COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1243-CR **Cir. Ct. No. 2013CT951**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALI GARBA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

¶1 HAGEDORN, J.[1] Ali Garba was convicted of operating a motor vehicle while intoxicated. The State tested Garba's blood, and the results showed

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

a substantial amount of alcohol in his system. Garba sought to challenge the reliability of this test result through expert testimony. According to Garba, the presence of anomalies in tests of other blood samples conducted the same day undermined the reliability of his results. However, the experts could not say what effect, if any, the anomalies had upon the reliability of Garba's results. The circuit court concluded that the testimony was speculative and excluded it under WIS. STAT. §§ 907.02 and 904.03. Garba contends that this was error and deprived him of his constitutional right to present a defense. Garba also challenges a portion of the jury instructions he claims created an unconstitutional presumption that the test results were accurate and reliable. We affirm.

Background

¶2 Garba was pulled over for a traffic violation in the City of Waukesha. The officer administered, and Garba failed, a series of field sobriety tests. The officer arrested Garba and took him to a hospital whereupon Garba consented to a blood draw. The test results revealed Garba's blood alcohol concentration was .206g/100mL. The State charged Garba with operating a motor vehicle while under the influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC)—both third offenses.

¶3 The Wisconsin State Laboratory of Hygiene tested Garba's blood using a method called headspace gas chromatography. The laboratory tests each blood sample twice in separate vials. To summarize, the test involves placing a blood sample in a long column where the blood is carried by pressurized gas and separated into its component substances. The individual substances then escape at different times and are measured by means of flame detection. A flame ignites any alcohol present in a blood sample as it escapes the column; the strength of the

flame is recorded and provides a measurement. These results are then plotted on a graph—a chromatogram—and indicate the alcohol concentration in the sample.

¶4 The day Garba's blood was tested, several chromatograms from test vials of others indicated a series of so-called "jagged humps."[2] These jagged humps—visible as a series of peaks in some of the chromatograms—appear on the graph/chromatogram before any signal should be detected. In other words, the chromatograms showed readings before the carrier gas had time to carry the sample through the column. Blood samples for the same person would sometimes display jagged humps in one test vial but not in the other. The cause of these jagged humps remains unknown. However, the laboratory calibrated the testing equipment daily and monitored its performance throughout the testing day. Additionally, although jagged humps appeared in chromatograms before and after Garba's, his results contained none.

¶5 Seeking to undermine the accuracy and reliability of his results, Garba consulted two expert witnesses—Jimmie Valentine and Janine Arvizu—and sought to introduce their testimony at trial. Valentine is a pharmacology professor and Arvizu is a certified quality auditor. Both experts opined that the presence of the jagged humps on some chromatograms created reliability issues with all of the results. According to their testimony at the motion hearing, the jagged humps should not be in the results, and the lab should have conducted a thorough analysis to determine what caused the anomalies. In the absence of an explanation, the

[2] The "jagged humps" had appeared in the lab equipment's results for some time. The anomalies had generated multiple articles in the Wisconsin Law Journal by defense counsel and even a written response by the Wisconsin State Laboratory of Hygiene.

experts maintained that none of the results could be trusted even though individual tests may or may not have been accurate.

¶6 The experts did, however, candidly admit a level of uncertainty in their opinions. Arvizu admitted that the machines were calibrated daily to determine at what point in the test the ethanol was separated from the sample. Because the jagged humps appeared on the chromatograms before the results for alcohol, Arvizu granted "in that respect it would not directly interfere with an ethanol determination." Arvizu conceded that she observed no inconsistencies in the alcohol readings between two test vials of the same blood sample even where one result showed a jagged hump and the other did not. She simply could not say whether the jagged humps produced a false positive or negative, or whether the humps had any effect whatsoever on the accuracy of the test. Valentine similarly admitted that the laboratory conducted controls and standards testing every ten samples, and the results were within the accepted tolerances on the day the laboratory tested Garba's blood. He too admitted he could not say to a reasonable degree of scientific certainty that Garba's test results were either accurate or inaccurate. Finally, both experts conceded that no jagged humps were present in Garba's blood test.

¶7 On the State's motion, the circuit court excluded the experts' testimony, reasoning it was not the product of reliable principles and methods, and any probative valued was outweighed by the danger of unfair prejudice. Garba also challenged part of WIS JI—CRIMINAL 2663, arguing that it created an unconstitutional presumption that the blood test was reliable. The circuit court rejected this argument and gave the instruction as written. Garba's case proceeded to trial before a jury, and the jury found him guilty of the OWI charge and the

PAC charge. On the State's motion, the PAC charge was later dismissed. Garba appeals.

