STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1478

State of Minnesota,
Respondent,

vs.

Kristina Marie Gretz,
Appellant.

Filed August 10, 2010
Affirmed
Lansing, Judge

Nicollet County District Court
File No. 52-VB-08-2305

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

James Brandt, St. Peter City Attorney, Stefanie L. Menning, Assistant City Attorney, St. Peter, Minnesota (for respondent)

Thomas K. Hagen, Mankato, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Lansing, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

A jury found Kristina Gretz guilty of driving while impaired and careless driving. On appeal from these convictions, Gretz challenges the admission of the dispatched

officer's testimony on two of five field sobriety tests and the denial of her motion for a mistrial after the officer said that he performed a "PBT." Because the admission of the testimony on the field sobriety tests was neither error nor prejudicial and the reference to the PBT was brief and unintentionally elicited, we affirm.

F A C T S

A driver returning to her St. Peter home from Mankato on Highway 22 after 9:00 p.m. on May 26, 2008, saw a car, driven by Kristina Gretz, that was "swerving all over the road." When she saw Gretz's car swerve over the center line and cause an oncoming car to drive off the roadway onto the shoulder, the observing driver called the St. Peter Police Department to report the driving conduct.

Maintaining telephone contact with police dispatch, the observing driver followed Gretz for about five miles until Gretz reached her residence and parked her car. According to the observing driver's testimony at trial, Gretz continued to drive in the oncoming traffic lane for significant distances and made a right turn from a left lane at one of the intersections. The state introduced at trial a recording of the telephone call, which was played for the jury.

The St. Peter police officer who was dispatched to Gretz's residence had Gretz's license-plate number, a description of Gretz's car, and a description of Gretz. This information was supplied by the observing driver during the five-mile observation span and the information was verified when that driver circled back by Gretz's residence and saw the police officer talking to Gretz outside her car.

The dispatched officer testified that Gretz's eyes were red, watery, glassy, and bloodshot; that he could smell alcohol on her breath; and that she was "unsteady on her feet." Because of these indications of intoxication, the officer conducted five field tests that he uses "to determine whether or not someone has been drinking." He described three "typical" tests—the horizontal-gaze-nystagmus test, the walk-and-turn test, and the one-leg-stand test. The officer testified that Gretz failed several parts of the horizontal-gaze-nystagmus test and could not correctly perform either the walk-and-turn or the one-leg-stand test. The officer said that in addition to the typical tests, he also conducts what he calls the alphabet test and the counting-number test. Gretz was able to perform the alphabet test accurately, but in counting backward from eighty-seven to seventy-eight she failed to stop at seventy-eight and continued to sixty-eight.

When the prosecutor asked the officer whether there were other tests that he asked Gretz to perform, the officer began to answer by saying, "The last test was the PBT from the—" At that point Gretz's attorney objected and the objection was sustained. During the next jury break, Gretz's attorney moved for a mistrial based on Minn. Stat. § 169A.41, subd. 2(4) (2006), which prohibits the admission of PBT results except in test-refusal prosecutions. The district court denied the motion and offered to provide a curative instruction. Gretz declined the instruction, and the trial continued.

Gretz testified in her defense. She explained that her eyes were red because she was returning from her cabin and had been out in the sun. She also said that the field sobriety procedures that tested her balance were negatively affected by her physical limitations caused by back operations and by being more than fifty pounds overweight.

And she believed that she had correctly performed the counting-number test, when she stopped at sixty-eight. She admitted that she had two vodka-and-fruit-juice drinks before leaving the cabin and that, because the drinks were made by someone else, she did not know how much alcohol was in them.

Before instructing the jury, the district court again asked Gretz's attorney whether the defense wanted a curative instruction on the reference to the PBT. Gretz declined, but, after the jury deliberations began, Gretz renewed her mistrial motion. The district court again denied the motion.

The jury found Gretz guilty of both driving while impaired and careless driving. She appeals from both convictions.

D E C I S I O N

I

The first challenge is to the admissibility of the results of two of the five tests that the dispatched officer used to determine whether Gretz was driving while impaired. When a challenge to the admission of evidence does not implicate constitutional rights, our review is limited to the question of whether the district court's ruling was an abuse of discretion. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006). If the evidence was admitted in error, the party against whom the evidence was admitted will not receive a new trial unless the error substantially influenced the jury's decision. *State v. Yang*, 774 N.W.2d 539, 554 (Minn. 2009).

