

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1351-CR

Cir. Ct. No. 2007CF30

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGG B. KANDUTSCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK M. BRADY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gregg Kandutsch appeals a judgment of conviction for operating while under the influence of an intoxicant, fifth and subsequent offense. He claims the circuit court erroneously admitted daily summary reports from his electronic monitoring device at trial. He contends the reports are

inadmissible because the State failed to present expert testimony establishing the reliability of the electronic monitoring system, and because the reports are hearsay. We conclude the reports were properly admitted because the State supplied sufficient evidence of the reports' authenticity under WIS. STAT. §§ 909.01 and 909.015.¹ We also conclude the reports are not statements made by a human declarant and are therefore not hearsay.

BACKGROUND

¶2 At 10:23 p.m. on June 19, 2006, police received a call that Kandutsch was trying to enter the home of his estranged wife, Jennifer Heilman. Kandutsch severely injured himself while breaking into the home and was transported to the hospital, where a blood draw revealed a blood alcohol content of .23%. When asked how Kandutsch would have arrived at her house, Heilman pointed out his mother's green van in a nearby parking lot. Kandutsch was charged with operating while intoxicated, fifth and subsequent offense, and requested a jury trial.²

¶3 At the time of the incident, Kandutsch was supervised under the state's electronic monitoring program. Kandutsch's probation agent, Amy Klarkowski, described the program as "a system which consists of an HMU, a home monitoring unit, and an RF, a radio frequency device" According to Klarkowski, the HMU is placed in an individual's home and receives a signal from the RF device, which is attached to the individual's ankle. Klarkowski further

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² Kandutsch pled no contest to charges of criminal trespass and criminal damage to property. He does not appeal those convictions.

testified the HMU has a range of approximately 150 feet, and is connected by telephone to an electronic monitoring center staffed by the Department of Corrections. Any movement by the RF transmitter in and out of the HMU's range is noted on reports generated by computer at the center. Through Klarkowski, the State introduced daily summary reports indicating Kandutsch's transmitter went out of range at 10:03 p.m. on June 19, 2006. The State argued that, based on the timing of events, Kandutsch must have been intoxicated by the time he started driving.

¶4 Kandutsch objected to the June 19, 2006 daily summary reports, arguing that the State supplied an insufficient foundation for them, and that they were inadmissible hearsay. The circuit court admitted the exhibits after concluding they were properly authenticated and were generated in the ordinary course of business.

DISCUSSION

¶5 On appeal, Kandutsch renews his objections to the daily summary reports. "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has a reasonable basis and was made in accordance with the facts of record." *Nischke v. Farmers & Merchants Bank & Trust*, 187 Wis. 2d 96, 105, 522 N.W.2d 542 (Ct. App. 1994). "If the court's decision is supportable by the record, we will not reverse even if the trial court gave the wrong reason or no reason at all." *Id.*

¶6 Kandutsch first contends the circuit court erred by admitting the daily summary reports without any corresponding expert testimony establishing the accuracy and reliability of the electronic monitoring system. Kandutsch argues this case is directly analogous to *State v. Doerr*, 229 Wis. 2d 616, 599 N.W.2d 897

(Ct. App. 1999), in which we concluded that administering a preliminary breath test (PBT) involves the use of a scientific device whose results are inadmissible unless the proponent presents evidence of the device's scientific accuracy and reliability, and proves compliance with accepted scientific methods.

¶7 The issue in *Doerr* was whether a proper foundation for the PBT results included expert testimony. Our analysis in *Doerr* was guided by the long-established principle that “expert testimony should be adduced when interpreting the evidence involves special knowledge, skill or experience that is not within an ordinary person’s realm of experience or knowledge.” *Id.* at 623. In these complex and technical situations, the lack of expert testimony constitutes an insufficiency of proof, because in its absence the trier of fact would be speculating. *Id.* at 623-24. Requiring expert testimony is an “extraordinary step” to be taken only when a jury is confronted with “unusually complex or esoteric issues.” *Wilson v. Tuxen*, 2008 WI App 94, ¶20, 312 Wis. 2d 705, 754 N.W.2d 220 (citing *Robinson v. City of West Allis*, 2000 WI 126, ¶29, 239 Wis. 2d 595, 619 N.W.2d 692).

