COURT OF APPEALS
DECISION
DATED AND RELEASED

January 23, 1996

NOTICE

No. 95-1894-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY M. KRUCKENBERG,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed*.

SULLIVAN, J. Gary M. Kruckenberg appeals from a judgment of conviction after a jury trial for operating a motor vehicle while under the influence of an intoxicant. He also appeals from an order denying his motion for postconviction relief. He presents three issues for this court to review: (1) whether the trial court erroneously exercised its discretion by not allowing his expert witness to testify on—(a) the effects of volatile organic compound on breath testing equipment, and—(b) the blood absorption rate of alcohol and the creation of a blood alcohol curve; (2) whether the trial court erroneously exercised its discretion by allowing only the first page of each of the defendant's

documents into evidence; and (3) whether he is entitled to a new trial based on the above errors. This court rejects most of Kruckenberg's arguments; however, the trial court did erroneously exclude Kruckenberg's proffered expert testimony on the blood alcohol curve. This error was harmless, given the police testimony about Kruckenberg's physical condition and his breath test results. Accordingly, the judgment of conviction and order are affirmed.[1]

I. BACKGROUND.

Kruckenberg was arrested and charged with operating a motor vehicle while under the influence of an intoxicant, and operating a motor vehicle with a prohibited alcohol concentration of .10% or more. He received a jury trial.

The factual premise of Kruckenberg's prosecution is unique because police never observed him driving. Kruckenberg alleged that he was driving down the street when another driver "cut him off." He followed the other driver to obtain his license number, but that driver realized he was being followed and stopped his car. The two drivers then allegedly had an altercation and, after it concluded, they both drove to the City of Greendale police station. While interviewing Kruckenberg, Officer David Sjoberg smelled alcohol and observed Kruckenberg's bloodshot eyes. Kruckenberg admitted drinking three beers earlier in the day, so the police asked him to perform several field sobriety test. He successfully passed all tests. The police then requested that Kruckenberg take an intoxilyzer test; the result was a .14% blood alcohol concentration (BAC).

At trial, Kruckenberg alleged that he was a painter and that, prior to driving on the day of his arrest, he had been spray-painting with a series of lacquers and sealers for about seven hours. Accordingly, he intended to present expert witness Roy Schenk, a Ph.D chemist, who would testify that the chemicals contained in the sprays used by Kruckenberg could be falsely read by the intoxilyzer as alcohol.

[1] This appeal is decided by one judge, pursuant to § 752.31(2), STATS.

Out of the presence of the jury, Kruckenberg made an offer of proof to allow Schenk to testify as an expert on the question of whether the chemicals Kruckenberg alleged he was spraying could affect the intoxilyzer result. After the offer of proof was made, the trial court issued its ruling:

> Based upon the testimony of Dr. Schenk, the Court is satisfied that he possesses the necessary education, experience, and skills to give testimony as an expert chemist.
>
> Doctor Schenk's testimony will be based upon his experiments and experience with volatile organic compounds and their effects on the Intoxilyzer 5,000.
>
> The Court finds that as a condition precedent to Dr. Schenk's testimony, medical testimony as to how these chemicals affect the human physiology is required.
>
> The trier of fact must know how the paint chemicals, to which Mr. Kruckenberg was exposed, are absorbed in the body and what, if any, effect that would have on the lungs and other organs.
>
> Medical testimony is necessary I believe to provide evidence as to the effects of paint chemicals on absorption in the human body. This is not a case where Mr. Kruckenberg presented the officer with a container of fumes and put it in the Intoxilyzer 5,000. Rather, Mr. Kruckenberg is a painter who is believed to have been exposed to paint fumes and who had consumed an amount of alcohol prior to being given a breath test with the Intoxilyzer 5,000.
>
> Dr. Schenk is not an expert to the effects of chemicals on human physiology. Before Dr. Schenk can testify, the defense must present medical testimony, without which, Dr. Schenk's testimony is and would become irrelevant.

> Furthermore, the Court finds that without medical testimony, the doctor's testimony will confuse the jurors.
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> ....
>
> .... I'm saying he doesn't have the expertise. That you need a doctor or a physiologist to testify as to how the body absorbs those chemicals before he, as a chemist, can testify.
>
> He is qualified as a chemist, based upon his experience and training to testify. His expertise deals with -- There's a difference between having a container full of fumes and places it in an Intoxilyzer 5,000, and in this case we have a human being.
>
> Obviously as a result of his profession, paint fumes -- having those paint fumes absorbed in the body, what effects that has on the body, coupled with the taking of some form of alcohol, and what that does to the lungs, to the other organs, how that effects it, and that his testimony -- without that testimony, it becomes irrelevant.