Gretz's primary argument on this issue is twofold: first, that the alphabet and counting-number tests are not standardized tests listed by the National Highway Traffic

Safety Administration (NHTSA) and that it was therefore error to allow the officer to refer to these tests as "field sobriety tests," and, second, that the tests were inadmissible because they were "merely observations of the [o]fficer." We note at the outset that we find nothing in the Minnesota Impaired Driving Code, Minn. Stat. §§ 167A.01-.78 (2006 & Supp. 2007), that limits the type of tests or police observations that may be admitted on the issue of intoxication and Gretz provides no authority for this type of limitation. In any event, Gretz's specific challenges to the admissibility of the two tests do not support reversal for a new trial.

First, the record confirms that the officer testified that he had "been through standard field sobriety tests given by the [s]tate [p]atrol," but the officer did not indicate that all five of the tests that he conducted with Gretz were "standard" field sobriety tests. He described three "typical" tests—the horizontal-gaze-nystagmus test, the walk-and-turn test, and the one-leg-stand test. Gretz does not dispute that these are "standard" field sobriety tests. The officer further testified that in addition to these "typical" tests, he conducts what he calls the alphabet test and the counting-number test. The officer testified that the counting-number test was not listed by NHTSA.

Gretz's contention of error rests on the premise that only field sobriety tests listed by NHTSA can be considered field sobriety tests. This premise is not supported. To the contrary, the term "field sobriety test" is more generally defined as "[a] motor-skills test administered by a peace officer during a stop to determine whether a suspect has been driving while intoxicated" that usually "involves checking the suspect's speaking ability

or coordination (as by reciting the alphabet or walking in a straight line)." *Black's Law Dictionary* 1517 (9th ed. 2009).

The second part of Gretz's argument is that her performance on the alphabet test and the counting-number test was not admissible because it was "merely observations of the [o]fficer." Again, the contention is not supported and the applicable law appears to be otherwise. In considering similar methods for detecting impairment, the supreme court concluded that the twelve steps of a drug-impairment-recognition protocol were designed "to refine and enhance the skill of acute observation" and to focus it on "motor skill deficiencies of the kind one would expect to find if the subject were 'under the influence' of or impaired" by drugs. *State v. Klawitter*, 518 N.W.2d 577, 585 (Minn. 1994). The *Klawitter* court reasoned that the protocol "is not itself a scientific technique but rather a list of the things a prudent, trained and experienced officer should consider before formulating or expressing an opinion whether the subject is under the influence of some controlled substance." *Id.* at 584.

A nonexpert witness may state an opinion or inference drawn from personal observation if it is "rationally based on the perception of the witness" and if it helps the fact-finder determine a fact at issue. Minn. R. Evid. 701. The dispatched officer testified to sufficient experience in his police work to observe signs of impairment even though he was not an expert on the science of intoxication. Furthermore, it has long been established that a nonexpert opinion about another's intoxication, subject to a proper foundation, is generally admissible. *Trail v. Vill. of Elk River*, 286 Minn. 380, 390-91,

175 N.W.2d 916, 922 (1970). Gretz has not demonstrated that it was error to allow the officer to testify to his observations of Gretz's responses to the two disputed field tests.

Gretz, in her argument on appeal, also makes a brief reference to error caused by not subjecting the two additional field tests to a *Frye-Mack* analysis. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000) (reaffirming *Frye-Mack* test for admission of scientific evidence). Because Gretz's reference is not supported by authority and the record does not show that Gretz requested a *Frye-Mack* hearing, we decline to analyze this fleeting claim. But we note that the supreme court has previously held that similar tests for detecting impairment "do [] not involve any significant scientific skill or training on the part of [an] officer." *Klawitter*, 518 N.W.2d at 585. As with the motor-skills tests described in *Klawitter*, the officer's two additional field tests are directed at observable behaviors that "one would expect to find if the subject were 'under the influence' [] or impaired." *Id*. The observable responses are not scientific and do not require a *Frye-Mack* analysis.

