Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-200

JUNE TERM, 2020

State of Vermont v. Gail Marie Jones*	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1449-12-17 Wmcr
		Trial Judge: John R. Treadwell

In the above-entitled cause, the Clerk will enter:

Defendant appeals her convictions by jury of driving under the influence of alcohol (DUI) and eluding a police officer. We affirm the convictions but remand for the trial court to reconsider certain probation conditions it imposed as part of defendant's sentence.

Defendant was charged with DUI, eluding a police officer, and careless or negligent operation of a vehicle as the result of a traffic stop in December 2017. The State dismissed the third charge at the beginning of the trial, which took place over two days in September 2018.

The following evidence was presented to the jury. On December 15, 2017, at 10:30 p.m., a patrolling officer with the Brattleboro Police Department observed a van traveling on Canal Street with one of its headlights out. The officer activated his blue lights and the van stopped on the exit 1 on-ramp to Interstate 91. A police sergeant arrived in his cruiser to provide backup for the officer. Defendant was driving the van, which contained three other passengers. The patrolling officer observed an empty beer bottle and a crushed Mike's Hard Lemonade can in the van. The van was thick with cigarette smoke. One of the passengers, Robert Farkas, who was the vehicle's owner, asked to speak to the officer. While the officer was speaking to Farkas behind the van, defendant and the other passengers got out of the van. The officer instructed them to get back in. Defendant attempted to get out again several times and had to be told to remain in the vehicle. After speaking to Farkas, the officer went to his cruiser to run the vehicle's information. He learned that the registration was expired and the van was uninsured. The officer informed Farkas that he was going to tow the van. He returned to his cruiser, summoned a tow truck, and wrote two tickets to defendant. The officer gave the tickets to defendant and she drove away. The officer did not recall his exact words to defendant when he handed her the tickets. He did not know if he said something that she could have misconstrued to make her think she was free to leave.

The officer, followed by the sergeant in his vehicle, pursued the van onto Interstate 91. Both cruisers had their blue lights on and used their sirens intermittently to get defendant's attention. After about a mile, the officer left his siren on for thirty seconds straight. After two and a half miles, the officer used a different siren tone to try to get defendant's attention, but she did not stop. During the pursuit, the van's tires hit the fog line several times. The officer testified that

at exit 3, he decided to call off the pursuit due to poor road conditions, but continued to follow the van as it exited the interstate and continued onto Putney Road. He then activated his lights one more time, and the van finally stopped.

The officer approached the van and spoke to defendant. He smelled an odor of alcohol and noticed that her eyes were bloodshot and watery. The officer asked defendant to exit the vehicle and to perform field sobriety tests. She agreed, but expressed concern about performing the tests because she had a bad ankle. The officer told her he would take that into consideration. The officer testified that during the walk-and-turn test, defendant could not balance during the instructions, could not step heel to toe on several steps, turned incorrectly, took the wrong number of steps, and used her arms for balance. During the one-leg test, defendant put her foot down, used her arms for balance, and swayed. The officer concluded that defendant was impaired and arrested her for DUI and eluding a police officer.

Defendant was transported to the Brattleboro Police Department for processing. She agreed to give an evidentiary breath sample using the DataMaster testing device but was unable to provide a valid sample for health reasons. She agreed to provide a blood sample instead. The officer took defendant to the hospital, where a nurse drew three samples of her blood. Subsequent testing indicated that defendant's blood alcohol content when the blood was drawn was 0.112. Based on this figure and the standard blood alcohol elimination rate, the State's forensic chemist estimated that defendant's blood alcohol content was 0.160 at the time she was operating the van.

On behalf of the defense, one of the passengers in the car testified that defendant had had nothing to drink. He also stated that during the first stop, the officer had returned defendant's license and said they were free to go. The witness agreed that while they were driving on the interstate, two police cars were behind them with blue lights on. He did not hear sirens but did not dispute that the sirens had been activated.

