COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1774-CR **Cir. Ct. No. 2015CM146**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT F. UFFERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed*.

¶1 HRUZ, J.[1] Scott Ufferman appeals a judgment convicting him of third-offense operating a motor vehicle with a detectible amount of a restricted controlled substance in the blood, in violation of WIS. STAT. § 346.63(1)(am).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Ufferman argues the circuit court erroneously exercised its discretion in making several evidentiary rulings during his jury trial. We disagree with Ufferman and affirm the judgment.

BACKGROUND

¶2 After crashing his car into a tree, Ufferman was taken to a hospital and had his blood drawn consensually under the suspicion he had been driving while impaired. He was eventually charged with third-offense operating a motor vehicle with a detectible amount of a restricted controlled substance in the blood. According to the complaint, a test of Ufferman's blood sample revealed an estimated concentration of 2.2 nanograms per milliliter of delta-9 tetrahydrocannabinols (THC) at the time of the crash.[2]

¶3 In a pretrial statement, Ufferman indicated his theory of defense was that the physical trauma brought upon by the crash caused delta-9 THC stored in his body's fat molecules—due to cannabis use on an earlier date—to be released into his bloodstream after the crash, thus innocently accounting for the alleged detectible amount of THC. In support, Ufferman proposed to admit several materials relating to research conducted by Professor Iain McGregor, PhD, of the University of Sydney in Australia, specifically: (1) an abstract of an article authored in part by McGregor summarizing findings linking exercise by cannabis users with post-use release of THC from fat molecules into their bloodstreams; (2) articles from the Australian Broadcasting Corporation, titled "Exercise may cause you to fail drug test," and from Time Magazine in which McGregor was

[2] The minimum concentration at which the state laboratory reports a detectible amount of delta-9 THC in a person's blood is 1.0 nanograms per milliliter.

interviewed; and (3) McGregor's curriculum vitae.[3] The defense did not retain McGregor as an expert witness; in fact, Ufferman presented no expert witness at trial.

¶4 Ufferman also indicated he intended to prove his pupils were of normal size and not dilated after the crash, which would tend to show that he was not impaired prior to the crash. The evidence in this regard was apparently in support of his theory on the lack of delta-9 THC in his blood prior to the accident. In particular, he moved to admit an ambulance diagnostic report recording his pupil sizes after the accident. Ufferman had anticipated calling an ambulance crewmember who supposedly measured his pupils to testify regarding the report, but he released the crewmember from subpoena prior to trial. Ufferman also moved to admit several excerpts from a National Highway Transportation and Safety Administration (NHTSA) drug recognition manual regarding the effect of cannabis use on pupil size.

¶5 During a pretrial hearing, Ufferman moved the circuit court to take judicial notice of McGregor's status as an expert. Ufferman also proposed, in addition to the other McGregor materials, to show the jury an Australian Broadcasting Company news report regarding McGregor's study. The court declined to take judicial notice of McGregor's expertise, and after the State objected under WIS. STAT. § 904.03, the court excluded all of the materials related to McGregor's research. The court also ruled that the entire NHTSA manual and

[3] Ufferman additionally included a printout of a University of Sydney faculty directory webpage showing McGregor was a professor of psychopharmacology at the university. A link to McGregor's curriculum vitae appears on this webpage.

the ambulance report were admissible under exceptions to the hearsay rule, but it cautioned Ufferman that it would not permit unlimited use of either item.

¶6 During the trial, deputy Jason Novak testified that when he arrived at the crash scene, Ufferman was outside his vehicle, appeared unsteady on his feet and confused, slurred his speech, and had bloodshot, glossy and "squinty" eyes. When cross-examined, Novak admitted he was not a drug recognition expert, and he expressed unawareness of the NHTSA manual. Ufferman attempted to question Novak regarding Ufferman's alleged pupil size by using the ambulance report and the NHTSA manual, prompting the State to object on grounds of a lack of foundation. The circuit court sustained the objection and disallowed further inquiry with Novak on the topic.

