COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1282 **Cir. Ct. No. 2014TR757**

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

IN THE MATTER OF THE REFUSAL OF KYLE R. CHRISTOFFERSEN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE R. CHRISTOFFERSEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Kyle R. Christoffersen appeals an order of the circuit court revoking his driver's license due to his refusal to submit to an evidentiary blood or breath test following his arrest for operating a motor vehicle while intoxicated. Christoffersen argues that the circuit court erred when it limited his cross-examination of the arresting officer. Christoffersen further argues that the circuit court did not allow him to make an offer of proof, and that this was error as well. Christoffersen maintains that these alleged errors combine to violate his right to due process. The circuit court did not err in limiting cross-examination because the testimony counsel sought to elicit was unnecessary to the finding of probable cause and therefore irrelevant. We affirm.

BACKGROUND

¶2 This is a refusal action under WIS. STAT. § 343.305(9). The circuit court found that Christoffersen refused to submit to an evidentiary test of his blood or breath, that the arresting officer read Christoffersen the informing-the-accused form, and that the officer had probable cause to believe Christoffersen was operating a motor vehicle while intoxicated. As a result, the circuit court revoked Christoffersen's driving privileges for thirty-six months. Christoffersen appeals this revocation order.

¶3 Officer Daniel Moschea of the Village of Germantown Police Department testified at the refusal hearing. At about 12:30 a.m. on March 29, 2014, Moschea observed Christoffersen's vehicle swerving within the lane of traffic. Moschea followed Christoffersen and saw him cross over the solid

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

yellow traffic line and into the median shoulder several times. He then saw Christoffersen cross over the yellow traffic line four additional times. Moschea activated his emergency lights to pull Christoffersen over. It took Christoffersen about two minutes to stop his vehicle, during which time he deviated outside the traffic lane. When Moschea spoke with Christoffersen, Christoffersen gave conflicting answers about where he was coming from, first indicating Germantown, then Richfield, and eventually a friend's house in Mayville. Christoffersen first told Moschea that he was aware he had deviated from his lane, but then said he did not think he had. Moschea observed Christoffersen to be lethargic, incoherent, mumbling, and with watery, bloodshot eyes. There was a strong smell of alcoholic beverages coming from Christoffersen's vehicle. Christoffersen admitted to having drunk three bottles of beer.

¶4 Moschea attempted to have Christoffersen perform field sobriety tests (FSTs). Just prior to the tests, while Christoffersen was standing in between his car and the squad car, Moschea noticed that he was swaying and that a strong odor of alcoholic beverages came from his breath. Moschea explained to Christoffersen how he should perform the horizontal gaze nystagmus test, then observed the lack of smooth pursuit, the onset of jerkiness prior to forty-five degrees, and jerkiness at maximum deviation of both Christoffersen's eyes. On the walk-and-turn test, Christoffersen failed to maintain his balance during the instructional phase. Christoffersen missed the heel-to-toe position and stepped off the line at each step. On the one-leg stand test, Christoffersen did not perform the test as instructed and began to hop and sway, falling backward. Moschea decided not to continue the test due to concern for Christoffersen's safety. Christoffersen's preliminary breath test showed a blood alcohol content of .242. Moschea concluded that Christoffersen's ability to operate a motor vehicle was impaired by

alcohol and placed him under arrest. Moschea read Christoffersen the informing-the-accused form. Christoffersen refused to submit to an evidentiary blood or breath test.

¶5 At the refusal hearing, defense counsel cross-examined Moschea about his training on and administration of the FSTs. When counsel sought to question Moschea further regarding his training, the court sustained the State's objection, ruling that the area of cross-examination was not relevant to the issue being heard:

> The issue is whether or not he determined, based on his training and experience, whether there is probable cause to believe this defendant operated a motor vehicle while impaired. We know he operated a motor vehicle. Only question was whether he was impaired. I don't even need field sobriety tests to come to that conclusion.

¶6 In support of its conclusion that Moschea had probable cause to believe Christoffersen was operating a motor vehicle while under the influence of alcohol even without the FSTs, the court pointed to Moschea's testimony as to Christoffersen's bad driving, impaired driving, swerving within the lane of traffic, and swerving across the solid yellow line into the median shoulder at least five times. The court further pointed to the fact that it took Christoffersen two minutes to stop his car when he was pulled over and to Moschea's observation of Christoffersen's watery, bloodshot eyes, the odor of intoxicants coming from the vehicle, and Christoffersen's admission that he had been drinking. Additionally, the court referenced Moschea's testimony that Christoffersen had incoherent, mumbled speech. All these factors added up to probable cause, even without the FSTs, the court concluded.

¶7 When the court sustained the State's objection to defense's cross-examination regarding training on and administration of the FSTs, defense counsel said she wanted to make an offer of proof. Defense counsel indicated that Moschea's "testimony would show that the officer's administration of the tests was not in keeping with … the standards [of] … the certifying organization." The court concluded that such testimony would not be relevant, because the hearing was on probable cause, which the court had determined had been shown even without the FSTs.

DISCUSSION

Standard of Review

¶8 Evidentiary decisions, such as the exclusion of evidence on relevancy grounds and the limitation of cross-examination to relevant matters, are within the sound discretion of the circuit court. *See* ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850 (limitation of cross-examination); ***State v. Eison***, 2011 WI App 52, ¶10, 332 Wis. 2d 331, 797 N.W.2d 890 (relevancy determination). Whether probable cause exists, given a set of undisputed facts, is a question of law we review de novo. ***Washburn Cnty. v. Smith***, 2008 WI 23, ¶16, 308 Wis. 2d 65, 746 N.W.2d 243.

