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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1882**

State of Minnesota,
Respondent,

vs.

Eric Christopher Swenson,
Appellant.

**Filed May 21, 2012
Affirmed
Cleary, Judge**

Clay County District Court
File No. 14-CR-10-774

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Jeanine R. Brand, Cheryl Duysen, Assistant County Attorneys, Moorhead, Minnesota (for respondent)

Kyle D. Kemmet, Jesse N. Lange, Aaland Law Office, Ltd., Fargo, North Dakota (for appellant)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

CLEARY, Judge

Appellant Eric Swenson challenges his conviction of fourth-degree driving while impaired (DWI), arguing that the district court erred by holding that the probative value

of the testimony of his expert witness is outweighed by the potential prejudicial effect on the jury, and therefore excluding the testimony. We affirm.

FACTS

At 12:12 a.m. on March 3, 2010, an officer from the Moorhead Police Department was on patrol in the City of Moorhead when he observed a vehicle cross the center line of the roadway several times. He stopped the vehicle, identified the driver as appellant, and noticed that appellant had bloodshot and watery eyes and emitted a strong odor of alcohol. The officer asked whether appellant had been drinking that night and appellant admitted to having consumed approximately four beers. The officer asked appellant to exit the vehicle and, following field sobriety tests and a preliminary breath test, appellant was arrested on suspicion of DWI.

Appellant was transported to jail, where he agreed to take a breath test using the Intoxilyzer 5000. The test was completed at 1:07 a.m. and registered a .11 alcohol concentration. During a voluntary interview, appellant admitted that he had drunk four regular-sized glasses of beer between approximately 7:00 p.m. and 11:30 p.m. Appellant also stated that he was not ill, did not have any diseases, and was not taking any prescription or non-prescription medication. Appellant was cited for fourth-degree DWI driving while under the influence of alcohol and fourth-degree DWI driving with an alcohol concentration of .08 or more. Appellant pleaded not guilty to the charges.

On November 22, 2010, appellant was diagnosed with gastroesophageal reflux disease (GERD). His medical records state that he had suffered from symptoms of GERD for eight years.

In December 2010, appellant filed a notice disclosing that he might call Dr. Robert Howard as an expert witness at trial to “provide testimony regarding breath test analysis and the accuracy and reliability of the Intoxilyzer with respect to testing conducted on [appellant].” In March 2011, appellant notified the state that he intended to call Dr. Howard at trial to “address the effects of Gastroesophageal reflux disease (GERD) on the Intoxilyzer 5000.” The state requested disclosure of Dr. Howard’s testimony and the basis for his opinions, and appellant subsequently provided the state with two articles regarding the reliability of breath-alcohol analysis in individuals with GERD, as well as Dr. Howard’s curriculum vitae. The state then filed motions to exclude the testimony of Dr. Howard on two bases. First, the state claimed that appellant had failed to comply with the state’s discovery request by not providing a written summary of Dr. Howard’s testimony or the findings, opinions, and conclusions he would give. Second, the state maintained that Dr. Howard’s testimony would be speculative and without foundational reliability and would not assist the jury.

The district court held a motion hearing on July 28, 2011, during which Dr. Howard provided an oral summary of the testimony he intended to give if called at trial. Dr. Howard stated that he had never met or tested appellant, is not a medical doctor, and had no independent knowledge as to whether appellant suffered from GERD on March 3, 2010. Dr. Howard stated that he intended to testify that, while the Intoxilyzer test assumes that an air sample given is deep lung air, certain conditions can impact the integrity of the sample. Dr. Howard maintained that in an individual who has GERD, when stomach material has refluxed into the esophagus and into the back of the

mouth, the air passes over that material such that the Intoxilyzer can pick up on any alcohol from the stomach (referred to as “mouth alcohol”). Dr. Howard stated that it would be impossible to tell what percentage of alcohol detected in air sample was related to mouth alcohol versus lung alcohol, and that in fact all of the alcohol detected by a test could be lung alcohol and none of it mouth alcohol. Dr. Howard could point to no studies or literature to support his opinion on the potential effect of GERD on the Intoxilyzer test, but stated that “it’s [a] very logical conclusion to draw” Although studies have concluded that GERD has little or no effect on an Intoxilyzer test, Dr. Howard intended to testify that he disagrees with those conclusions. Dr. Howard himself had not conducted any studies or testing on this issue. Dr. Howard also intended to testify that, while the scientific community uses a “rule of thumb” that assumes that ingested alcohol is completely absorbed into the bloodstream within approximately 90 minutes of the time an individual stops ingesting alcohol, this “rule of thumb” is only an estimation and studies have shown that absorption times vary widely depending on the individual and can be up to 192 minutes.