¶8 Kandutsch submits that the electronic monitoring system in the present case is at least as complex, if not more, than the PBT device in *Doerr*. But *Doerr* did not focus on the complexity of the PBT device’s operation. Instead, we noted the legislature has directed that the Department of Transportation approve techniques or methods of performing chemical analysis of an individual’s breath. *Doerr*, 229 Wis. 2d at 624-25; *see also* WIS. STAT. § 343.305(6)(b). Our decision relied on the fact that the particular device used in that case was not among those approved by the DOT. *Doerr*, 229 Wis. 2d at 624-25. The statutory and administrative provisions relied on in *Doerr* are not applicable to electronic monitoring devices, and consequently that decision provides no support for

Kandutsch's argument that a jury cannot understand evidence derived from an electronic monitoring system without expert testimony.

¶9 *Doerr* aside, we must consider whether the State was required to introduce expert testimony explaining the electronic monitoring system's operation. Kandutsch concedes, as he must, that radio signals and telephone connections are well-known technologies easily understood by jurors without the aid of experts. He contends, however, that these technologies, when combined with a connection to a computer system, create a new application of old technology that is beyond the general understanding of persons in the community. Kandutsch asserts this "interconnected" technology is still in its infancy and its operation cannot be understood by a lay person.

¶10 The electronic monitoring system's operation is not so "unusually complex or esoteric" as to demand the assistance of expert testimony. Electronic monitoring technology essentially involves two processes: transmission of a radio signal from an RF device to a receiver, and transmission of information from the receiver to the monitoring center via a telephone line. As Kandutsch concedes, these matters are well within the knowledge and experience of the average juror. The relevant technologies have been around for decades and are in common use by the general population. That these technologies "interconnect" to form a functioning system does not elevate them above the average juror's comprehension.³ We see no reason to take the extraordinary step of requiring

³ The cordless telephone, in existence for over three decades, uses the same technologies as the electronic monitoring system. The base station of the telephone converts information it receives over a standard phone connection to an FM radio signal which is then broadcasted to a wireless handset, and vice versa. Craig Freudenrich, Ph.D., *How Cordless Telephones Work*, HOWSTUFFWORKS.COM (Dec. 11, 2000), <http://electronics.howstuffworks.com/cordless->

(continued)

expert testimony as a condition precedent to the admissibility of evidence derived from an electronic monitoring unit.

¶11 Although expert testimony is not required, the question remains: what sort of foundation must the proponent of daily logs from an electronic monitoring system lay? We conclude the logs must be authenticated in accordance with WIS. STAT. § 909.01. Section 909.01's authentication requirement is a condition precedent to admissibility and is satisfied by the proponent presenting proof sufficient to support a finding by the court that "the matter in question is what its proponent claims." *Id.* WISCONSIN STAT. § 909.015 provides specific illustrations of this general concept. For example, evidence derived from a process or system is admissible if the proponent submits evidence describing the process or system used to produce the result and showing that the process or system produces an accurate result. WIS. STAT. § 909.015(9). Once the court is satisfied that the daily summary reports are generated by a reliable electronic monitoring system, the authenticity requirement is satisfied.

¶12 Here, the State presented sufficient evidence describing the electronic monitoring system and its reliability. Klarkowski stated the DOC has used the program since 1987 and relies on it to supervise approximately 2,000 individuals on any given day. She further stated she has used the program to supervise approximately thirty to thirty-five individuals, and has never experienced any malfunction or false reporting, nor has she ever heard of the system producing a false report. Michael Williams, Klarkowski's supervisor and a thirty-four-year DOC employee, testified that he has been familiar with electronic

telephone.htm. Ultimately, the telephone company documents calls placed and received on a bill that, like the daily summary reports at issue in this case, is generated by computer.

monitoring for twenty years, has used it since 1994, and has never heard of or experienced a monitoring unit falsely reporting an event. Both Klarkowski and Williams testified the monitoring system is a routine supervision tool, and the daily summary reports are used regularly by the DOC.

