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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1144**

State of Minnesota,
Respondent,

vs.

Daniel Eugene Meyer,
Appellant.

**Filed June 25, 2018
Affirmed
Kirk, Judge**

Grant County District Court
File No. 26-CR-15-317

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Justin R. Anderson, Grant County Attorney, Heather L. Brandborg, Assistant County Attorney, Elbow Lake, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges his conviction for second-degree driving while impaired (DWI), arguing that his alcohol concentration (AC) result of 0.08 or more within two hours

of driving is not valid or accurate, because there is insufficient evidence in the record to show that the arresting officer correctly operated the Datamaster Transportable breathalyzer (DMT). We affirm.

FACTS

On November 9, 2015, appellant Daniel Eugene Meyer was arrested for DWI by a Grant County deputy sheriff. Appellant was taken to the sheriff's office where he agreed to take a breath test. The deputy, a certified DMT operator, performed the DMT test, which registered an AC of 0.14 for appellant. As a result, appellant was charged with second-degree DWI under Minn. Stat. § 169A.20, subd. 1(5) (2014)—AC of 0.08 or more within two hours of driving.

A jury trial was held, and the sole witness was the sheriff's deputy, who testified that he properly administered the DMT and that the DMT was working properly. The printed DMT result was admitted into evidence and published for the jury without objection. The jury found appellant guilty of second-degree DWI. This appeal follows.

DECISION

Appellant challenges the sufficiency of the evidence for his conviction, claiming that there were problems with the operation of the DMT that impacted his breath test results. Appellant concedes that the state presented evidence of appellant's DMT test result of 0.14 AC within two hours of driving. However, appellant argues that the DMT test result "is only as reliable as its operator," and that the state failed to prove that the deputy operated the DMT properly so as to produce a valid and accurate result.

I. The state made a prima facie showing of the DMT test result's admissibility and presumed reliability.

The test result of a DMT, which is an “approved breath-testing instrument,” is admissible without expert testimony that the result is trustworthy or reliable if the test is performed by a fully trained person. Minn. Stat. § 634.16 (2016); *see* Minn. Stat. § 169A.03, subd. 11 (2016) (defining approved breath-testing instrument); Minn. R. 7502.0425, subps. 2-3 (2015) (authorizing the DMT as approved breath-testing instrument). There is a rebuttable presumption that approved breath-test results are reliable. Minn. Stat. § 634.16. “[T]his presumption [may] be challenged by drivers charged with DWI-related offenses.” *State v. Underdahl*, 767 N.W.2d 677, 685 n.4 (Minn. 2009).

“The proponent of a chemical or scientific test must establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977). To do so, the proponent of the test must show that “the necessary steps have been taken to ensure reliability,” and thereafter, “it is incumbent on the driver to suggest a reason why the [breath] test was untrustworthy.” *State v. Nelson*, 399 N.W.2d 629, 632 (Minn. App. 1987) (citing *Dille*, 258 N.W.2d at 568), *review denied* (Minn. Apr. 17, 1987). If the foundational reliability of a test result is established and it is admitted into evidence, the reliability of, and weight to be afforded to, the test result becomes a question for the jury to decide. *See State v. Ards*, 816 N.W.2d 679, 687 (Minn. App. 2012); 10A *Minnesota Practice*, CRIMJIG 29.10 (2015).

The sheriff's deputy testified that he did not observe any malfunction or interference with the DMT machine, and appellant concedes that the DMT was functioning properly on November 9, 2015. The record also supports that the deputy was certified to operate the DMT as of September 15, 2015, and that he had training and field practice in operating a DMT. The deputy testified that he followed the procedure and protocol consistent with his DMT training in administering appellant's DMT test.

First, the deputy testified that he observed appellant for 15 minutes to ensure that appellant's alcohol concentration was not impacted by any burping, belching, or vomiting. The deputy said that the observation period started at 10:46 p.m. shortly before he began reading appellant the implied-consent advisory at 10:48 p.m.¹ Next, the deputy turned on the DMT machine and entered basic physical information from appellant's driver's license. The deputy then performed a required diagnostic check on the DMT, which included a sample run and air blanks; the diagnostic check was passed at 11:01 p.m.

The deputy testified that "the machine will tell [the operator when] it is ready for the subject's first breath sample." Appellant provided his first good breath sample of 0.146 AC at 11:04 p.m.; the DMT would have indicated if the sample was bad or deficient. After the first sample, the deputy ran an air blank and control test on the DMT before appellant gave a second good breath sample of 0.147 AC at 11:08 p.m. The DMT then generated an AC result of 0.14 for appellant. The deputy explained that, other than the manual input of

¹ In 2017, the law was amended and now refers to the advisory as a breath-test advisory. Minn. Stat. § 169A.51, subd. 2 (2017).

the start time for the observation period, the DMT machine auto populates the dates and times.

On this record, the state made a prima facie showing that the test was performed by a fully trained certified operator, that the deputy followed the required steps to ensure the test's accuracy and validity, and that the DMT test result was a trustworthy measure of appellant's AC. At the district court, appellant did not object or indicate in any other way that foundation was lacking for the admission of the DMT test result. Accordingly, the state met its burden of showing the admissibility and presumed foundational reliability of the DMT test so as to create a question of fact for the jury. The burden then shifted to appellant to show why the DMT test result was not reliable.

II. Appellant failed to rebut the presumption of the DMT test result's reliability.

To rebut the state's prima facie showing of admissibility and presumed reliability, appellant must show a reason why the DMT test result is untrustworthy. *Nelson*, 399 N.W.2d at 632. To do so requires more than “speculation that something might have occurred to invalidate th[e] results.” *Ards*, 816 N.W.2d at 687 (quoting *Hounsell v. Comm’r of Pub. Safety*, 401 N.W.2d 94, 96 (Minn. App. 1987)). Appellant argues that his DMT test result was not valid or accurate because: (1) the state failed to present evidence that the deputy entered appellant's physical information into the DMT correctly; (2) the deputy was relatively inexperienced in using the DMT by himself; and (3) the deputy's testimony and the record show internal inconsistencies with the deputy's written reports

from the incident. Appellant's arguments rely on mere assumption and speculation, and they are not supported by evidence in the record.

To the extent that appellant introduced evidence to support these arguments, it was during cross-examination of the deputy and it only went to the weight of the evidence. As indicated earlier in this opinion, no objection was made to the DMT test result's admissibility. Weighing the evidence and the credibility of witnesses is the exclusive function of the jury. *See State v. Triplett*, 435 N.W.2d 38, 44 (Minn. 1989). Here, the record shows that appellant failed to negate the prima facie showing that the deputy properly operated the DMT, and as such, appellant failed to rebut the presumption of the DMT test result's foundational reliability.

During final jury instructions, the district court instructed the jury to "evaluate the reliability of the testing method and the test results in determining whether the defendant's alcohol concentration was 0.08 or more within two hours of the time of driving." The jury, by returning a verdict of guilty, determined that the DMT test result was reliable. We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *See Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

On this record, there was sufficient evidence for the jury to reasonably infer that the DMT methodology, operation, and test result were accurate, valid, and reliable, and thus, for the jury to rely on the DMT result in reaching its verdict. The record shows that

appellant's DMT test result was 0.14 AC within two hours of driving. Therefore, there was sufficient evidence for the jury to reasonably conclude that the state proved that appellant was guilty of second-degree DWI beyond a reasonable doubt.

Affirmed.