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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

February 20, 2019

To:

Hon. Ann Knox-Bauer
Circuit Court Judge
Taylor County Courthouse
224 S. 2nd St.
Medford, WI 54451

Rose Thums
Clerk of Circuit Court
Taylor County Courthouse
224 S. 2nd Street
Medford, WI 54451

Robert A. Kennedy, Jr.
Kennedy Law Office
209 E. Madison St.
Crandon, WI 54520-1416

Michael C. Sanders
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kristi S. Tlusty
District Attorney
224 S. Second Street
Medford, WI 54451

You are hereby notified that the Court has entered the following opinion and order:

2018AP1122-CR State of Wisconsin v. Randall S. Fellbaum (L. C. No. 2016CF141)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Randall Fellbaum appeals a judgment convicting him of fifth-offense operating a motor vehicle with a prohibited alcohol concentration. Fellbaum contends the circuit court erroneously exercised its discretion and also denied him his constitutional right to present a defense when it prohibited him from introducing a data table from a learned treatise, and from cross-examining a State witness regarding that table. Based upon our review of the briefs and record, we conclude

at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

A police officer who stopped Fellbaum's truck for speeding noticed a distinct odor of alcohol coming from Fellbaum. The officer conducted three field sobriety tests on Fellbaum, including the horizontal gaze nystagmus (HGN) test. The officer observed no clues of intoxication on the HGN test, but arrested Fellbaum based upon his performance on the other two field sobriety tests and his admission that he had consumed "a couple of glasses," in conjunction with the knowledge that Fellbaum was prohibited, as a result of prior convictions, from driving with a blood alcohol concentration (BAC) above .02. Fellbaum then provided a blood sample.

A chemist at the Wisconsin State Laboratory of Hygiene analyzed Fellbaum's blood sample and found a BAC of .064. The chemist also performed a retrograde extrapolation calculation and concluded that Fellbaum's BAC one hour before the test was taken, when Fellbaum was driving, would have been about .08.

At trial, Fellbaum pointed out that the chemist's retrograde extrapolation calculation was based upon the premise that Fellbaum had already absorbed all of the alcohol from three beers that he acknowledged drinking just prior to driving. However, Fellbaum asserted that the fact that he exhibited no clues of intoxication during the HGN test demonstrated that he had not yet absorbed all of the alcohol at the time he was stopped. Therefore, Fellbaum argued, "the

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

chemist's theory doesn't apply," and his BAC would actually have been lower rather than higher than .064 at the time he was driving.

In support of his theory that he could not have "passed" the HGN test if he had a BAC at or above .064 at that time, Fellbaum sought to introduce Table 10 from a 2007 publication of the National Highway Transportation Safety Administration (NHTSA) entitled "The Robustness of the Horizontal Gaze Nystagmus Test." The table was labeled "HGN Signs (Total Number) by Variations of Stimulus Speed, BACs, and Examination." The table contained thirty-six rows apparently corresponding to thirty-six study participants whose BAC results ranged from a high of .102 to a low of .016. There were additional columns showing the number of HGN signs the tester detected in each participant using two different stimulus speeds.

The table assigned asterisks and double asterisks, respectively, to indicate results that were deemed to be false negatives (i.e., fewer clues were detected than expected) or false positives (i.e., more clues were detected than expected) based upon the number of clues that would be expected to be exhibited in three categories of BAC results: those over 0.1, those from .05 to .099, and those under .05. There were no false negatives or false positives shown among any of the study participants in the high-BAC range in either the slower or faster stimulus speed columns. There were two false negatives shown among participants in the mid-BAC range in the slower stimulus column, and nine false negatives among participants in the mid-BAC range in the faster stimulus column. There was one false positive shown among participants in the low-BAC range in the slower stimulus, and there were two false positives shown among participants in the low-BAC range in the faster stimulus column.

The two participants who showed false positives also happened to be the only two participants in the study whose BAC results were below .02. Specifically relevant to Fellbaum's argument, one participant with a .019 BAC result exhibited two HGN signs (within the expected range) with the slower stimulus, and four HGN signs (higher than the expected range) with the faster stimulus, while another participant with a .016 BAC result exhibited four HGN signs (higher than the expected range) with both the slower and faster stimuli. Fellbaum told the circuit court that these entries from the table represented "an actual example of someone with no clues less than .02.[2] That person showed a clue at .019 and would be less than .019 with no clue." Fellbaum then argued the table would show "[s]ince this person would be innocent, so could the defendant."

The circuit court treated the table as part of an official government document that could be judicially recognized as a learned treatise, and therefore fell within a hearsay exception. *See generally* WIS. STAT. § 908.03(18). However, the court determined that expert testimony would be necessary to interpret the table. Absent such expert testimony, the court concluded that the probative value of the table was low and was outweighed by the risk of prejudice because the jury would be left to speculate what the table meant and how it applied to Fellbaum. The court further determined that the State's chemist was not an expert in the area of HGN testing and was not qualified to explain the chart. Therefore, the court excluded the table from evidence.

[2] It appears this assertion misstated the data in the table. As we interpret it, the table did not show any participant with a BAC level under .02 who did not exhibit any HGN clues.