Discussion

¶8 We affirm and conclude that the circuit court properly exercised its discretion in excluding the proffered expert testimony. That decision did not violate Garba's right to present a defense because he does not have a right to present testimony where the danger of unfair prejudice outweighs the probative value of the evidence. We further conclude that WIS JI—CRIMINAL 2663 does not violate due process, and that even if WIS. STAT. § 903.03 required a modification to WIS JI—CRIMINAL 2663, any error was harmless.

A. Expert Testimony

¶9 Garba complains that the circuit court erred in excluding his experts' testimony. First, he claims that the court's decision was an erroneous exercise of discretion under WIS. STAT. §§ 907.02 (governing admissibility of expert testimony) and 904.03 (allowing exclusion of unfairly prejudicial evidence). Garba insists that the circuit court applied an incorrect legal standard because it concluded that blood tests are presumed reliable and the burden shifts to him to prove they are inaccurate. He also maintains the court misunderstood the distinction between accuracy and reliability. Just because individual results are accurate, Garba reasons, does not make them reliable. Even though his experts could not opine that any results were in fact inaccurate, Garba insists they should have been allowed to testify because they cast doubt on the reliability of the results. Second, he claims that the circuit court's decision denied him his constitutional right to present a defense.

¶10 The court's decision to admit or exclude expert testimony, like most evidentiary rulings, is discretionary and will not be reversed unless the court erroneously exercised its discretion. ***State v. Giese***, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687, *review denied*, 2015 WI 24, 862 N.W.2d 602. The court appropriately exercises its discretion if it rationally applies the correct legal standard to the facts of the case. ***Id.***

¶11 WISCONSIN STAT. § 907.02 governs the admissibility of expert testimony and adopts the reliability standards the United States Supreme Court explained in ***Daubert***.[3] ***Giese***, 356 Wis. 2d 796, ¶17. It provides:

> (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a [qualified] witness … may testify thereto … if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Sec. 907.02(1). Under this standard, the circuit court acts as the "gate-keeper … to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***Giese***, 356 Wis. 2d 796, ¶18. Experts are not permitted to speculate. ***Id.***, ¶19 ("The goal [of § 907.02] is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion.").

¶12 This standard is flexible. The court has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." ***Khumo Tire Co. v. Carmichael***, 526 U.S. 137, 152 (1999). The court may consider a variety of factors including whether the expert's

[3] ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993).

opinions have been subjected to peer review and whether they were developed for the express purpose of testifying. ***Giese***, 356 Wis. 2d 796, ¶18; ***Daubert v. Merrell Dow Pharms., Inc.***, 43 F.3d 1311, 1314 (9th Cir. 1995) ("[I]n determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office."). "The focus [of the court's inquiry] must be solely on principles and methodology, not on the conclusions that they generate." ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 595 (1993); *see also* ***Giese***, 356 Wis. 2d 796, ¶18.

¶13 Even if evidence is relevant and otherwise admissible, it may nevertheless be excluded under WIS. STAT. § 904.03 if the court determines that its probative value is substantially outweighed by the danger of unfair prejudice or the risk that it will mislead or confuse the jury. ***Id.***

¶14 In a thoughtful and comprehensive written decision, the court discussed the proper standards under WIS. STAT. §§ 907.02 and 904.03. Determining the proffered testimony was expert and not lay opinion testimony, it concluded that the testimony should not be admitted under § 907.02. Although the experts concluded the jagged humps rendered Garba's test results unreliable, the court observed that this conclusion was backed, not by evidence, but speculation in the absence of evidence. The court expressly relied on the fact that "[n]either one of Mr. Garba's experts … could opine to a reasonable degree of scientific certainty that the results were inaccurate, or that the jagged hump phenomenon—which was not even present on Mr. Garba's test results—in any way impacted the test results on Mr. Garba's sample." The court also noted that the testimony was

developed specifically for litigation and had not been subjected to peer review.[4] Accordingly, the court concluded that the opinions were not sufficiently reliable and would not be helpful to the jury.

¶15 The court separately concluded that WIS. STAT. § 904.03 provided an independent ground to exclude the evidence. It found that the testimony would invite the jury to speculate that Garba's test was unreliable despite the experts' inability to say whether the jagged humps had any effect at all on the test results. Hence, the circuit court concluded that the probative value was outweighed by the danger of unfair prejudice.

