his
13 head back with closed eyes and estimate the passing of a certain amount of time--
14 defendant estimated 34 seconds during what was actually 30 seconds. Clarke
15 characterized defendant's performance as "passing" on the one-leg stand, and stated that
16 defendant's modified Romberg performance was "within normal ranges." During both
17 the one-leg stand and the walk-and-turn tests, Clarke observed that defendant had leg
18 tremors. Clarke testified that leg tremors can be an indication of use of a controlled
19 substance in addition to alcohol.

20 During the modified Romberg test, defendant's eyelids trembled. Clarke
21 stated that eyelid tremors also can signify the presence of a controlled substance other

1 than alcohol. While still at the scene of the stop, Clarke measured defendant's pupils
2 using a "pupilometer," and found that both pupils were "dilated for the lighting
3 conditions." Clarke asked defendant to open his mouth and saw "raised taste buds near
4 the back of his tongue[,]" which Clarke knew to be an indicator of possible marijuana
5 consumption. Defendant told Clarke that he had smoked marijuana the night before.
6 Based on his training and experience, Clarke knew that a person could still be under the
7 influence of marijuana 24 hours after smoking it.

8 Clarke arrested defendant for DUII and driving while suspended (DWS). A
9 breath test administered at the jail showed that defendant's blood alcohol content (BAC)
10 was 0.10. According to Clarke, if a subject's BAC on a breath test is higher than 0.08, a
11 DRE does not conduct a DRE evaluation. Therefore, Clarke did not perform a DRE
12 evaluation on defendant.

13 Defendant was charged by amended information with DUII under ORS
14 813.010(1)(c), and DWS, ORS 811.175. Before trial, defendant moved *in limine* to
15 exclude all evidence that Clarke might give concerning defendant's marijuana
16 consumption and its effects. Defendant argued that the foundation for Clarke's testimony
17 was inadequate because he had not conducted a complete DRE evaluation of defendant,
18 and the observations that he made were at the roadside and not in the controlled setting
19 required by the DRE protocol. Relying on *State v. O'Key*, 321 Or 285, 899 P2d 663
20 (1995), defendant argued that, in the absence of a completed DRE, the physiological
21 signs that Clarke observed in this case were not signs of controlled substance intoxication

1 usually recognized or understood by most people, but rather, constituted scientific
2 evidence that could not properly be admitted solely on the basis of an officer's "training
3 and experience." In sum, defendant asserted that the marijuana-related evidence was
4 inadmissible to show that defendant was under the influence of a controlled substance
5 because it misleadingly conveyed the stature of an approved scientific methodology in
6 that the methodology had not been completed.

7 The trial court took defendant's motion under advisement, indicating that it
8 would "make a decision as to what [it could] consider and what [it could not] and let the
9 parties know what [its] decision [was] and go from there." In the ensuing bench trial, the
10 state adduced Clarke's testimony described above. At the close of the state's case-in-
11 chief, defendant moved for a judgment of acquittal on the ground that the evidence was
12 insufficient to show that he had operated his vehicle under the influence of a controlled
13 substance. Although defendant did not challenge the sufficiency of the state's evidence
14 that he had driven under the influence of alcohol, he asserted that, because the state had
15 pleaded the charge as a "combination" DUII under ORS 813.010(1)(c), it was required,
16 but had failed, to show that marijuana use had contributed to his alcohol intoxication.
17 The trial court denied defendant's motion for a judgment of acquittal. At the close of
18 evidence, the trial court took the case under advisement and indicated that it would
19 announce its decision on the motion *in limine* when it rendered its verdict.

20 In a letter opinion, the trial court found defendant guilty of both charged
21 offenses. In support of its verdict, the trial court enumerated 28 findings of fact. In

1 particular, defendant focuses on the following findings that the court made:

2 "15. Clarke observed tremors in defendant's lead leg while he was standing
3 and that the pupils of defendant's eyes were dilated.

4 "16. Clarke testified that based on his law enforcement training, education,
5 and experience, leg tremors and dilated pupils are 'indicators' of possible
6 consumption of a controlled substance.

7 "* * * * *

8 "18. Clarke observed additional eyelid tremors during the Romberg field
9 sobriety testing and noted that the taste buds on the back of defendant's
10 tongue were raised.

11 "19. Based on Clarke's training and experience, raise[d] buds are an
12 indicator of cannabis consumption.

