COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP307-CR **Cir. Ct. No. 2016CT343**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMIE M. SRB,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JOSANN M. REYNOLDS, Judge. *Affirmed and cause remanded with directions.*

¶1 SHERMAN, J.[1] Jamie Srb appeals from a judgment of conviction following a jury trial for operating a motor vehicle while under the influence of an intoxicant, second offense, contrary to WIS. STAT. § 346.63(1). Srb contends the

[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.

circuit court erred in concluding that the results from Srb's blood alcohol concentration test were admissible at trial. Srb argues that the test results were not admissible because the test was not administered within three hours of driving and because expert testimony establishing the probative value of the test results was not admissible. For reasons explained below, I affirm.

BACKGROUND

¶2 At approximately 2:30 a.m. on March 6, 2016, Sun Prairie Police Officer Jamison Davis received a report of a suspicious vehicle parked at the intersection of Rebel Drive and Normandin Court in Sun Prairie. Upon arriving at that location, Officer Davis observed a parked vehicle with its lights on and engine running, and Srb asleep in the driver's seat. After questioning Srb and administering field sobriety tests, Officer Davis transported Srb to a nearby hospital to have Srb's blood drawn for blood alcohol concentration testing. A sample of Srb's blood was taken at 3:42 a.m., and subsequent testing of that sample showed 0.158 grams of alcohol per 100 milliliters of blood.

¶3 Srb was charged with OWI and operating a motor vehicle with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b), both as second offenses. At trial, Srb objected to the admissibility of the results of the blood analysis, and to expert testimony on retrograde extrapolation. Srb argued that the State failed to present evidence that his blood sample was taken within three hours of operation of his motor vehicle and as a result, the results of his blood alcohol concentration test are not automatically admissible. *See* WIS. STAT. § 885.235(1g) ("evidence of the amount of alcohol in the person's blood … is admissible … if the sample was taken within 3 hours after the event to be proved"). Srb further argued that pursuant to WIS. STAT. § 885.235(3), the blood

analysis evidence would be admissible if expert testimony established its probative value, but argued that to do so, the State would need to present expert testimony on retrograde extrapolation. *See* § 885.235(3) ("If the sample of … blood … was not taken within 3 hours after the event to be proved, evidence of the amount of alcohol in the person's blood … is admissible only if expert testimony establishes its probative value."). Srb argued that expert testimony on retrograde extrapolation was not admissible because the State's notice of expert testimony did not provide notice that any expert would testify regarding retrograde extrapolation. Srb argued that absent that expert testimony, the State was unable to establish that the blood analysis result was admissible and the result should, therefore, be excluded.

¶4 The circuit court overruled Srb's objections. The court did not make a specific finding that Srb had or had not operated his vehicle within three hours of the analysis of his blood. Instead, the court focused on whether the State's expert should be permitted to testify as to retrograde extrapolation. The court found that the State's expert could testify that "blood alcohol gets absorbed and gets eliminated over time" because "what happens with regard[] to blood alcohol over time" was common knowledge to Srb's trial counsel.

¶5 At trial, the State's expert, Theodore Savage, testified that he tested Srb's blood sample and found a blood alcohol concentration level of 0.158. Officer Davis testified that Srb had stated that Srb had consumed four to five beers between 2:00 p.m. and 4:00 p.m. the day prior to his arrest but had not had anything to drink after that. Savage testified that he would not expect "an individual who only had four or five beers and stopped drinking at 4:00 p.m. the prior day to have a level of alcohol this high." Savage further testified that to get a

0.158 blood alcohol concentration, an average person would have to have consumed eight to ten beers "all [] at once."

¶6 Srb was found guilty by a jury of OWI and PAC, both as second offenses. Pursuant to WIS. STAT. § 346.63(1)(c), Srb was sentenced on only the OWI offense.[2] Srb appeals.

DISCUSSION

¶7 Srb contends the circuit court erroneously admitted expert testimony by Savage on retrograde extrapolation that should have been excluded because of a discovery violation. Srb contends that because Savage's testimony was inadmissible, the circuit court also erroneously admitted the blood analysis result under WIS. STAT. § 885.235(3).