¶16 We conclude the court appropriately exercised its discretion in excluding Garba's expert witnesses under both WIS. STAT. §§ 907.02 and 904.03. Its decision was reasonable, grounded in the law, and clearly explained. Garba complains that the trial court should not have substituted its judgment regarding the significance of the jagged humps for that of the experts. Quite the contrary, the gatekeeper function—ensuring the expert opinion testimony is sufficiently reliable—is precisely what the circuit court should be doing. Despite Garba's insistence otherwise, the court did not misunderstand the difference between accuracy and reliability. It concluded that the expert testimony was not sufficiently probative on the issues of accuracy and reliability.

¶17 Garba also attempts to incorporate concerns about the presumption of reliability for this testing method under WIS. STAT. § 885.235(1g) into the

[4] Garba claims that the court's observation in this regard was an ad hominem attack. It was not. Whether the expert's opinions have been developed as part of litigation is one of the many permissible factors the court may consider. *See* ***Daubert v. Merrell Dow Pharms., Inc.***, 43 F.3d 1311, 1314 (9th Cir. 1995).

decision to exclude his experts. But who bears the burden to prove the accuracy of test results has nothing to do with whether the expert testimony here ought to have been admitted. This court is not authorized to second guess the circuit court's judgment; our job is to ensure legally appropriate judgment was employed. Here, it was.

¶18 Garba further protests that excluding his experts violated his constitutional right to present a defense. This is a question of constitutional fact we review de novo. *See* ***State v. Miller***, 2002 WI App 197, ¶44, 257 Wis. 2d 124, 650 N.W.2d 850.

¶19 The right to present a defense is based on the confrontation and compulsory process clauses of the Sixth Amendment to the U.S. Constitution and article I, section 7 of the Wisconsin Constitution. ***Miller***, 257 Wis. 2d 124, ¶45. Although evidentiary rules like WIS. STAT. §§ 907.02 and 904.03 are constitutionally permissible,[5] their application may abridge the defendant's right to present a defense in certain circumstances. ***State v. St. George***, 2002 WI 50, ¶¶50-51, 252 Wis. 2d 499, 643 N.W.2d 777. Evidentiary rules abridge the defendant's right to present a defense only where they are "'arbitrary' or 'disproportionate to the purposes they are designed to serve'" by infringing upon a "weighty interest of the accused." ***United States v. Scheffer***, 523 U.S. 303, 308 (1998) (quoting ***Rock v. Arkansas***, 483 U.S. 44, 56, 58 (1987)).

[5] It is well-settled that states have broad constitutional latitude to establish rules excluding evidence, and the accused's right to present evidence may be subjected to reasonable restrictions. ***State v. St. George***, 2002 WI 50, ¶50, 252 Wis. 2d 499, 643 N.W.2d 777.

¶20 Our supreme court developed the following two-part test to determine whether a decision to exclude expert testimony violates a defendant's right to present his or her defense. Part one requires the defendant to show the following: (1) the expert testimony would have been admissible under WIS. STAT. § 907.02,[6] (2) the testimony was "clearly relevant to a material issue," (3) the testimony was necessary to the defendant's case, and (4) the probative value of the testimony outweighed the danger of unfair prejudice. ***St. George***, 252 Wis. 2d 499, ¶54. Although WIS. STAT. § 904.03 "echoes" the fourth prong and contains similar language, it differs in that we do not defer to the court's decision. *See* ***State v. Schmidt***, 2016 WI App 45, ¶¶72, 86, 370 Wis. 2d 139, ___ N.W.2d ___. Even if the defendant meets these four requirements, the second prong of the test allows the evidence to be excluded if the State's compelling interest in excluding the evidence outweighs the defendant's interest. ***St. George***, 252 Wis. 2d 499, ¶55; *see, e.g.*, ***State v. Fischer***, 2010 WI 6, ¶32, 322 Wis. 2d 265, 778 N.W.2d 629 (holding the State had a compelling interest in excluding the results of a preliminary breath test). Thus, each part of the test—all five inquiries—must be satisfied to raise the evidentiary determination to one of constitutional concern.[7]

¶21 We conclude Garba's constitutional claim fails because the danger of unfair prejudice outweighed any probative value the testimony might have had.

[6] The question here is not whether the circuit court properly exercised its discretion in excluding the evidence. Rather, the question is whether a decision to admit the evidence "would have been upheld by a reviewing court." ***St. George***, 252 Wis. 2d 499, ¶57.