Defendant testified that she had nothing to drink on the day of the incident. She stated that the officer gave her two tickets and told her she was free to go. She stated that she had seen the officer's blue lights behind her. She could not figure out why he was stopping her again and thought at first that he was giving her an escort. She testified that she did not believe it was her blood that was tested because the sample was held for a month in Brattleboro before being sent to the state lab. Defendant agreed on cross-examination that while she was on the interstate a police car came up behind her with its lights on and she continued to drive. She also stated that she agreed with the chain of custody of her blood sample other than when it was with the arresting officer but that she did not believe the officer. She stated that she was not in diabetic shock on the day of the incident and had not consumed any fluids such as windshield washer fluid, hand sanitizer, or nail polish remover that would explain any ethanol alcohol in her system.

After the defense rested, the State proposed to recall the forensic chemist as a rebuttal witness to testify that the DataMaster breath test results, although insufficient to indicate whether defendant had alcohol in her system, did indicate the presence of a volatile substance. The State argued this testimony would support a reasonable inference that the substance was alcohol and rebut defendant's testimony that she had not consumed alcohol and the blood sample was not hers. Defense counsel objected that defendant had not said anything about the breath test. The court ruled that the testimony was admissible to rebut defendant's testimony that the blood sample was not hers. Defense counsel then asked for a continuance so that he could obtain his own expert. He conceded that he had received a copy of the DataMaster results indicating the presence of a volatile

substance. He stated, however, that he was "not equipped to be able to understand" the substance of the State's expert testimony. The court denied the continuance and permitted the testimony.

The chemist testified that the DataMaster result indicated the presence of a volatile substance in the breath sample. The minimum sample requirements were not met, so the device did not proceed to determine whether it was ethanol or some other volatile substance such as methanol, propanol, or butanol. The blood sample was tested for these other substances and none were detected.

The jury found defendant guilty on both charges. In May 2019, the court imposed a sentence of six months to two years, all suspended, with four years of probation for the DUI conviction. It imposed a sentence of zero months to one year to serve for the eluding-a-police-officer conviction. Defendant appealed.

On appeal, defendant argues that her DUI conviction must be reversed because the court permitted the State to introduce prejudicial rebuttal testimony over her objection. She argues that the State never disclosed to the defense that it planned to use the DataMaster test results to establish that she had alcohol in her system or that it planned to call its forensic chemist to testify about the results. She argues that the court should have granted her a continuance so that she could obtain an expert.

"Trial courts have great latitude in deciding whether to admit or exclude evidence, and such decisions will not be reversed absent an abuse of discretion resulting in prejudice." State v. Little, 167 Vt. 577, 579 (1997). The trial court did not abuse its discretion in allowing the State to recall the forensic chemist to discuss the DataMaster results. The purpose of rebuttal evidence is to explain or rebut evidence offered by an opponent. See State v. Noyes, 2015 VT 11, ¶ 16, 198 Vt. 360 (citing United States v. Tejada, 956 F.2d 1256, 1266 (2d Cir. 1992)). Defendant testified that she did not drink any alcohol on the day of the incident and did not believe that the blood sample tested was her own. To rebut this testimony, the State sought to recall the chemist to testify that the DataMaster results indicated the presence of a volatile chemical that was likely alcohol in defendant's breath. The chemist's testimony rebutted the inference created by defendant's testimony that her blood did not in fact contain alcohol.

Nor has defendant demonstrated a violation of Vermont Rule of Criminal Procedure 16. Rule 16 requires the prosecutor to disclose to defendant's attorney "within a reasonable time . . . any reports or statements of experts, made in connection with the particular case." V.R.Cr.P. 16(a)(2)(C). "To establish reversible error under V.R.Cr.P. 16, a defendant must show both a violation of the rule and resulting prejudice." State v. Jones, 160 Vt. 440, 446 (1993). Neither is present here. It is undisputed that the State disclosed the DataMaster results to defendant prior to trial. Once defendant testified that she did not drink alcohol and believed the blood sample did not belong to her, the State notified the defense of its intent to recall the chemist to provide rebuttal testimony about the significance of those results. Defendant has failed to show that the timing of the disclosure was unreasonable under the circumstances. And although defendant claims that if she had known the State planned to bring up the DataMaster results, she would have prepared her defense differently, she has not demonstrated that doing so would have affected the outcome of the case. She therefore has failed to show reversible error. See id. at 446-47 (holding defendant not entitled to reversal due to State's disclosure of witness on day before trial began, where timing of disclosure was reasonable under circumstances and defendant did not show that more time would have affected result of case).