13 "20. Clarke asked defendant if he had used marijuana, to which defendant
14 responded 'not tonight,' but that he had used marijuana the day before.

15 "20. [*sic*] Clarke * * * testified that it is possible for a person to still be
16 under the influence of the controlled substance marijuana 24 hours after
17 consumption.

18 "* * * * *

19 "24. Although he is certified as a DRE, Deputy Clarke did not conduct a
20 DRE evaluation, reach a DRE conclusion, or offer a DRE opinion.

21 "* * * * *

22 "27. The evidence establishes that defendant was driving under the
23 influence of alcohol and a controlled substance (marijuana).

24 "28. The evidence is insufficient to establish that defendant was driving
25 under the influence of marijuana, alone."

26 The trial court also made the following pertinent findings of fact, to which
27 defendant does not refer:

1 "22. Testing of defendant's breath revealed a .10% blood alcohol level
2 about one hour and 6 minutes after the stop.

3 "* * * * *

4 "26. The evidence establishes that defendant was driving under the
5 influence of alcohol."

6 To place defendant's arguments on appeal in proper perspective, we first
7 consider the nature of the DUII charge in this case. As noted, the amended information
8 charged defendant with DUII under ORS 813.010(1)(c), which provides that a person
9 commits that offense if the person drives while "under the influence of any combination
10 of intoxicating liquor, an inhalant and a controlled substance." Where the evidence is
11 sufficient to establish that the defendant drove while impaired, and the defendant
12 admitted the recent use of both alcohol and a controlled substance, a trier of fact can find
13 that the defendant was under the combined influence of alcohol and a controlled
14 substance without additional evidence that ingestion of the controlled substance caused
15 the defendant's impairment. See [State v. Harmon](#), 239 Or App 587, 592, 244 P3d 910
16 (2010), *rev den*, 349 Or 654 (2011) (rejecting the defendant's argument that, to prove a
17 combined alcohol-controlled substance DUII, the state must adduce "additional evidence
18 of causation beyond the evidence of his admissions and impairment[]").

19 By contrast, when a charging instrument alleges that the defendant has
20 driven solely under the influence of a controlled substance under ORS 813.010(1)(b), it is
21 necessary to establish that the influence of the controlled substance alone unlawfully
22 impaired the defendant's operation of his or her vehicle. In such circumstances, it is

1 common for the state to introduce evidence of impairment through DRE evidence. *See*
2 [State v. Sampson](#), 167 Or App 489, 491, 6 P3d 543, *rev den*, 331 Or 361 (2000)
3 (describing the DRE protocol as "a 12-step procedure performed by a trained officer that
4 purports to determine whether a subject is under the influence of a controlled
5 substance").¹

¹ Those steps are:

"1. A blood alcohol content (BAC) analysis is done. If the subject's BAC exceeds 0.08 percent, the DRE protocol ends.

"2. The DRE officer interviews the arresting officer to elicit information about the subject's behavioral and physical symptoms.

"3. The DRE officer conducts a preliminary physical examination: he or she checks the subject's eyes for synchronization and pupil size, checks the pulse, and asks general health questions. This step determines whether the subject is impaired by a medical condition.

"4. The DRE officer conducts four standard eye examinations developed to detect intoxication: horizontal gaze nystagmus (HGN), vertical gaze nystagmus (VGN), and lack of convergence (LOC).

"5. The DRE officer conducts four FSTs [field sobriety tests]: the Romberg balance test, the walk and turn test, the one leg stand test, and the finger to nose test.

"6. The DRE officer checks the subject's pulse, blood pressure, and body temperature.

"7. The DRE officer measures the subject's pupil size under three light conditions (near total darkness, indirect light, and direct light), and inspects the nose and mouth for signs of drug ingestion.

"8. The DRE officer checks the subject's muscle tone for extreme flaccidity or rigidity.

"9. The DRE officer inspects for injection sites.