¶13 Klarkowski also testified about the measures used to verify the monitoring device's successful setup. Klarkowski explained that initially, the HMU is placed in an individual's residence and connected to a phone line and a power source, while the RF device is placed on the individual. Klarkowski then discussed the procedures used to ensure the device is operating properly:

When an individual initially is hooked up on the Electronic Monitoring Program, when I've completed the hookup I'm going to call the monitoring center and personally speak with an agent there and verify that the RF has been properly placed on the individual's ankle, so there's a closed strap, and I'm also going to verify that this home monitoring unit was properly installed and that there are no issues, which is called a good hookup.

I'm also going to receive a fax from the home monitoring unit directly to my office indicating both of those things, that there was a closed strap on the RF, and that the home monitoring unit was properly installed and there are no issues.

¶14 After setup, Klarkowski stated the electronic monitoring device continuously functions despite attempts to circumvent it. For example, an individual cannot simply disconnect the phone or power line; the electronic monitoring center places a call, known as a "hello," to the HMU every few hours to verify the HMU is still connected. If the phone or power cord becomes unplugged, the center receives an alert and tracking information is stored in the HMU's battery-powered internal memory until the phone or power connection is restored, at which time the saved information is relayed to the center. Further, the

RF device requires a closed circuit to function. According to Klarkowski, if the RF device is cut or opened, both she and the monitoring center would be alerted.

¶15 Klarkowski also testified about the reliability of Kandutsch's specific monitor. She stated Kandutsch's monitor was properly installed by a trained DOC transport sergeant and that she had received written verification of the proper installation. An exhibit introduced at trial, and not challenged here, indicates Kandutsch's unit was turned on, the HMU was working properly, the RF device on Kandutsch's ankle was closed, and there was a "good hookup." Kandutsch offered no evidence that his unit malfunctioned on June 19, 2006.⁴

¶16 The evidence presented by the State sufficiently described the electronic monitoring system and established its reliability as required by WIS. STAT. § 909.01. Consequently, the daily summary logs produced by the system were properly admitted. Their weight was a matter for the jury.

¶17 Kandutsch claims the evidence describing the electronic monitoring system and its accuracy is unreliable because neither Klarkowski nor Williams is a witness qualified to testify about the system's operation. *See State v. Hanson*, 85 Wis. 2d 233, 244-45, 270 N.W.2d 212 (1978) (radar readings may be introduced by law enforcement official qualified in radar's use and operation). Kandutsch relies on the fact that neither Klarkowski nor Williams was certified in the electronic monitoring device's use. However, both agents testified that there is no certification process for electronic monitoring, nor is certification required to use the device. At the time of trial, Klarkowski had used electronic monitoring to

⁴ The sole contradictory evidence Kandutsch supplied was his own testimony that he left his home shortly after 9 p.m. and drank at a tavern near Heilman's residence.

supervise between thirty and thirty-five individuals over five years, and Williams had over fourteen years' experience with the system. Further, Klarkowski received mandatory training at the outset of her employment. Klarkowski and Williams were sufficiently qualified to offer foundation testimony for the daily summary reports.

¶18 Finally, Kandutsch asserts the daily summary reports were inadmissible hearsay. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” WIS. STAT. § 908.01(3). A statement includes oral or written assertions, or nonverbal conduct of a person if intended as an assertion. WIS. STAT. § 908.01(1). “A ‘declarant’ is a person who makes a statement.” WIS. STAT. § 908.01(2).

¶19 It is clear from these definitions that hearsay can only come from a person. Thus, “readings generated by machines are excluded from hearsay’s realm.” Daniel D. Blinka, *Wisconsin Evidence*, 7 WISCONSIN PRACTICE SERIES § 801.2, at 647 (3d ed. 2008). As professor Blinka notes, computer generated evidence may fall outside the hearsay rule because it is not “made” by a human being, even though human beings create the computer code. *Id.* For example, in *State v. Zivcic*, 229 Wis.2d 119, 131, 598 N.W.2d 565 (Ct. App. 1999), we concluded that a printout from an Intoxilyzer device was admissible because it was the result of a process, not a statement by a declarant. The key factor is how much human involvement is required to produce the evidence.

¶20 In this case, the daily summary reports were the result of an automated process free of human intervention. Once the electronic monitoring system has been installed and activated for a particular individual, no further

human input is necessary for the system to function. Klarkowski's testimony establishes that the system producing the reports does not rely on the assistance or observations of a human declarant. Accordingly, the circuit court properly admitted the report over Kandutsch's hearsay objection.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