On August 17, 2011, the district court issued an order granting the state’s motion to exclude the testimony of Dr. Howard. The court found that appellant had failed to fully comply with discovery but refused to exclude the testimony on that basis, determining that the failure was not intentional or willful and that the state had adequate time to prepare for trial, which at that point was scheduled for September 13, 2011. However, the court determined that Dr. Howard’s testimony was inadmissible because its probative value was outweighed by its potential prejudicial effect on the jury.

Appellant subsequently waived his right to a jury trial and agreed to submit the case to the court on stipulated facts. The court found appellant guilty of fourth-degree DWI driving with an alcohol concentration of .08 or more, in violation of Minn. Stat. § 169A.20, subd. 1(5) (Supp. 2009). The charge of fourth-degree DWI driving while under the influence of alcohol was dismissed. This appeal followed.

D E C I S I O N

I. The district court did not abuse its discretion by determining that the testimony of Dr. Howard is inadmissible.

Appellant argues that the probative value of Dr. Howard’s testimony outweighs its potential prejudicial effect on the jury, and that therefore it should not have been excluded. The state maintains that Dr. Howard’s testimony is speculative, has no foundational reliability, would not assist the jury, and that therefore it was properly excluded. The admission of an expert’s opinion testimony generally rests within the discretion of the district court, and a reviewing court will not reverse the district court’s determination unless there was an apparent error. *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984).

Courts have traditionally “proceeded with great caution when admitting testimony of expert witnesses, especially in criminal cases. An expert with special knowledge has the potential to influence a jury unduly.” *State v. Grecinger*, 569 N.W.2d 189, 193 (Minn. 1997). “Expert testimony generally is admissible if: (1) it assists the trier of fact, (2) it has a reasonable basis, (3) it is relevant, and (4) its probative value outweighs its

potential for unfair prejudice.” *State v. Jensen*, 482 N.W.2d 238, 239 (Minn. App. 1992), *review denied* (Minn. May 15, 1992).

A. Would Dr. Howard’s testimony assist the trier-of-fact?

The district court determined that Dr. Howard’s testimony would assist the trier-of-fact. “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 witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Minn. R. Evid. 702. “If the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury’s ability to reach conclusions about that subject which is within their experience,” then the expert testimony will not assist the jury. *State v. Helterbride*, 301 N.W.2d 545, 547 (Minn. 1980).

Dr. Howard intended to testify about GERD, a medical condition, and the effect that it can have on the Intoxilyzer 5000 breath test. He also intended to testify regarding absorption time of alcohol into the bloodstream. These subjects require specialized knowledge and experience that would not likely be possessed by members of a lay jury. The district court did not abuse its discretion by finding that Dr. Howard’s testimony would assist the trier-of-fact.

B. Does Dr. Howard’s testimony have a reasonable basis?

The district court determined that Dr. Howard’s testimony has a reasonable basis. An expert’s witness’s opinion “must have foundational reliability.” Minn. R. Evid. 702. “In addition, if the opinion or evidence involves novel scientific theory, the proponent

must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.” *Id.* “A reasonable basis exists where an expert’s opinion is probably true; mathematical or absolute certainty is not required.” *Jensen*, 482 N.W.2d at 239.

The studies described in articles produced by appellant have concluded that GERD has little or no effect on an Intoxilyzer test. Dr. Howard disagrees with those conclusions but did not produce any articles or materials to support his opinion that GERD does have an impact on the test, and Dr. Howard himself had not conducted any studies or testing on this issue. We hold that there is no reasonable basis for Dr. Howard’s testimony.

C. Is Dr. Howard’s testimony relevant?

The district court determined that Dr. Howard’s testimony is relevant. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. “A fact is relevant if, when taken alone or in connection [with] other facts, [it] warrants a jury in drawing a logical inference assisting, even though remotely, the determination of the issue in question.” *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

Appellant was diagnosed with GERD more than eight months after the incident that gave rise to this proceeding. Although he alleges that he suffered from symptoms of the disease for eight years before being diagnosed, there is no evidence that appellant was experiencing GERD on March 3, 2010, or that he was in reflux when the Intoxilyzer test

was administered. We hold that Dr. Howard's testimony has very little relevance or probative value in this matter.