1 In *Sampson*, we concluded that the procedure and results of the DRE
2 protocol are admissible as scientific evidence in a DUII-controlled substance prosecution
3 to show that a defendant was under the influence of a controlled substance. 167 Or App
4 at 512. We noted, however, that the state still must establish, in each case, that the DRE
5 officer was properly qualified to administer the protocol, that the officer administered it
6 properly, and that the results were accurately recorded. *Id.* The admissibility of the
7 complete DRE protocol as scientific evidence does not demonstrate the general
8 admissibility of each component of the protocol. Rather, "in *Sampson*, we approved the
9 12-step DRE protocol as scientific evidence because its complete administration by a
10 competent examiner qualified for admission as scientific evidence * * *." [State v. Aman](#),
11 194 Or App 463, 472, 95 P3d 244 (2004), *rev dismissed as improvidently allowed*, 339
12 Or 281 (2005). Further, in *Aman*, we concluded that an incompletely administered DRE
13 protocol is not admissible as scientific evidence, although we noted that evidence of
14 individual components of the DRE protocol were not necessarily inadmissible as
15 nonscientific evidence of impairment. *Id.* at 473; *see also* [State v. Hernandez](#), 227 Or

"10. The DRE officer conducts a focused interrogation and observation of the subject's behavior.

"11. Considering the results of all the foregoing procedures, the DRE officer develops a formal opinion identifying the drug that the subject took.

"12. The DRE officer obtains a urine sample for toxicological testing. The test is used to corroborate the DRE officer's opinion and to provide a learning tool for the officer."

[State v. Rambo](#), 250 Or App 186, 190-91, 279 P3d 361 (2012).

1 App 319, 324, 206 P3d 197 (2009) (rejecting the state's argument that individual
2 components of an incomplete DRE protocol were admissible as nonscientific expert
3 evidence where the state failed to identify which elements of the protocol were
4 nonscientific).

5 The state's theory in this case was that defendant was guilty of operating his
6 vehicle under the influence of alcohol and that, at least to some extent, his use of
7 marijuana had contributed to his impairment. Thus, at trial, the state's primary focus was
8 on evidence pertaining to defendant's alcohol intoxication. As noted, although Clarke
9 was a trained DRE, he explained that had not completed the full DRE protocols after
10 defendant's BAC was measured at .10 on the breath test. Likewise, Clarke did not testify
11 that defendant had operated his vehicle under the influence of a controlled substance,
12 although he did opine that defendant had operated his vehicle while intoxicated. In short,
13 the state's theory was that defendant had operated his vehicle while under the influence of
14 alcohol and that his ingestion of marijuana in the previous 24 hours had materially
15 contributed to the extent of his intoxication. *See, e.g., State v. Stiles*, 165 Or App 584,
16 594, 998 P2d 703 (2000) ("[T]he phrase 'being under the influence of a controlled
17 substance,' as used in ORS 813.010(2), necessarily encompasses all cases in which the
18 state contends that the defendant's use of a controlled substance materially contributed to
19 culpable impairment.").

20 The evidence regarding defendant's consumption of marijuana and its
21 effects was tailored accordingly. That evidence showed that, while Clarke was

1 investigating defendant for DUII, defendant exhibited several indicators of impairment
2 by a controlled substance. Defendant's pupils were dilated, his leg trembled during field-
3 sobriety tests, and his eyelids trembled--all signs, according to Clarke--of impairment that
4 are unexpected when a person is solely under the influence of alcohol. Because of his
5 training and experience in recognizing the signs of controlled-substance use, Clarke
6 suspected that defendant had used marijuana. Clarke asked defendant to open his mouth;
7 defendant complied, and Clarke saw that defendant's taste buds were raised on the back
8 of his tongue, which Clarke also recognized as consistent with marijuana use. Based on
9 those indicators, Clarke asked defendant whether he had used marijuana, and defendant
10 admitted that he had used it the night before. Clarke testified that, based on his training
11 and experience, the effects of marijuana can persist for 24 hours.² That array of evidence
12 was sufficient to submit the combination alcohol-marijuana DUII theory to the trier of
13 fact under *Harmon*. Thus, if that evidence was admissible, it was sufficient to defeat
14 defendant's challenge to the denial of his motion for judgment of acquittal.³

15 For two reasons, we reject defendant's challenge to the marijuana evidence
16 as inadmissible scientific evidence. First, at least some of the evidence was nonscientific

² For the first time on appeal, defendant asserts that Clarke "was not properly qualified as an expert." However, defendant did not object before the trial court to Clarke's qualifications to testify as an expert in this case, either generally, or in particular with reference to his testimony about the persistence of the effects of marijuana. Accordingly, we reject that unpreserved argument without further discussion.

³ Because, as explained below, the challenged evidence was admissible, we reject defendant's challenge to the denial of his motion for a judgment of acquittal without further discussion.

