COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2548-CR **Cir. Ct. No. 2008CF660**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS M. ROCHA-MAYO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Luis Rocha-Mayo appeals from a judgment convicting him of first-degree reckless homicide by use of a dangerous weapon; homicide by intoxicated use of a vehicle; first-degree reckless endangerment by

use of a dangerous weapon; and operating a motor vehicle without a valid license, causing the death of another person. He also appeals from an order denying his motion for postconviction relief. We affirm.

¶2 Rocha-Mayo was involved in a collision with two motorcyclists while driving his car home after bar time. One motorcyclist died; the other was injured. An ambulance transported the semiconscious Rocha-Mayo to the hospital. The emergency room (ER) physician directed a registered nurse to perform a preliminary breath test (PBT)[1] to determine whether Rocha-Mayo's confusion was the result of head trauma, suggested by his facial injuries, or intoxication, suggested by the odor of alcohol on his breath. The PBT result was 0.086. Rocha-Mayo admitted consuming a number of beers over several hours.

¶3 Rocha-Mayo vigorously, but unsuccessfully, challenged admission of the PBT result. He entered a guilty plea to operating a motor vehicle without a valid license, causing the death of another person; the remaining three charges were tried to a jury. After several days of deliberations, the jury found him guilty. His postconviction motion alleging ineffective assistance of counsel was denied after a ***Machner***[2] hearing. This appeal followed.

¶4 Rocha-Mayo asserts that the trial court erred in admitting his PBT result because WIS. STAT. § 343.303 (2011-12)[3] expressly bars admission of a PBT result in a motor vehicle prosecution. We disagree.

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[1] The ER nurse testified that he performed "the BAT. The Breath Alcohol Test." We will use PBT, an acronym more familiar in legal settings, to mean the same thing.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

¶5 WISCONSIN STAT. § 343.303 provides in relevant part:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) … the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1) … and whether or not to require or request chemical tests as authorized under s. 343.305(3). *The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3).* (Emphasis added.)

Resolution of this issue requires that we interpret § 343.303. Statutory interpretation presents a question of law, which we review de novo. ***State v. Fischer***, 2010 WI 6, ¶15, 322 Wis. 2d 265, 778 N.W.2d 629. We look first to the language of the statute. ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If it is clear and unambiguous, the plain language of the statute guides us. *See* ***id.***

¶6 As the State observes, Rocha-Mayo takes the last sentence out of its context. In ascertaining a statute's meaning, we must "do more than focus on 'a single, isolated sentence,'" and must look at its role in the statute as a whole. ***Teschendorf v. State Farm Ins. Cos.***, 2006 WI 89, ¶12, 293 Wis. 2d 123, 717 N.W.2d 258 (citation omitted). By its plain language, WIS. STAT. § 343.303 applies to PBTs administered by law enforcement officers for the specified purposes of determining whether probable cause exists to arrest an individual for a motor vehicle intoxication offense, and whether to require or request chemical tests under WIS. STAT. § 343.305(3). Read in context, "the preliminary breath

screening test" in the last sentence must refer back to the PBTs addressed in the preceding part of the statute. It does not apply to breath alcohol tests performed by medical personnel for diagnostic or treatment purposes. The statute did not bar the PBT's admission.

¶7 Accordingly, admission or exclusion of the evidence was a discretionary trial court decision. *See* ***State v. Doerr***, 229 Wis. 2d 616, 621, 599 N.W.2d 897 (Ct. App. 1999). On review, we assess "whether the court exercised its discretion according to accepted legal standards and the facts of record." ***Id.***

¶8 Rocha-Mayo asserts that the test result should have been excluded because of the PBT's unreliability. Our supreme court has rejected this proposition, stating that there is "no indication whatsoever that the prohibition on the use of PBT results is rooted in concerns about reliability of the test." ***Fischer***, 322 Wis. 2d 265, ¶34.[4] Even so, the trial court heard testimony about the accuracy and reliability of the particular device used and that the ER nurse had been trained in its use and was experienced in administering it. The decision to allow the jury to decide what weight, if any at all, to give the test result reflects a proper exercise of discretion. We thus will not overturn the trial court's ruling. *See* ***Doerr***, 229 Wis. 2d at 621.

¶9 Rocha-Mayo next asserts that neither the testing device the ER staff used nor the test it administered met the statutory and administrative code requirements for admissibility under the implied consent statute, WIS. STAT.

[4] Rocha-Mayo asserts that the supreme court's reliability discussion in ***State v. Fischer***, 2010 WI 6, ¶34, 322 Wis. 2d 265, 778 N.W.2d 629, is dicta. This court may not dismiss a statement from a supreme court opinion by concluding that it is dicta. ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

§ 343.305. A method of testing that complies with those specifications is afforded a presumption that its results are accurate and reliable. ***State v. Busch***, 217 Wis. 2d 429, 443, 576 N.W.2d 904 (1998). Rocha-Mayo suggests that the fact that the test and device does not satisfy these requirements renders his test results inadmissible qualitative evidence.

¶10 The test was not performed at the behest of law enforcement under the aegis of the implied consent statute. Further, the State did not invoke the presumption but instead presented expert testimony to establish scientific accuracy and reliability. It also put on evidence that the PBT was a quantitative test—i.e., that the device does not simply indicate the presence or absence of alcohol but actually quantifies the amount. The ER nurse testified that quantification is important because the alcohol level aids diagnosis and helps direct treatment.