[7] Though not at issue here, this court sees little connection between the multi-factor test created by our supreme court in ***St. George*** and the United States Supreme Court's formulation that the right to present a defense is only implicated where a "weighty interest" is infringed by an "arbitrary" or "disproportionate" evidentiary rule. *See* ***United States v. Scheffer***, 523 U.S. 303, 308 (1998). Nonetheless, this court must follow binding precedent.

Garba chooses to focus on his experts' overall conclusions and glosses over the process they used to get there. It is true that both experts questioned whether the testing machines were functioning properly. But the experts based their conclusions not on evidence, but on a lack of evidence. Neither could say whether the jagged humps had any effect whatsoever on the results. Despite regular testing showing the results were within tolerances, the experts nevertheless concluded the results could not be trusted for reasons they could not explain. The testimony would have encouraged the jury to improperly speculate that the results were somehow suspect, despite a lack of evidence so indicating. In short, we agree with the circuit court that the speculative nature of the proffered testimony left it with limited probative value that was outweighed by the danger of unfair prejudice. *See* ***Schmidt***, 370 Wis. 2d 139, ¶86. Accordingly, Garba had no constitutional right to present it to the jury. *See* ***St. George***, 252 Wis. 2d 499, ¶54.[8]

B. Jury Instruction

¶22 Garba next takes issue with part of WIS JI—CRIMINAL 2663. The instruction states in part: "The law recognizes that the testing device uses a scientifically sound method of measuring." Garba complains that this instruction

[8] In addition to arguing that his experts should have been allowed to testify, Garba makes a cursory claim that he should have at least been allowed to cross-examine the State's expert about the jagged humps and the laboratory's explanation of them. This is a separate argument implicating the extent to which a court may constitutionally limit the scope of cross-examination. *See* ***State v. Rhodes***, 2011 WI 73, ¶23, 336 Wis. 2d 64, 799 N.W.2d 850 (explaining that a circuit court has wide constitutional latitude to impose limits on cross-examination). We decline to address this argument because Garba fails to properly develop it. *See* ***Cemetery Servs., Inc. v. Wisconsin Dep't of Regulation & Licensing***, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998) ("A one or two paragraph statement that raises the specter of [constitutional] claims is insufficient to constitute a valid appeal …. We cannot serve as both advocate and court."). His argument takes up a half-dozen sentences scattered throughout his briefs, and contains only a single legal citation—a recitation of the basic holding of ***Chambers v. Mississippi***, 410 U.S. 284 (1973). It is up to Garba to properly develop his argument. We will not do it for him.

creates an improper and unconstitutional presumption about a fact necessary to constitute the crime of OWI. He maintains that the instruction could be valid if it informed the jury that "[y]ou may infer that the testing device used in this case uses a scientifically sound method … but you are not required to do so." He also argues that WIS. STAT. § 903.03(3) required the court to caveat the instruction to inform the jury it was not required to accept the testing method as reliable.

¶23 The circuit court has broad discretion when instructing a jury. ***State v. Ferguson***, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187. The court's charge is to fully and fairly inform the jury of the applicable law. ***Id.*** A jury instruction is constitutional unless it so infected the entire trial process that the resulting conviction violates due process. ***State v. Vick***, 104 Wis. 2d 678, 691, 312 N.W.2d 489 (1981). We interpret jury instructions as read by a reasonable juror, ***Sandstrom v. Montana***, 442 U.S. 510, 517 (1979), and review de novo whether the instructions properly state the law. ***Ferguson***, 317 Wis. 2d 586, ¶9.

¶24 The due process clause of the Fourteenth Amendment requires the State to prove "beyond a reasonable doubt … *every fact* necessary to constitute the crime with which he is charged." ***Sandstrom***, 442 U.S. at 520 (quoting ***In re Winship***, 397 U.S. 358, 364 (1970)) (alteration in original). A mandatory presumption—i.e. that the jury must find an elemental fact upon proof of certain basic facts—is problematic because it has the effect of shifting the burden of proof from the State to the defendant. ***Sandstrom***, 442 U.S. at 521; ***Vick***, 104 Wis. 2d at 693. The issue is whether WIS JI—CRIMINAL 2663 creates such a presumption as to a fact necessary to constitute OWI. *See* ***Sandstrom***, 442 U.S. at 521. We conclude it does not.