Limitation on Cross-Examination

¶9 The scope of cross-examination is properly limited by the circuit court when counsel seeks to delve into areas irrelevant to the proceeding.

> Although on cross-examination counsel is permitted to question witnesses on matters collateral to the case to test credibility, a witness may not be questioned as to matters that are wholly irrelevant or immaterial. A trial court's

> decision not to permit cross-examination as to such matters is sustainable as an exercise of judicial discretion.

State v. Becker, 51 Wis. 2d 659, 667, 188 N.W.2d 449 (1971).

¶10 This was a refusal hearing. The issues to be determined were whether there was probable cause to believe Christoffersen was operating a motor vehicle while under the influence of alcohol, whether Moschea read Christoffersen the informing-the-accused form, in compliance with WIS. STAT. § 343.305(4), and whether Christoffersen refused to provide a sample of breath, blood, or urine. Sec. 343.305(9)(a)5. A § 343.305(9) refusal hearing is a civil, not a criminal, matter, and the rules of civil procedure apply. ***State v. Krause***, 2006 WI App 43, ¶9, 289 Wis. 2d 573, 712 N.W.2d 67. The State's burden of persuasion is only to "show that the officer's account is plausible, and the court will not weigh the evidence for and against probable cause or determine the credibility of the witnesses. Indeed, the court need not even believe the officer's account. It need only be persuaded that the State's account is plausible." ***State v. Wille***, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994) (citation omitted).

¶11 The only factor at issue here was probable cause. "In the context of a refusal hearing … 'probable cause' refers generally to that quantum of evidence that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***Smith***, 308 Wis. 2d 65, ¶15. Probable cause must be determined on a case-by-case basis. ***Id.***, ¶34. Poor performance on FSTs is not a requisite for a finding of probable cause. ***Id.***, ¶¶33, 36-37 (holding that there can be sufficient indicia of intoxication, even without FSTs, to support a finding of probable cause).

¶12 The court reasoned that Christoffersen's cross-examination about the FSTs was irrelevant to the determination of probable cause, because the plausible facts, even without the FSTs, supported probable cause. We agree. The court heard testimony that Christoffersen had crossed over the yellow traffic line at least five times and onto the median shoulder; had swerved within the lane of traffic; took two minutes to pull over; had incoherent, mumbling speech; gave contradictory answers to questions; had a car that smelled of intoxicants; had watery, bloodshot eyes; admitted he had been drinking; swayed while standing to perform the FSTs; and had an odor of alcoholic beverages on his breath. The officer's account is plausible, and the facts therein added up to probable cause, even without the FSTs. *See* ***id.***, ¶36. The court did not erroneously exercise its discretion in limiting cross-examination on Moschea's training and the administration of the FSTs because the FSTs were not necessary and therefore not relevant to the court's determination of probable cause in this case. *See* ***Desjarlais v. State***, 73 Wis. 2d 480, 502, 243 N.W.2d 453 (1976) (wide open cross-examination rule does not permit admission of irrelevant matters).

Offer of Proof

¶13 When the court excludes proffered evidence, counsel makes an offer of proof to show what the evidence was so the appellate court can decide whether it was properly excluded. *See* ***State ex rel. Schlehlein v. Duris***, 54 Wis. 2d 34, 39, 194 N.W.2d 613 (1972). While in most instances the circuit court should allow an offer of proof, the court "need not, in fact should not, permit offers of proof as to matters that are clearly immaterial, irrelevant, without proper foundation, or by incompetent witnesses." ***Id.***

¶14 Christoffersen's counsel wanted to ask Moschea about his training on and administration of the FSTs. When the court limited this avenue of cross-examination, counsel sought to make an offer of proof. The court did not allow counsel to question Moschea as an offer of proof because the manner of administration of the FSTs was not necessary to its probable cause determination and therefore irrelevant under the circumstances. The court explained that Moschea's plausible account of the facts had established probable cause to believe that Christoffersen was operating a motor vehicle while under the influence of alcohol even without testimony about his poor performance on the FSTs. We have upheld this decision, as discussed above. There was no error in not allowing counsel to make an offer of proof where the proof would have been unnecessary and therefore irrelevant. *See* ***State v. Dundon***, 226 Wis. 2d 654, 674, 594 N.W.2d 780 (1999) (holding that it is not error for a circuit court to exclude evidence where it is clear that an offer of proof could not have shown that the evidence was relevant); 75 AM. JUR. 2D *Trial* § 374 (2007) ("Offers of proof must consist of relevant proof.").

¶15 Because the court's evidentiary rulings were not erroneous, we reject Christoffersen's argument, citing ***Montana v. Egelhoff***, 518 U.S. 37, 51-53 (1996), that his due process rights were violated by a combination of evidentiary errors.

CONCLUSION

¶16 It was within the circuit court's discretion to conclude that cross-examination of the arresting officer regarding his training on and administration of FSTs was unnecessary and therefore irrelevant to the determination of probable cause where the undisputed, plausible facts supported probable cause even without

the FSTs. Because it had been determined that the proposed questioning would have elicited irrelevant evidence under the circumstances, the circuit court did not err in limiting counsel's question-and-answer offer of proof. We affirm the circuit court's order revoking Christoffersen's driver's license.

By the Court.—Order affirmed.

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