DA 17-0145

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 187N

CITY OF GREAT FALLS,

Plaintiff and Appellee,

v.

MICHAEL STUART MCVAY,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. BDC-16-258
Honorable Elizabeth A. Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Lisa S. Korchinski, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Neal Anthon, Great Falls City Attorney, Great Falls, Montana

Submitted on Briefs: June 19, 2019

Decided: August 6, 2019

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 A City of Great Falls jury convicted Michael Stuart McVay of driving under the influence, careless driving, and obstructing a peace officer. The Municipal Court allowed the City to use testimony regarding a portable breath test ("PBT") to impeach McVay after he claimed that his blood alcohol content was on the rise from the time he was stopped until the time he was at the detention center. On appeal, the District Court held that the Municipal Court erred in admitting the PBT without proper foundation but that it was harmless error. We affirm.

¶3 A witness called 9-1-1 to report that a driver, later identified as McVay, had cut him off on snowy roads, had cut off other vehicles, had hit a curb attempting to turn into a parking lot, and that the driver was currently yelling in his parked vehicle, waving his arms, and hitting the steering wheel. Law enforcement officers responded to the parking lot and found McVay "slumped over," apparently asleep behind the wheel of his vehicle. Officers knocked on the window and woke McVay up, but he refused to get out of the car or unlock the vehicle. McVay admitted at trial that he refused to get out of the vehicle because he knew he had alcohol on his breath, his BAC was likely on the rise, and he was afraid he

would lose his commercial driver's license. After repeated attempts to get McVay to open the door, an officer broke out the window to unlock the vehicle and remove him.

¶4 When Officer Aaron McAdam made contact with McVay he smelled an odor of alcohol coming from McVay's breath and observed that McVay's speech was slurred and that his eyes were glassy and watery. Officer McAdam testified that based upon his training and experience, these observations were signs of impairment from alcohol consumption. Officer McAdam observed McVay demonstrate four out of eight indications of impairment on the walk-and-turn test of the field sobriety tests, including: stepping off the line, not performing the turn as instructed, missing heel-to-toe steps, and stopping before completing the test as instructed. McVay also showed three out of four indications of impairment in the one-leg stand test: swaying, raising his arms greater than six inches for balance, and putting his foot down multiple times. McVay took a PBT, which indicated a blood alcohol content ("BAC") of 0.182. He was transported to the jail where he again performed the field sobriety tests, with similar results. McVay consented to the Intoxilyzer 8000 breath test at the detention center. The results showed that McVay's BAC was 0.148. McVay was arrested and charged with driving under the influence, among other charges.

¶5 Prior to jury selection, the Municipal Court granted McVay's motion in limine to prohibit the City from presenting evidence concerning the PBT unless the City could establish the reliability of the test or unless the evidence became valid for impeachment purposes. McVay argued that even if used for impeachment purposes, the PBT still needed

a proper foundation. The Municipal Court held that if McVay "opened the door," and the City used the evidence for impeachment, the City would not be required to establish a foundation.

¶6 McVay's theory at trial was that his BAC was rising from the time he was removed from the vehicle, at 3:38 p.m., to the time he took the Intoxilyzer 8000 breath test, at 4:51 p.m. McVay's defense was that he was not intoxicated when he was driving, but that he became intoxicated after he stopped driving, had fallen asleep, and the alcohol was absorbed. McVay testified that he did not feel impaired when he was driving from his friend's house, where he had consumed alcohol about twenty minutes before he left to drive home. McVay maintained that when the law enforcement officers brought him out of his vehicle, he was beginning to feel the effects of the alcohol; by the time he was brought to the detention center, he was "really feeling" intoxicated from the drinks he consumed. On cross-examination, the City asked McVay if he remembered taking the PBT at the scene, and McVay stated that he did not. McVay objected on grounds that the court previously excluded the PBT evidence. The city attorney argued that McVay opened the door by testifying that his BAC was rising, and the prosecution could show that was not true. The judge overruled the objection, reasoning that McVay opened the door, and limited the questioning to exclude the PBT numbers. After reviewing the police report, McVay agreed that his PBT result was higher than his 0.148 BAC at the detention center. McVay appealed the Municipal Court's admission of testimony regarding the PBT to the District Court. The District Court held that the Municipal Court committed clear error by

allowing the use of the PBT results to impeach McVay. The court held, however, that the error was harmless because "the overwhelming evidence presented at trial in this particular case support[s] the verdict of guilt beyond a reasonable doubt."