¶7 William Johnson, a chemist supervisor in the toxicology section of the state hygiene laboratory, testified regarding the results of the test of Ufferman's blood and the detected amount of delta-9 THC. Based upon laboratory calculations, Johnson estimated Ufferman ingested delta-9 THC approximately two hours before Ufferman's blood sample was drawn.

¶8 During cross-examination, and at Ufferman's request, the circuit court determined Johnson qualified as an expert on biophysical responses to drugs. Johnson then explained that ingesting cannabis is typically expected to cause a person's pupils to dilate. Johnson admitted, however, that he had no recollection of the normal range of pupil sizes, prompting Ufferman again to present both the ambulance records and the NHTSA manual selections, ostensibly so Johnson could "apply the medical record" to the manual. After the State objected, the court ruled Ufferman could not cross-examine Johnson with those materials. Specifically, on the ambulance report, the court explained that without greater

foundation, Ufferman "need[ed] to introduce it through some type of a witness" regardless of whether the report was hearsay. On the NHTSA manual, the court determined that Johnson was "not comfortable to give his professional opinion" on the ranges of pupil sizes and that the manual also did not "refresh[] his memory" when questioned. After determining Johnson was not an expert on drug retention and release, the court also barred Ufferman from questioning Johnson with general principles on whether exercise or stress causes THC concentrations stored in fat to be released in a person's bloodstream.

¶9 Ufferman testified on his own behalf, and he called no other witnesses. The jury found him guilty. He now appeals.

DISCUSSION

¶10 Ufferman challenges the circuit court's rulings regarding the ambulance report on his pupil size, the NHTSA manual, and the McGregor materials. A circuit court's decision to admit or exclude evidence is generally reviewed for an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A court properly exercises its discretion if it examines the relevant facts, applies a proper legal standard, and, using a demonstrated rational process, reaches a reasonable conclusion. ***Id.*** If the circuit court fails to provide adequate reasoning, we independently review the record to determine if the court properly exercised its discretion. ***Id.***, ¶29.

¶11 Ufferman first contends the ambulance report "was a routine business record with no challenge to [its] accuracy," but his exact claim of error is unclear. We understand him to argue this report was admissible under WIS. STAT. § 908.03(6) regarding records of regularly conducted activity, such that the circuit

court "was required to articulate an inaccuracy or irregularity in the record to support the requirement of a live witness."

¶12 Even if this argument is correct,[4] Ufferman has no cause for complaint. The circuit court ruled in his favor that the ambulance report was admissible under WIS. STAT. § 908.03(6m) as a patient health care record, even after Ufferman dismissed the ambulance crewmember from his subpoena. In fact, the court suggested defense counsel introduce the ambulance record into evidence by having Ufferman testify as to its content during his direct examination. Ufferman refused this option, with defense counsel stating it "wouldn't do him any good." Ufferman provides no explanation on appeal for why he did not avail himself of the court's favorable evidentiary ruling.[5]

[4] Ufferman argues the ambulance report was admissible without the testimony of a custodial witness under ***State v. Rundle***, 166 Wis. 2d 715, 728, 480 N.W.2d 518, 524 (Ct. App. 1992), because the pupil dilation measurements in the report were "'clinical and nondiagnostic' evidence … that would not be disputed by trained medical personnel." In response, the State asserts the circuit court *wrongly* ruled the ambulance report was admissible because the report was neither undisputed nor "diagnostic" evidence.

It is not clear if ***Rundle*** is on point, as the passage Ufferman cites on "clinical and nondiagnostic evidence" involved a dispute over the defendant's right to confrontation. *See* ***id.*** at 728-29. Moreover, despite his claims of undisputed record accuracy, Ufferman acknowledges only "that there is a record reference to a pupilometer" regarding these measurements and that "[c]ircumstances suggest" the crewmember used a pupilometer. Given Ufferman's failure to introduce the ambulance report here once the court ruled it was admissible, and our deferential standard of review on evidentiary matters, we need not address these additional arguments.