Defendant also argues that the court erred in denying her motion to continue the trial so she could obtain an expert witness. We review the court's decision for abuse of discretion. See State v. Heffernan, 2017 VT 113, ¶ 18, 206 Vt. 261. A continuance to obtain a missing witness "can be granted where a particular, known person is needed to supply missing evidence." State v. Kelly, 131 Vt. 582, 589 (1973); see also V.R.Cr.P. 50(b)-(c) (governing continuances). Here, however, defense counsel asked for time to find a possible expert witness to challenge the forensic chemist's testimony. Given that the trial was nearly over, and there was only a possibility of finding the additional witness, the trial court acted within its discretion in denying the request for a continuance. See Kelly, 131 Vt. at 589 ("We do not think that the trial court abused its discretion in denying a continuance where the jury had been impaneled and where there was only a possibility of finding additional witnesses."). Furthermore, defendant has not explained what additional evidence she would have provided if the continuance had been granted. She therefore has not demonstrated prejudice resulting from the alleged abuse of discretion. See Heffernan, 2017 VT 113, ¶ 18 (explaining that reversal is not required for erroneous denial of continuance unless error resulted in prejudice).

Next, defendant argues that the court should have granted her motion for judgment of acquittal on the count of eluding a police officer because she proved by a preponderance of the evidence that she brought her vehicle to a stop in a manner, time, and distance that was reasonable under the circumstances. When reviewing a motion for judgment of acquittal, we "will review the evidence presented by the State viewing it in the light most favorable to the prosecution and excluding any modifying evidence, and determine whether that evidence sufficiently and fairly supports a finding of guilt beyond a reasonable doubt." State v. Brochu, 2008 VT 21, ¶ 21, 183 Vt. 269 (quotation omitted).

Section 1133 of Title 23 makes it a crime for an operator of a motor vehicle to "fail to bring his or her vehicle to a stop when signaled to do so by an enforcement officer . . . operating a law enforcement vehicle sounding a siren and displaying a flashing blue or blue and white signal lamp." 23 V.S.A. § 1133(a). Eluding a police officer is a strict liability crime that does not require the State to prove intent. State v. Roy, 151 Vt. 17, 27 (1989). However, "the operator may raise as an affirmative defense, to be proven by a preponderance of the evidence, that the operator brought his or her vehicle to a stop in a manner, time, and distance that was reasonable under the circumstances." 23 V.S.A. § 1133(c). Defendant argues that she did not know that the officer was trying to pull her over on the interstate because the officer had told her she was free to go. She argues that she maintained a reasonable speed on the interstate and pulled over after exiting the interstate once she realized that the officer was signaling her to pull over.

A reasonable jury could have found that defendant did not prove by a preponderance of the evidence that she stopped in a reasonable manner, time, and distance. The evidence showed that after defendant drove away from the first stop, the police officer and the sergeant both pursued her in their cruisers. Their blue lights were activated throughout the pursuit. The officer first sounded his siren intermittently, then continuously for thirty seconds, then used a different tone to get defendant's attention. Defendant admitted that she saw the blue lights, yet she continued to drive for three or more miles without stopping. The jury could fairly conclude from this evidence that defendant did not stop within a reasonable time or distance after the officer first signaled her to do so.

Finally, defendant argues that the court committed plain error by imposing four probation conditions related to substances other than alcohol, which were not supported by the record. The State concedes that imposition of such conditions is inappropriate where the record only supports

a finding of alcohol abuse. See State v. Nash, 2019 VT 73, ¶ 24 n.5 (explaining that conditions relating to drug use were inappropriate where record did not show defendant abused any substance other than alcohol). Accordingly, we remand the matter for the court to review the probation conditions and modify or strike them as appropriate.

Defendant's convictions are affirmed. The matter is remanded for further proceedings consistent with this opinion.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

William D. Cohen, Associate Justice