1 expert opinion evidence that was admissible under OEC 702. Under that rule, where
2 "scientific, technical or other specialized knowledge will assist the trier of fact to
3 understand the evidence or to determine a fact in issue, a witness qualified as an expert
4 by knowledge, skill, experience, training or education may testify thereto in the form of
5 an opinion or otherwise." In [State v. Rambo](#), 250 Or App 186, 279 P3d 361 (2012), we
6 held that, where a DRE protocol was not completed, an investigating officer nevertheless
7 could opine, based on his or her expertise, that the defendant was under the influence of a
8 controlled substance based on the defendant's performance of tests that--although also
9 included in the DRE protocol--do not improperly convey that they were conducted as part
10 of an approved scientific methodology. So, for example, in *Rambo*, we upheld the trial
11 court's admission of such opinion testimony based on evidence "relating to [the]
12 defendant's blood alcohol content, her statements, the HGN test, her performance on the
13 field sobriety tests, her pupil size, and the needle injection sites on her body." *Id.* at 189.⁴

14 Echoing defendant's argument here, in *Rambo*, the defendant had argued
15 that, "[e]ven if there were mixed scientific and nonscientific components, the end result is
16 that [the officer] was integrating scientific tests to form a larger scientific conclusion,
17 giving the imprimatur of science to his opinion when his opinion has not been established
18 as scientific absent a urinalysis." *Id.* at 193. Our reasoning in rejecting that argument
19 informs our analysis in this case:

⁴ In so concluding, we noted that the results of some of those tests, including the HGN and blood alcohol tests, were independently admissible as scientific evidence when a proper foundation has been laid. *Rambo*, 250 Or App at 192 n 1.

1 "In *Aman*, the vice of admitting opinion evidence of an incompletely
2 administered DRE protocol was that the DRE officer not only had testified
3 at length about his training and experience, he also testified at length about
4 the 'details of the 12-step protocol.' *Aman*, 194 Or App at 471. In contrast,
5 here, the evidence showed that [the officer] was qualified, by virtue of
6 considerable training and experience, to recognize the symptoms of drug
7 impairment in the course of a DUI investigation. Based on such training
8 and experience, police officers can--and frequently do--testify as to their
9 opinions of whether an individual was under the influence of alcohol or a
10 controlled substance. See, e.g., *State v. Chatelain*, 347 Or 278, 281, 220
11 P3d 41 (2009) ('[O]ne of the arresting officers testified that defendant
12 "show[ed] all the classic signs of [being under the influence of] some sort
13 of stimulant": he "was real fidgety," seemed "really, really, extremely
14 anxious," and "couldn't stop messing with his clothes."); *State v. Moore*,
15 334 Or 328, 332, 49 P3d 785 (2002) (officer 'testified that, when he arrived
16 at the scene, defendant was intoxicated'); *State v. Vantress*, 195 Or App 52,
17 55, 96 P3d 867 (2004) (officer 'testified that defendant's leaning conduct
18 was "pretty common with intoxicated drivers" in his experience as an
19 officer'); *State v. Kimsey*, 182 Or App 193, 196, 47 P3d 916 (2002) (officer
20 testified that defendant 'seemed to be intoxicated'). The fact that they may
21 rely in part on independently admissible scientific evidence, such as blood
22 alcohol content and HGN test results, to reinforce their opinions, does not
23 render those opinions inadmissible as unqualified scientific evidence.

24 "Although the line we draw may be fine, it is not artificial.
25 Specialized expert opinion evidence based on a witness's training and
26 experience draws its force from that training and experience, but not
27 necessarily from the mantle of science. Unlike in *Aman* and [*State v.*
28 *Marrington* [335 Or 555, 561-63, 73 P3d 911 (2003)], here, the officer did
29 not--apart from his reference to independently admissible scientific tests--
30 rely on the vocabulary of science, nor did he suggest that his conclusions
31 had been reached through the application of a scientific method to collected
32 data. The trial court's ruling scrupulously sanitized the record of any
33 evidence of a scientifically-based protocol, thereby mitigating the risk that
34 [the officer's] testimony would be given unfair weight beyond the
35 credentials that he claimed. The trial court did not err in admitting the
36 challenged evidence."