[5] Ufferman also appears to take the position that his defense counsel was entitled to introduce the ambulance report into evidence by reading it to the jury on cross-examination of Novak and Johnson, irrespective of any relevance or foundation concerns, because the report was a self-authenticating and self-identifying document under WIS. STAT. § 909.02(11). If that is indeed his argument, it is not supported by adequately developed reasoning in his appellate briefing and thus need not be considered. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (appellate courts do not address undeveloped arguments).

¶13 Ufferman may instead mean to argue that the circuit court wrongly prevented him from "impeaching" Novak and Johnson with the ambulance report on the issue of his pupil size. But as the court correctly explained, the fact that the ambulance report satisfied a hearsay exception does not obviate all relevancy and foundation requirements for introducing it into evidence. Although Novak testified about the general appearance of Ufferman's eyes, he did not recall observing Ufferman's pupil size. Johnson never observed Ufferman at all. Ufferman otherwise failed to establish what the ambulance report was, or why he was seeking to use it, prior to attempting to present it to either Novak or Johnson. These failures happened despite the court's frequent admonitions regarding the need for some foundation for this exhibit relative to these witnesses and their respective testimony. Given the deficiencies in Ufferman's presentation of the ambulance report, the circuit court's rulings were not an erroneous exercise of discretion.

¶14 Ufferman next asserts he should have been allowed to "impeach" Johnson by referencing the NHTSA manual and questioning him regarding Ufferman's own pupil size. Specifically, he contends the circuit court committed "an error of law limiting impeachment to the domain of reliability set by the witness."

¶15 Ufferman misapprehends the circuit court's decision. It is axiomatic that an expert witness may only provide opinions in areas where he or she is qualified, subject to the circuit court's proper exercise of discretion. *See* WIS. STAT. § 907.02; *see also* ***State v. Giese***, 2014 WI App 92, ¶¶16-19, 356 Wis. 2d 796, 854 N.W.2d 687. Although the circuit court ruled Johnson was qualified as an expert on biophysical responses to drugs, Ufferman overlooks that Johnson never provided an expert opinion that Ufferman was impaired on the basis of any

biophysical responses he exhibited after the crash. In fact, Johnson specifically testified he lacked any memory of the ranges of pupil sizes, and he could not solely rely on the NHTSA manual in *forming* an opinion on whether Ufferman's pupils were dilated based upon THC use at the time of the accident.

¶16 The circuit court barred further questioning while using the NHTSA manual for exactly this reason. Johnson's opinion that Ufferman had a detectible amount of THC in his bloodstream at the time of the crash was based solely upon the results of Ufferman's blood test, on which his expertise was conceded. Ufferman summarily alleges the NHTSA manual "contradicted William Johnson's opinion [on] the time of the last use []as just before the accident with evidence [Ufferman's] pupil sizes were normal." However, Ufferman never challenged Johnson's expert opinion regarding the blood test analysis and calculation, and Ufferman does not explain why the expected dilation of his pupils was relevant to impeaching *that* opinion. The circuit court thus did not err in forbidding Ufferman's use of the NHTSA manual regarding Johnson's nonexistent opinion on Ufferman's pupil size. Simply put, without Johnson having an opinion on the subject, there was nothing to impeach.

¶17 Ufferman also takes issue with the circuit court's exclusion of the McGregor materials. We discern two reasons for his umbrage. He first argues the court erred when it did not take judicial notice of McGregor's expertise under WIS. STAT. § 908.03(18) after he presented the court with McGregor's curriculum vitae, an itinerary of a seminar at which McGregor was a presenter, and a Time Magazine article that "endorsed" McGregor's study. According to Ufferman, the circuit court "was not in a position to refuse expert status" once the State submitted no evidence challenging the reliability of these sources. We disagree.