¶25 To the extent Garba argues that the instruction creates a presumption that the test *results* are accurate, he is incorrect. The relevant portion of the instruction reads as follows:

> The law recognizes that the testing device used in this case uses a *scientifically sound method* of measuring the alcohol concentration of an individual. The state is not required to prove the underlying scientific reliability of the method used by the testing device. However, the state is required to prove that the testing device was in proper working order and that it was correctly operated by a qualified person.

WIS JI—CRIMINAL 2663 (emphasis added). The instruction only informs the jury that the *method* used for testing is recognized to be reliable. It contains no presumption as to the accuracy or reliability of a particular test or machine.

¶26 At most, WIS JI—CRIMINAL 2663 creates a presumption that the testing method is reliable. Such a presumption does not run afoul of due process because whether a testing method is reliable is not a fact necessary to constitute OWI.[9] An OWI conviction requires the State to prove two elements: (1) the defendant operated a motor vehicle on the highway, and (2) the defendant was under the influence of an intoxicant. WIS. STAT. § 346.63; WIS JI—Criminal 2663. The instruction clarifies that "under the influence" means that the defendant is "less able" to exercise the necessary control over the vehicle. WIS JI—CRIMINAL 2663. Chemical tests are merely a way to show a defendant was under the influence. *See* ***id.***; WIS. STAT. § 885.235.[10]

[9] We do not address Garba's PAC charge because it was dismissed and is not before us.

[10] Given a test result of .08 or higher, the jury may infer that the defendant was impaired but it is not required to so find. WIS JI—CRIMINAL 2663; *see* WIS. STAT. § 885.235(1g)(c).

¶27 Garba further argues that the instruction is problematic because it violates WIS. STAT. § 903.03, which provides that whenever the existence of a fact is presumed "against the accused" the court must instruct the jury that the law allows the inference but does not require it. Sec. 903.03(3). We need not decide whether WIS JI—CRIMINAL 2663 presumes a fact "against the accused" or whether § 903.03(3) required the court to modify the instruction as Garba requested. Even if Garba is right, any error on that point was harmless.[11]

¶28 An error in the jury instructions is harmless if it is clear beyond a reasonable doubt that the jury would have convicted Garba even without the error. ***State v. Schultz***, 2007 WI App 257, ¶¶24-25, 306 Wis. 2d 598, 743 N.W.2d 823. Absent some challenge to the reliability of the testing method, we cannot see how Garba's modified instruction would have altered the outcome.

¶29 Garba made no attempt at trial, and makes no attempt here, to contest the reliability of the method of headspace gas chromatography. Nor does he identify anything that would cast doubt upon this method of blood testing. His only complaint was that the particular results were unreliable because the machines were malfunctioning. The instruction, WIS JI—CRIMINAL 2663, only concerns the reliability of the testing *method*, not the *results*. And it required the State to shoulder the burden of proving the results were reliable by demonstrating the machines were in proper working order and operated by a qualified technician.

[11] Garba contends that harmless error does not apply in this case. He is wrong. Although harmless error does not apply to certain "instruction[s] that impermissibly shift[] the burden of proof," we find no constitutional problem here. ***Rose v. Clark***, 478 U.S. 570, 577, 580 (1986). Rather, we apply harmless error solely to the question of whether the jury instruction violated WIS. STAT. § 903.03 as we have done before. *See* ***State v. Schultz***, 2007 WI App 257, ¶¶ 24-25, 306 Wis. 2d 598, 743 N.W.2d 823 (applying harmless error analysis to an instruction which violated § 903.03).

Furthermore, the testing method is two steps removed from the real issue in Garba's case: impairment. The testing method is simply a way to determine BAC, which in turn is relevant evidence from which a jury may infer impairment. Finally, in closing arguments on the OWI charge, the State focused on Garba's inability to complete the field sobriety tests, not his BAC. The reliability of headspace gas chromatography simply was not at issue.

Conclusion

¶30 The circuit court properly exercised its discretion as gatekeeper to exclude Garba's experts because it permissibly concluded that their testimony was not sufficiently reliable. We similarly conclude that this routine evidentiary decision did not deprive Garba of his constitutional rights. The testimony was speculative, and Garba had no right to present such speculation to the jury. Finally, Garba's complaints concerning WIS JI—CRIMINAL 2663 miss the mark. The instruction creates no unconstitutional presumption, and even if we assume it runs afoul of WIS. STAT. § 903.03, the error was harmless.

By the Court.—Judgment affirmed.

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