Later, the trial court also prevented Schenk from testifying about the absorption rate of alcohol and the creation of a blood alcohol curve estimating Kruckenberg's blood alcohol level at the time he was driving. The trial court concluded that Schenk did not have the sufficient expertise to qualify as an expert on this subject.

Kruckenberg also presented several chemical data sheets as evidence. The sheets provided detailed information on the chemicals Kruckenberg alleged he was spraying. The trial court only allowed the first page of each sheet to be entered into evidence, concluding that the remaining pages would confuse the jury.

The jury found Kruckenberg guilty of operating a motor vehicle while under the influence of an intoxicant. The trial court entered the judgment of conviction from which Kruckenberg appeals.

II. ANALYSIS.

Kruckenberg challenges the trial court's rulings on several evidentiary questions. "A trial court possesses great discretion in determining whether to admit or exclude evidence. We will reverse such a determination only if the trial court erroneously exercises its discretion." ***State v. Morgan,*** 195 Wis.2d 388, 416, 536 N.W.2d 425, 435 (Ct. App. 1995). Applying this standard of review, this court addresses each of the questions raised by Kruckenberg *seriatim*.

A. Scientific expert evidence.

Kruckenberg argues that the trial court erroneously exercised its discretion by preventing his expert witness to testify. Kruckenberg misconstrues the trial court's ruling on this issue. The trial court did not preclude Schenk from testifying, but merely determined that the relevancy of Schenk's testimony was logically conditioned on the introduction of other scientific evidence.[2] Because Kruckenberg did not present this other evidence, the trial court concluded Schenk's testimony was irrelevant.

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[2] The record also supports the trial court's conclusion that Schenk was not qualified to testify about the effects of the volatile organic chemicals in question on the human body. Schenk's testimony during the offer of proof provides this court with no basis for questioning the trial court determination that Schenk had insufficient knowledge, skill, experience, training, or education to qualify as an expert on the effects and absorption of such chemicals on the body. *See generally* RULE 907.02, STATS.

Kruckenberg's direct examination and the State's cross-examination of Schenk focused almost exclusively on Schenk's expertise dealing with the effect of volatile organic chemicals on breath testing equipment. Although further testimony by Schenk may have provided a sufficient basis to qualify him as an expert on these chemicals and the effects on human beings, the trial court could validly determine that based upon Kruckenberg's offer of proof, Schenk did not have the minimal

"`Expert testimony is admissible only if it is relevant.'" ***Id***. (citation omitted). The trial court determined that Schenk's expert testimony on the effects of the chemicals on an intoxilyzer was relevant, conditioned on the testimony of an expert on the effects of the chemicals on humans. Essentially the trial court was applying the theory of conditional logical relevance, which allows a court "to admit conjunctive or coordinate facts that cannot be proven simultaneously." *See* Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577, 590 (1984).

> "When Item A and Item B considered separately are each irrelevant in absence of proof of the other, a relevancy objection may be interposed to whichever one is offered first. But a party must start somewhere. This rule requires the proponent merely to bring forward evidence from which the truth of Item A could be found, upon the representation that evidence of Item B will be offered. Evidence of the conditionally relevant Item B can then be shown. The dispute as to the truth of each is ultimately for the jury rather than the judge. But the order of proof is, as generally, for the judge .... He [or she] can decide whether to hear evidence of Item A or of Item B first .... Whichever one he elects to hear first will be admitted conditionally or, in the traditional phraseology, de bene. If the proponent fails to make good on his representation to offer sufficient evidence of the second item, the evidence of the first will on the motion be stricken and the jury instructed to disregard it."

Id. at 590-91 (citation omitted); *see also* RULE 901.04(2), STATS.[3] The trial court determined that Kruckenberg needed to present the medical expert testimony

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expertise necessary to qualify as an expert on this subject under RULE 907.02, STATS.

[3] RULE 901.04(2), STATS., provides:

> **(2) Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it

first, in order to prevent juror confusion, and that Schenk could then testify on the effects of the chemicals on the intoxilyzer. This determination was a proper exercise of trial court discretion. *See* RULE 906.11, STATS. (the trial court shall exercise reasonable control over the order of presenting evidence).

The question then becomes whether the trial court impermissibly prevented Kruckenberg from presenting the medical expert evidence when it denied his motion for a continuance to procure the expert witness. The record confirms that the trial court properly exercised its discretion in denying the motion for a continuance.