Even if Gretz had demonstrated error in the admission of the disputed testimony, she has not shown the level of prejudice required to trigger a new trial. No argument has been presented to explain how the officer's testimony about the alphabet recitation and the counting-number test substantially influenced the jury in determining Gretz's guilt. The officer testified that Gretz passed the alphabet test, so that testimony cannot have influenced the jury to convict her of the two charges. In the counting-number test she counted accurately but counted down to sixty-eight rather than stopping at seventy-eight. This minor, contested failure did not figure prominently in the state's case.

Instead, the primary evidence was the eyewitness testimony describing Gretz's egregious driving conduct over a distance of five miles; Gretz's own testimony that she had two vodka-and-fruit-juice drinks with an undetermined amount of alcohol in each; the officer's observation that Gretz had bloodshot and watery eyes, emitted the odor of an alcoholic beverage, and was unsteady on her feet; and Gretz's failure of three "standard" field sobriety tests—the horizontal-gaze-nystagmus test, the walk-and-turn test, and the one-leg-stand test. On this record, we cannot conclude that the jury's decision relied substantially on the officer's testimony that, while counting backward, Gretz stopped at sixty-eight instead of seventy-eight.

II

The second issue raised in this appeal is whether the district court should have granted a mistrial after the officer, responding to the prosecutor's question, briefly referred to a PBT. Because the district court has the duty of supervising, directing, and controlling trial proceedings, it has discretion to determine when circumstances warrant a mistrial. *State v. Graham*, 371 N.W.2d 204, 207 (Minn. 1985). The district court is in the best position to assess whether a mistrial is the only means of obtaining "the ends of substantial justice," and we review that determination under an abuse-of-discretion standard. *State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997) (quotation omitted).

The results of a preliminary breath test are not admissible in a prosecution for driving while impaired unless the charge is based on refusal to take one of the required chemical tests. Minn. Stat. § 169A.41, subd. 2(4). The state has a duty to prepare its witnesses before testifying to avoid impermissible statements. *State v. McNeil*, 658

N.W.2d 228, 232 (Minn. App. 2003). If impermissible testimony was intentionally elicited, denial of a mistrial may be reversible error. *State v. Mahkuk*, 736 N.W.2d 675, 690 (Minn. 2007). But a district court should not grant a mistrial unless there is a reasonable probability that the outcome of the trial would have been different if the event that prompted the motion had not occurred. *State v. Spann*, 574 N.W.2d 47, 53 (Minn. 1998).

Gretz was on trial for charges on which the results of a PBT are not admissible. But Gretz acknowledged that the statement was not intentionally elicited, so the question narrows to whether the outcome would have been different if the officer had not made the statement. In *Mahkuk*, the supreme court addressed this question in conjunction with an impermissible reference to firearms, and—although it was troubled by the inadmissible statement—the court upheld the denial of a mistrial because the inadmissible testimony was brief, the objection to it was sustained, and a curative instruction was given. *Mahkuk*, 736 N.W.2d at 689. The supreme court has also upheld denial of a mistrial when a curative instruction was not given because the defendant declined the instruction for strategic reasons. *See Ture v. State*, 353 N.W.2d 518, 524 (Minn. 1984) (noting defendant's strategic decision and finding improper testimony harmless).

In this case, the officer's reference to the PBT was fleeting and incomplete. He did not state what "PBT" stood for, did not describe the test, and did not testify about the results. The testimony immediately proceeded to other topics, and no other reference was made to the PBT. The district court sustained the objection. In its preliminary instructions to the jury the district court told the jurors that, if an objection is sustained,

they "should not speculate about what the possible answer would have been." The jurors therefore understood that the officer's response was objectionable and jurors are presumed not to have speculated about what the rest of the uncompleted statement would have been. *See State v. James*, 520 N.W.2d 399, 405 (Minn. 1994) (stating that jurors are presumed to follow district court's instructions). The district court offered Gretz a curative instruction specifically about the PBT reference, but Gretz declined.

It is undisputed that the officer's misstatement was not intentionally elicited and the district court's conclusion that the reference had minimal, if any, effect on the jury is supported by the record. A specific curative instruction was offered and declined at the time of the statement and at the close of trial. The district court's other instructions minimized any consideration the jury might have given to the reference to the PBT. The district court did not abuse its discretion by denying the motion for a mistrial.

Affirmed.