¶18 Ufferman suggests we may independently review the record and reach a different result than the circuit court on this issue of judicial notice. He is wrong. *See, e.g.*, ***Fringer v. Venema***, 26 Wis. 2d 366, 372, 132 N.W.2d 565 (1965) ("[T]he trial court may in its discretion take judicial notice of facts of 'verifiable certainty' either upon its own motion or upon request of a party to the action."); ***State v. Peterson***, 222 Wis. 2d 449, 453, 457-58, 588 N.W.2d 84 (Ct. App. 1998) (circuit court's taking of judicial notice reviewed under erroneous exercise of discretion standard). As the court recognized, judicial notice is only possible if a fact is not subject to reasonable dispute in that it is generally known within the court's jurisdiction, or it is capable of accurate and ready determination by resort to sources whose accuracy may not be questioned.[6] *See* WIS. STAT. § 902.01(2)(a)-(b). Ufferman presented neither any evidence nor any witnesses recognizing McGregor as an authority in his field that put his expertise beyond reasonable dispute. The court was well within its discretion in concluding the proffered information alone was insufficient to allow it to qualify McGregor as an expert as a matter of judicial notice.

¶19 Ufferman also argues the circuit court wrongly concluded that the probative value of the collective McGregor materials was substantially outweighed by the risk of undue prejudice under WIS. STAT. § 904.03. He asserts

[6] Ufferman argues the "option of judicial notice [in WIS. STAT. § 908.03(18)] is surplusage if limited by the domain of the opposing expert," apparently in reference to Johnson expressing only a general understanding of Ufferman's defense theory before the court barred further questioning. However, Ufferman does not develop an argument that judicial notice somehow functions differently in the context of § 908.03(18) regarding learned treatises than it does within WIS. STAT. § 902.01. *See* ***Elbin***, 146 Wis. 2d at 244-45. We also note that Ufferman omits any explanation of why the Australian Broadcasting Company and Time Magazine articles qualify as "learned treatises" under the terms of § 908.03(18).

there was "no complexity" in McGregor's research, such that it could not mislead or confuse the jury.

¶20 However, in reviewing and excluding the McGregor materials, the circuit court rightly observed that the materials themselves established no foundation or offered any greater explanation in support of McGregor's study.[7] Indeed, Ufferman himself readily admits in his appellate briefing that "McGregor is the first scientist to use" the test he performed. And, of course, McGregor never attempted to apply his principles to Ufferman or to the particular accident in question, which likely contributed to the court's conclusion the McGregor materials' probative value was "very small." Moreover, as the court explained, the fact that Ufferman's method of presenting this theory rested on media articles "made for popular consumption" created a considerable risk of misleading the jury. In light of the lack of foundation for applying McGregor's theory to the circumstances of this case and substantial risk of undue prejudice, the court's decision to exclude the materials was not erroneous.

¶21 It seems evident Ufferman was attempting to present McGregor's so-called expert "opinion" allegedly in support of his defense without him ever actually retaining his own expert, let alone submitting any probative material in support of that opinion's application to the facts of this case. Under these

[7] Despite Ufferman's broad assertion that the "methods used by McGregor are so basic," there is nothing in the record explaining the exact scientific foundation and procedure for these "methods." At most, Ufferman included an abstract of a scholarly article McGregor authored in part. According to the abstract, the authors concluded that evidence suggests exercise may cause residual THC to be released into the bloodstream from fat stores. Regardless of this conclusion's merit, the entire main body of this article is not in the record. Ufferman's specific theory that stress from the crash, not exercise, caused THC release appears to be based largely upon speculation from the Australian Broadcasting Company and Time Magazine articles about the study's implications.

circumstances, the circuit court did not err in prohibiting Ufferman's attempts to do so. Similarly, Ufferman had means of properly introducing the ambulance report and the NHTSA manual into evidence. He failed to properly do so. In all, we conclude the circuit court properly exercised its discretion with respect to all of its evidentiary rulings.

¶22 Finally, Ufferman argues he was denied his constitutional right to present a defense when the circuit court prevented him from cross-examining Johnson on Ufferman's proffered theories on pupil size and THC retention in fat. As Ufferman failed to raise this issue before the circuit court, we do not address it. *See* ***State v. Dowdy***, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691 (issues not raised in the circuit court will not be considered for the first time on appeal).

By the Court.—Judgment affirmed.

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