¶8 The admissibility of evidence is generally a discretionary decision for the circuit court and that decision will be upheld on appeal so long as it has a reasonable basis and was made in accordance with the facts of record. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). If the circuit court's decision is supportable by the record, this court will not reverse even if the circuit court gave the wrong reason or no reason at all. ***Id.***

[2] The judgment of conviction reflects Srb was convicted of both OWI and PAC, though he was sentenced on only the OWI offense. This court explained in ***Town of Menasha v. Bastian***, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993), that if a "defendant 'is found guilty of both [OWI] and [PAC] for acts arising out of the same incident or occurrence' … the defendant is to be sentenced on one of the charges, and the other charge is to be dismissed." (Quoting WIS. STAT. § 346.63(1)(c) (emphasis omitted)). Accordingly, I remand this matter to the circuit court for an amended judgment of conviction to be entered reflecting that the PAC count is dismissed.

¶9 Turning first to Srb's challenge of the circuit court's admission of expert testimony on retrograde extrapolation, Srb argues that the State violated rules of discovery by failing to disclose that Savage would testify about retrograde extrapolation, as required by WIS. STAT. § 971.23(1)(e).

¶10 Under WIS. STAT. § 971.23(1)(e), the State is required to disclose to the defendant:

> Any relevant written or recorded statements of a witness named on a list under par. (d), including any audiovisual recording of an oral statement of a child under [WIS. STAT. §] 908.08, any reports or statements of experts made in connection with the case or, *if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony*, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial. (Emphasis added.)

¶11 The application of WIS. STAT. § 971.23(1)(e) to the facts before this court presents a question of law that this court reviews de novo. ***State v. Harris***, 2008 WI 15, ¶15, 307 Wis. 2d 555, 745 N.W.2d 397. This court undertakes the following three-part review of an alleged violation of § 971.23(1)(e):

> First, we decide whether the State failed to disclose information it was required to disclose under [] § 971.23(1). Next, we decide whether the State had good cause for any failure to disclose under § 971.23(1). Absent good cause, the undisclosed evidence must be excluded. However, if good cause exists, the circuit court may admit the evidence and grant other relief, such as a continuance. Finally, if evidence should have been excluded under the first two steps, we decide whether admission of the evidence was harmless.

State v. Rice, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517 (internal citations omitted); *see also* § 971.23(7m). Each part is reviewed without deference to the circuit court. ***Id.***

¶12 It is undisputed that the State disclosed the blood analysis report prepared by Savage and that the report contained no information regarding retrograde extrapolation. According to Srb, that portion of WIS. STAT. § 971.23(1)(e) that provides "or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony" obligated the State to divulge before trial that Savage would testify at trial regarding retrograde extrapolation.

¶13 The fact that the blood analysis report and other materials turned over to the defense did not mention retrograde extrapolation does not mean that the State failed to turn over "a written summary of … the subject matter of [Savage's] testimony." That language does not require that every detail be disclosed to the defense. *See* ***State v. Schroeder***, 2000 WI App 128, ¶9, 237 Wis. 2d 575, 613 N.W.2d 911 ("The statute does not require than an expert make out a report reciting in detail the bases for his or her opinion. Rather, it requires that the defense be provided with the report if one has been prepared or, if the expert does not prepare a report, a written summary of findings."). As observed by the circuit court, it should come as no surprise to Srb or his trial counsel that a determination of a defendant's blood alcohol concentration for an OWI charge may involve estimating what the defendant's alcohol content was at a specific time. Srb provides no case law to support the proposition that the absence of this detail in the pretrial discovery materials rises to the level of a discovery violation. *See, e.g.*, ***State v. Gimino***, No. 2012AP1498, unpublished slip op. (March 7, 2013) (concluding that lack of information regarding pain medication in medical report did not rise to the level of a discovery violation). Accordingly, I agree with the State that the fact that the blood analysis report did not contain any information regarding retrograde extrapolation is not a discovery violation, and I conclude that

allowing expert testimony on that issue was not erroneous. Because admission of Savage's expert testimony was not erroneous, I further conclude that the circuit court did not err in admitting into evidence the result of Srb's blood analysis.

CONCLUSION

¶14 For the reasons stated above, I conclude that the circuit court did not err in admitting Savage's expert testimony on retrograde extrapolation or the result of Srb's blood analysis. However, for the reasons explained in footnote 2, I remand to the circuit court to enter an amended judgment of conviction reflecting that the PAC count is dismissed.

By the Court.—Judgment affirmed and cause remanded with directions.

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