A trial court's grant or denial of a motion for a continuance to obtain the attendance of a witness will not be disturbed on appeal unless the trial court erroneously exercised its discretion. ***Elam v. State,*** 50 Wis.2d 383, 389-90, 184 N.W.2d 176, 180 (1971). "There is no set test for determining whether the trial court [erroneously exercised] its discretion. Rather, that determination must be made based upon the particular facts and circumstances of each individual case." ***State v. Anastas,*** 107 Wis.2d 270, 273, 320 N.W.2d 15, 16 (Ct. App. 1982). Among the factors to be considered are "whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located." ***Bowie v. State,*** 85 Wis.2d 549, 556-57, 271 N.W.2d 110, 113 (1978). In determining whether a trial court acted erroneously, the reviewing court should also consider "the defendant's right to adequate representation by counsel and the public's interest in the prompt and efficient administration of justice." ***State v. Echols,*** 175 Wis.2d 653, 680, 499 N.W.2d 631, 640, *cert. denied*, 114 S. Ct. 246 (1993).

Applying the above factors, it is clear that the trial court's earlier conditional relevancy ruling made an expert medical witness's potential testimony relevant and material. This court's analysis does not stop at this factor, however, and it is the remaining factors that this court must consider which tip the balance in favor of upholding the trial court's ruling.

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> upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

The trial court found that Kruckenberg's trial, for various reasons, had been pending from 1993 to December 1994; that although the pre-trial proceedings began on December 12, Kruckenberg did not "wish" to have Schenk in Milwaukee until the afternoon of December 13; and that the trial court had informed Kruckenberg that before Schenk could testify as an expert, Kruckenberg needed to make an offer of proof as to his qualifications. Further, the trial court stated that Kruckenberg should have been "prepared for all kinds of contingencies," including the trial court's ruling on Schenk's expert testimony. Hence, the trial court denied Kruckenberg's motion based on the need for the efficient administration of justice and to lessen the burden on the jury.

The trial court could reasonably conclude that the failure to have a contingent expert witness available was at least partly due to Kruckenberg's delay in providing Schenk's offer of proof and lack of preparation for "all kinds of contingencies." Further, the trial court also took into consideration the effect further delays in the trial would have on the jury. Based on the particular facts and circumstances in the case, this court cannot conclude that the trial court erroneously exercised its discretion in denying the motion for continuance.

B. Blood-alcohol curve.

The trial court also prevented Schenk from testifying about the absorption of alcohol in the human body and, more specifically, about a blood alcohol curve which would establish, based on his expert opinion, Kruckenberg's blood alcohol level at the time he was driving. We conclude that trial court erroneously exercised its discretion in excluding Schenk's expert testimony on this topic.

Schenk's testimony in Kruckenberg's offer of proof establishes that he was qualified to testify about the absorption rates of alcohol on the human body, and creation of blood alcohol curves. He discussed how alcohol was absorbed by the body, and the factors that could effect this absorption. In addition, he testified that he had constructed over 1000 blood alcohol curves in the ten years prior to his testimony. Further, he had previously testified in an estimated 150 other trials about the blood alcohol curve. Under the standards of RULE 907.02, STATS., Schenk clearly possesses the minimal necessary

requirements to qualify as an expert on this limited subject. The State, of course, would be free to challenge the credibility of Schenk's expertise through cross-examination and by providing its own expert witnesses. Thus, the trial court committed an error when it concluded Schenk was not qualified to testify on such matters; however, this error was harmless.

Detective Steven Brinza testified that Kruckenberg was swaying when he entered the police station, that he had a strong odor of intoxicants on his breath, and that he slurred when speaking. Further, Detective Brinza testified that according to the intoxilyzer, Kruckenberg had a .14% BAC when he was tested.

The effect of any error in excluding Schenk's expert testimony on the blood alcohol curve was *de minimis* given the above evidence. As such, the error was harmless. *See* ***State v. Dyess,*** 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

C. Chemical data sheets.

Kruckenberg next challenges the trial court's exclusion of all but the first pages of several exhibits that provided data on the various chemicals Kruckenberg allegedly sprayed at work. The trial court excluded all but the first pages of these exhibits because it concluded that the remaining pages would confuse the jury. *See* RULE 904.03, STATS.

The exhibits are not part of the appellate record;[4] accordingly, this court must presume that the evidence not in the record supports the trial court's discretionary decision to exclude the pages. *See* ***Austin v. Ford Motor Co,*** 86 Wis.2d 628, 634, 273 N.W.2d 233, 235 (1979). As such, this court will not reverse the trial court's ruling.

[4] Kruckenberg included the exhibits in his brief-in-chief's appendix; however, the appendix of a brief is not part of the appellate record. *See* ***Jenkins v. Sabourin,*** 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981).

C. New trial.

Finally, Kruckenberg asks this court to order a new trial based on the above alleged errors. His argument on this claim is nothing more than a rehash of his earlier arguments that this court rejected. Accordingly, his arguments need not be addressed again. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

III. CONCLUSION.

In short, while this court rejects most of Kruckenberg's arguments, the trial court did erroneously exclude Schenk's expert testimony on the blood alcohol curve. Nonetheless, this error was harmless and the judgment of conviction and order are affirmed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.