¶7 A PBT, as currently administered, remains statistically unreliable and must be demonstrably accurate to be admitted. *State v. Weldele*, 2003 MT 117, ¶ 57, 315 Mont. 452, 69 P.3d 1162. PBT results are admissible if the State establishes with scientific or expert testimony that the results are reliable, accurate, and otherwise satisfy all other requirements for admissibility. *Weldele*, ¶ 58. The City did not offer any scientific or expert testimony to establish foundation for the PBT. When the City introduced evidence that the PBT had a higher result than the Intoxilyzer 8000, there was no foundation to establish that the result in fact was higher. The Municipal Court erred in admitting testimony regarding the PBT without a proper scientific or expert basis. The District Court's ruling was correct.

¶8 "Presentation of [PBT] evidence is trial error and is thus subject to harmless error review." *State v. Snell*, 2004 MT 334, ¶ 40, 324 Mont. 173, 103 P.3d 503. We therefore analyze "whether there was a reasonable possibility that the erroneously admitted evidence might have contributed to the conviction." *State v. Van Kirk*, 2001 MT 184, ¶ 43, 306 Mont. 215, 32 P.3d 735. To answer this query, we apply the "cumulative evidence test." *Van Kirk*, ¶ 43. To prove that a trial error was harmless, the prosecution "must demonstrate that (a) there was other admissible (cumulative) evidence demonstrating the 'under the influence' element of the crime charged; and (b) that, qualitatively,

no reasonable possibility exists that the tainted evidence might have contributed to [McVay's] conviction." *Van Kirk*, ¶ 48.

¶9 The Municipal Court instructed the jury that driving "under the influence" is defined as a person's diminished ability to operate a motor vehicle as a result of consuming alcohol. The Municipal Court also instructed that if a person's alcohol concentration was greater than 0.08, the jury is permitted, but not required, to infer that the defendant was under the influence. Reference to McVay's PBT during the City's cross-examination was not the only evidence presented to prove intoxication. The jury heard eye-witness observation of McVay's driving, law enforcement officers' observations of McVay's impairment, McVay's performance on field sobriety tests, and the Intoxilyzer 8000 result of 0.148—nearly twice the legal limit. A witness testified that McVay swerved into his lane, and the witness had to hit his brakes to avoid a collision. The witness testified also that he saw McVay swerve into another driver's lane and hit the curb when he pulled into the parking lot, where he then was yelling and hitting his steering wheel. Officer McAdam testified that he could smell alcohol on McVay's breath; that McVay had slurred speech and glassy, watery eyes; and that based on his training and experience, the results of field sobriety test maneuvers in both the field and at the detention center indicated that McVay was under the influence. The officer explained that glassy, watery eyes are indicative of intoxication and that alcohol impairs brain functions, including fine motor skills, which can cause slurred speech.

¶10 To prove the element of "under the influence," the City did not have to prove whether McVay's BAC was going up or down at the time he was arrested. The City had to prove that McVay's ability to operate a motor vehicle was diminished due to alcohol consumption. The jury had ample evidence that McVay was under the influence when he was driving. The City brought up the PBT only when it cross-examined McVay. And the jury could infer from McVay's 0.148 BAC result at the detention center that he was under the influence while he was driving, just over an hour earlier. The City demonstrated that the quality of the non-specific reference to the PBT during cross-examination was such that there was no reasonable possibility that it might have contributed to McVay's conviction. *See Van Kirk*, ¶ 44. The District Court did not err in holding that the City's questioning on the PBT was harmless error.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court's interpretation and application of the law were correct. We affirm.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE
/S/ DIRK M. SANDEFUR