37 *Rambo*, 250 Or App at 194-95 (emphasis omitted). In this case, some, or most, of the
38 FSTs that Clarke administered may have been admissible under OEC 702, because they
39 were neither part of the DRE protocol nor otherwise suggestive of a scientific

1 methodology.

2 However, Clarke's testimony concerning the dilation of defendant's pupils
3 is more problematic. In that regard, defendant asserts:

4 "OAR 257-025-0012 provides that 'pupil size estimation,' an approved FST,
5 may be performed only by 'officers who have completed the 8-hour "Drugs
6 That Impair Driving" curriculum[.]' Determining 'pupil size under varying
7 light intensities' is part of an approved test that only an officer who has
8 completed DRE training and been certified as a DRE may use. Clarke
9 employed both types of pupil size evaluation. First, he estimated that
10 defendant's pupils were dilated more than normal. Next, Clarke actually
11 performed an approximation of the DRE pupil evaluation in which the DRE
12 examines the sides of the subject's pupils under indirect light and
13 determines their size using a 'pupillometer.' He testified that the state of
14 defendant's pupils was consistent with marijuana consumption. Both the
15 test and the conclusion were scientific evidence."

16 As noted, in *Rambo*, we approved the trial court's admission as
17 nonscientific expert evidence of an officer's testimony about the defendant's pupil size.
18 However, the trial court in that case had excluded under OEC 403 a portion of the state's
19 proffer, in particular, "the darkroom test" which, as an element of the determination of
20 "pupil size under varying light intensities" at issue here, is a part of the DRE protocol that
21 may only be administered by a DRE officer.⁵ *Rambo*, 250 Or App at 189.⁶ Thus, in

⁵ OAR 257-025-0012 includes a list of approved tests for all sworn police officers and additional tests to be performed only by officers who have met certain criteria. Section three of that rule provides a list of additional tests utilized by an officer "trained and approved by the Oregon State Police as a Drug Recognition Expert (DRE)" and "upon successful completion of the 72-hours of DRE training * * *." Among those tests are:

"(a) Physical examination tests including the following: the person's vital signs (pulse, temperature and blood pressure); the person's psychophysical responses (coordination of mind and body); signs of administration of drugs (injection sites, etc.); eye responses

1 *Rambo*, we did not consider whether the admission of such evidence was improper in the
2 absence of a particularized scientific foundation or a completed DRE protocol.

3 However, we need not determine whether the pupil-dilation evidence was
4 scientific in nature because, even if it was, defendant's challenge to its admission is not
5 well taken. As discussed, like the defendant in *Rambo*, defendant has consistently
6 asserted that the officer's testimony--including the pupil dilation evidence--was
7 inadmissible to show that defendant was under the influence of a controlled substance
8 because it falsely conveyed the imprimatur of an approved scientific methodology that
9 had not been completed. Here, however, Clarke did not opine, based on his DRE
10 training, that defendant was under the influence of a controlled substance because he had
11 dilated pupils. As the trial court found, Clarke testified that, "based on his law
12 enforcement training, education, and experience, * * * dilated pupils are 'indicators' of
13 *possible* consumption of a controlled substance." (Emphasis added.) In fact, Clarke
14 never opined that defendant was currently under the influence of a controlled substance at
15 all; rather, he abandoned that focus when it became apparent to him that defendant was
16 under the influence of alcohol. After that point, and throughout trial, the focus of this

(horizontal/vertical gaze nystagmus, eye convergence, *pupil size under varying light intensities*); and physical and behavioral characteristics (muscle rigidity or flaccidity, hyperactivity, *etc.*)."

(Emphasis added.)

⁶ Again, the trial court in *Rambo* excluded that evidence "under OEC 403 because of its unfairly prejudicial effect insofar as it bore a false imprimatur of science." *Id.* at 189.

1 case instead was on whether defendant's admitted use of marijuana within 24 hours of his
2 arrest had materially contributed to his alcohol intoxication.

3 Because of the narrow purpose for which the marijuana-related evidence
4 was proffered and received, the trial court did not improperly infer that the eye-dilation
5 evidence was part of a scientific protocol that showed that defendant was under the
6 influence of a controlled substance at the time of the offense. Accordingly, the trial court
7 did not err in denying defendant's motion to exclude the challenged marijuana-related
8 evidence--including the eye dilation evidence--on the ground that it was scientific
9 evidence of controlled substance intoxication that was inadmissible in the absence of a
10 completed DRE.

11 Affirmed.