D. Does the probative value of Dr. Howard's testimony outweigh the potential for unfair prejudice?

The district court determined that the probative value of Dr. Howard's testimony is outweighed by its potential prejudicial effect on the jury, and therefore excluded the testimony. "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" Minn. R. Evid. 403. "Unfair prejudice under rule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *Schulz*, 691 N.W.2d at 478.

Dr. Howard was not present when appellant's Intoxilyzer test was administered and has no knowledge as to whether the test picked up on any mouth alcohol. To be able to affirmatively say that it did, Dr. Howard would need to assume that appellant had GERD on March 3, 2010, and that he was in reflux when the test was administered. Even then, Dr. Howard testified that he would only be able to speculate as to the percentage of mouth alcohol that may have been registered as opposed to lung alcohol, and that no mouth alcohol may have been registered at all. Given the assumptions and speculation required for Dr. Howard to be able to say that appellant's Intoxilyzer test results were impacted by his GERD, there is a high probability that Dr. Howard's testimony would confuse and mislead the jury and cause unfair prejudice. The district court did not abuse

its discretion by determining that the testimony's probative value is outweighed by its potential prejudicial effect on the jury.

This conclusion conforms with other decisions by this court that speculation cannot invalidate the results of an Intoxilyzer test. *See, e.g., Israel v. Comm'r of Pub. Safety*, 400 N.W.2d 428, 430 (Minn. App. 1987) (“Mere speculation that some contamination might have occurred is insufficient.”); *Engen v. Comm'r of Pub. Safety*, 383 N.W.2d 399, 401 (Minn. App. 1986) (“Where a driver alleges that he might have burped, might have had a fever, or otherwise alleges that occurrences could affect the test result, the allegations are merely an invitation to speculation.”) (quotation omitted); *Fritzke v. Comm'r of Pub. Safety*, 373 N.W.2d 649, 650–51 (Minn. App. 1985) (holding that a general allegation that allergy medication affects the results of the Intoxilyzer 5000, without specific proof that it actually did in the defendant's particular case, could not be used to invalidate test results).

II. The district court did not abuse its discretion by refusing to exclude the testimony of Dr. Howard due to appellant's failure to fully comply with discovery.

The state argues that appellant's failure to comply with discovery provides an additional basis for excluding the testimony of Dr. Howard. The state maintains that the testimony should have been excluded on procedural grounds because appellant failed to timely provide a written summary of Dr. Howard's testimony or the findings, opinions,

and conclusions he would give. Appellant did not address this issue in his brief and did not file a reply brief.¹

“The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the [district] court.” *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). “[T]he [district] court is in the best position to determine whether any harm has resulted from the particular violation and the extent to which this harm can be eliminated or otherwise alleviated.” *Id.* Accordingly, a district court’s ruling on such an issue should not be overturned absent a clear abuse of discretion. *Id.*

When determining whether to impose a sanction for failure to comply with discovery, a court should take into account the reason why disclosure was not made, the extent of prejudice to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant factors. *Id.* Here, the state was first notified in December 2010 that Dr. Howard might be called to testify at trial. Dr. Howard fully disclosed what his trial testimony would be during the motion hearing on July 28, 2011. At that point, trial was scheduled for September 13, 2011, giving the state more than six weeks to prepare for the testimony. The trial was scheduled and continued several times.

¹ We note that the state did not file a notice of related appeal pursuant to Minn. R. Civ. App. P. 103.02, subd. 2 (“After one party timely files a notice of appeal, any other party may seek review of a judgment or order in the same action by serving and filing a notice of related appeal.”). Therefore, we could decline to even address this issue. *301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Ass’n*, 783 N.W.2d 551, 561 n.2 (Minn. App. 2010) (stating that a claim the respondent could have made was not properly before this court because the respondent had not filed a notice of related appeal, and therefore refusing to address the claim). However, we will discuss the issue briefly.

Moreover, the district court found no evidence that appellant's failure to fully comply with discovery was intentional or willful. Given these factors, it is unlikely that the state would have been prejudiced to any appreciable degree at trial, and the district court did not abuse its discretion by refusing to exclude the testimony of Dr. Howard due to appellant's failure to fully comply with discovery.

Affirmed.