¶11 Rocha-Mayo also challenges the related jury instruction, WIS JI—CRIMINAL 1185. The court instructed the jury that if it was satisfied beyond a reasonable doubt that Rocha-Mayo's alcohol level was 0.08 or greater, as his breath sample was taken within three hours of operating his vehicle, it could, but was not required to, draw the inference that he was under the influence of an intoxicant. Rocha-Mayo argues that there is no statutory support for granting a PBT this prima facie effect because it does not meet the requirements for admissibility under the implied consent statute and related administrative rules.

¶12 The trial court is afforded broad discretion when it comes to instructing the jury. ***State v. Fonte***, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. Whether an "instruction is appropriate, under the given facts of a case, is a legal issue subject to independent review." ***State v. Groth***, 2002 WI App

299, ¶8, 258 Wis. 2d 889, 655 N.W.2d 163 *overruled on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1.

¶13 The jury heard testimony about the requirements for an admissible test under the implied consent law and that the ER nurse did not employ safeguards such as the twenty-minute waiting period or a two-breath test sequence. It also heard expert testimony about the device used and that it is not approved for evidential use under the implied consent law. The instruction stated only a permissible inference that the jury was entitled to draw from the evidence presented. We see no error.

¶14 Next, Rocha-Mayo asserts that it was error to allow Dr. William Falco, the ER physician, to testify to his opinion that Rocha-Mayo was intoxicated while in the ER. The trial court allowed the testimony under WIS. STAT. § 907.04, which provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rocha-Mayo contends that Dr. Falco's testimony on the ultimate fact nonetheless was improper because it embraced a "legal concept for which a definitional instruction was required" and given.

¶15 The legal concept at issue was whether Rocha-Mayo was under the influence of an intoxicant at the time he operated the motor vehicle. Dr. Falco did not testify to that. Indeed, he confirmed that he could not opine as to Rocha-Mayo's alcohol level at the time of the accident. What he testified to was that, based on seeing intoxicated people "pretty much on a daily basis" throughout his thirteen years of ER experience, it was his opinion that Rocha-Mayo was intoxicated while being assessed and treated in the ER.

¶16 Rocha-Mayo next asserts that he was prejudiced by the trial court's "uneven" evidentiary rulings based on relevance. "Questions concerning the relevance of particular evidence are left to the trial court's discretion." ***State v. Vander Linden***, 141 Wis. 2d 155, 163, 414 N.W.2d 72 (Ct. App. 1987).

¶17 Rocha-Mayo testified in his defense. He first complains that the court permitted him to answer on cross-examination that he was nineteen on the date of the accident. He argues that the answer allowed the jury to judge him on the irrelevant fact that he was below the legal drinking age.

¶18 Relevant evidence is evidence that has a tendency to make a fact of consequence to a case more or less probable. WIS. STAT. § 904.01. Proposed cross-examination is relevant if it would "be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." ***Rogers v. State***, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980). Rocha-Mayo testified that he felt threatened by the motorcyclists and sped to escape them after one smashed his rear window. Rocha-Mayo's age was relevant to the jury's evaluation of his credibility, the probative value of his version of events, his exercise of judgment, and his reactions that ended in the fatal crash.

¶19 Rocha-Mayo also contends that the trial court erred in excluding evidence that the deceased motorcyclist did not have a motorcycle endorsement. He argues that the evidence went to the victim's knowledge of how to operate a motorcycle and therefore was relevant to his affirmative defense under WIS. STAT. § 940.09(2)(a) that the death would have occurred even had Rocha-Mayo not been under the influence of an intoxicant.

¶20 The trial court ruled that, like Rocha-Mayo's lack of a valid driver's license, the deceased victim's lack of a motorcycle endorsement were irrelevant to

the issue of how each individual operated his vehicle at the time in question. We cannot say that this determination represents an erroneous exercise of discretion.

¶21 State Trooper Michael Smith, the accident reconstructionist, gave opinions at trial that were based on the reports of the state trooper who investigated the accident and the mechanical inspector who examined Rocha-Mayo's car, neither of whom testified. Smith also opined that Rocha-Mayo had been driving recklessly. Rocha-Mayo asserts that trial counsel was ineffective for failing to object to Smith's opinions based on the reports of others not subject to cross-examination and to Smith's opinion on an ultimate issue.

¶22 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, the defendant must establish "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶20 (citation omitted). We view the case from counsel's perspective at the time of trial. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶23 The defense theory was that Rocha-Mayo was driving fast to get away from the motorcyclists when the victim entered the turn lane ahead of him and abruptly slowed, such that Rocha-Mayo was unable to stop in time to avoid hitting the cyclist. Trial counsel testified at the ***Machner*** hearing that he did not

object to the reports on which Smith's testimony was based, as they did not affect the defense theory.

¶24 The trial court concluded that counsel's decisions were consciously and strategically made. A trial court's determination that counsel undertook a reasonable trial strategy is "virtually unassailable." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436. The court also observed that counsel's performance was not deficient because, even if the underlying reports were hearsay, they were admissible under WIS. STAT. §§ 907.03 and 907.05 and Smith's opinion as to recklessness was allowed under WIS. STAT. § 907.04. Therefore, failing to object to Smith's testimony when the trial court likely would have overruled an objection was not deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

By the Court.—Judgment and order affirmed.

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