On appeal, Fellbaum argues that the circuit court erroneously exercised its discretion by excluding the table without foundational expert testimony, and that the exclusion deprived him of his constitutional right to present a defense. We will address each contention in turn.

The admissibility of evidence is subject to multiple layers of analysis. First, evidence is not admissible unless it is relevant—meaning that it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." WIS. STAT. §§ 904.01 and 904.02. Expert testimony may be needed to establish the relevance of proffered evidence "when interpreting the evidence involves special knowledge, skill or experience that is not within an ordinary person's realm of experience or knowledge." ***State v. Doerr***, 229 Wis. 2d 616, 623, 599 N.W.2d 897 (Ct. App. 1999). Next, evidence that has some relevance may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03.

Fellbaum offers several overlapping but poorly articulated explanations as to why he believes Table 10 was relevant. For example, at one point he asserts:

> Fellbaum sought to raise a reasonable doubt he was .02 or below for the reason he passed [the] HGN [test]. To do that he needed an actual example of someone failing [the] HGN [test] at .02 or less. Such a person by definition would be less than .02 if [the] HGN [test] was passed.

Fellbaum then contends that the table presents "an actual example of someone failing [the] HGN [test] at .019% but passing at .016.[3] Because that test subject passed [the] HGN [test] at only less than .02, Fellbaum could have been below .02 when he passed [the] HGN [test]." Boiled down, it appears Fellbaum's relevance arguments rest upon the premise that the table somehow demonstrates "passing [the] HGN [test] can occur only under .02." The fatal flaw in Fellbaum's argument is that he does not point to a single passage in the NHTSA article, much less a discussion of Table 10, that leads to such conclusion.

A textual paragraph describing Table 10 explains that it shows the results of a test in which one officer "examined smooth pursuit movements with a standard two-second pass of the stimulus," while a second officer "moved the stimulus quickly with a one-second pass." The paragraph states the results of the study showed "significantly more signs [of possible intoxication] were reported when the stimulus movement duration was two seconds than when it was twice as fast at one second." A subsequent summary of the results of several tests in the study concluded that "rapid stimulus movement (a one-second pass) significantly decreases an officer's ability to detect the HGN sign. The optimal viewing time for the stimulus movement (center-to-side and side-to-center) was shown to be approximately two seconds."

In other words, the stated significance of the data set forth in Table 10 relates to how rapidly the HGN test should be administered, not to whether or how many HGN clues can be expected to be exhibited at a particular BAC level. Yet the latter was the purpose for which it

[3] Once again, Fellbaum misstates the data in Table 10. The table shows that the participant with the BAC result of .016 exhibited four HGN signs—above the expected range—while the participant with the BAC result of .019 exhibited only two HGN signs—within the expected range. That is the exact opposite of "someone failing [the] HGN [test] at .019 but passing at .016."

was offered by Fellbaum. We fully agree with the circuit court that if Fellbaum wished to use the data collected in a particular study in a learned treatise to support a proposition other than the proposition set forth in the treatise itself, he needed expert testimony to do so. No lay person could be expected to understand the science behind the HGN test, the differing conditions under which it might be administered, or the significance of a table of data showing the number of clues exhibited under various conditions by test subjects. Further, no lay person could correlate the data in the table with Fellbaum's HGN test results and reach any conclusion as to whether he exhibited signs of intoxication at the time he was driving. We conclude that the circuit court properly exercised its discretion in barring admission of Table 10 without expert testimony to explain it.

We turn next to Fellbaum's claim that he was prevented from presenting a defense. A criminal defendant's constitutional right to present a defense may in some cases require the admission of testimony that would otherwise be excluded under applicable evidentiary rules. ***State v. Jackson***, 216 Wis. 2d 646, 663, 575 N.W.2d 475 (1998). In order to warrant a new trial, the exclusion of evidence must have "completely" prohibited the defendant from exposing a witness's bias or motive for testifying falsely, or deprived the defendant of material evidence so favorable to his defense as to "necessarily" prevent him from having a fair trial. ***United States v. Manske***, 186 F.3d 770, 778 (7th Cir. 1999); *see also* ***United States v. Valenzuela-Bernal***, 458 U.S. 858 (1982). Whether an evidentiary decision deprives a defendant of the right to present a defense is a constitutional question that we will review de novo. *See* ***State v. Heft***, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994).

The exclusion of Table 10 from evidence did not prohibit Fellbaum from arguing the chemist's opinion that Fellbaum's BAC level while driving was based upon an assumption as to

when Fellbaum absorbed the alcohol he drank. To the contrary, the chemist acknowledged that it was possible, though not likely, that Fellbaum could have had a BAC level under .02 while driving, yet tested at .064 an hour later, if he had consumed all or most of the alcohol right before driving the car. Moreover, Fellbaum was able to elicit testimony from the deputy who conducted the HGN test that he would expect someone with a BAC of .08 to exhibit HGN clues. That testimony was more probative of Fellbaum's theory than the raw data set forth in Table 10. We conclude that Fellbaum was not denied his constitutional right to present a defense.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals