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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1573**

State of Minnesota,
Respondent,

vs.

Ahmed Lafta Abduljabbar,
Appellant.

**Filed July 16, 2018
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-15-35135

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

Steven M. Tallen, Maple Grove Prosecuting Attorney, Tallen & Baertschi, Minneapolis,
Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and
Kirk, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Ahmed Abduljabbar challenges his conviction of driving while impaired,
arguing the admission of a breath-test result was plain error. We affirm.

FACTS

On December 11, 2015, Abduljabbar was pulled over for having a loud muffler. After the officer who pulled over Abduljabbar smelled alcohol and noticed that Abduljabbar's eyes were watery and bloodshot, she arrested Abduljabbar and took him to the Osseo police department for breath testing. That test indicated an alcohol concentration of 0.12.

Abduljabbar was charged with driving while under the influence of alcohol, having a 0.08 or higher alcohol concentration within two hours of driving, and careless driving. A jury trial was held on September 6, 2017. The state called one witness—the police officer who arrested Abduljabbar and performed the breath test. She testified that she was certified to operate the breath-test machine and that she knew how to recognize if the machine was not functioning properly. Although the officer testified that the machine was a “DataMaster transportable gas spectrometer with infrared option,” she did not testify as to the specific model number, nor does that model number appear anywhere in the record. After describing how she went about operating the machine when testing Abduljabbar's breath, the officer testified, without objection, that machine measured a 0.12 alcohol concentration.

The jury found Abduljabbar guilty of having a 0.08 or higher alcohol concentration within two hours of driving and not guilty of the other two charges.

Abduljabbar appeals.

DECISION

Abduljabbar argues the district court erred by admitting the result of the breath test. Abduljabbar did not object to this admission at trial. Generally, when a defendant fails to object to the admission of evidence at trial, the defendant forfeits review of that admission on appeal. *State v. Fraga*, 898 N.W.2d 263, 276 (Minn. 2017). However, “the plain-error rule provides a limited power to correct certain errors that a defendant has forfeited.” *Id.* at 277 (quotation omitted).

The plain-error rule requires a defendant to establish (1) an error, (2) that is plain in that it violates or contradicts case law or a rule, and (3) that the error affects the defendant’s substantial rights. If all three requirements are met, we then determine whether relief is required to ensure fairness and the integrity of the judicial proceedings.

Id. (citation and quotation omitted). This fourth prong is satisfied “only ‘in those circumstances in which a miscarriage of justice would otherwise result.’” *State v. Huber*, 877 N.W.2d 519, 528 (Minn. 2016) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14, 102 S. Ct. 1584, 1592 n.14 (1982)).

Under Minn. R. Evid. 702, an expert opinion “must have foundational reliability” to be admissible. However, Minnesota statutes relieve the state of this burden, provided certain conditions are met, in the context of breath-test results:

In any civil or criminal hearing or trial, the results of a breath test, when performed by a person who has been fully trained in the use of an infrared or other approved breath-testing instrument, as defined in section 169A.03, subdivision 11, pursuant to training given or approved by the commissioner of public safety or the commissioner’s acting agent, are admissible in evidence without antecedent expert testimony that an infrared or other approved breath-testing instrument

provides a trustworthy and reliable measure of the alcohol in the breath.

Minn. Stat. § 634.16 (2016). The Commissioner of Public Safety has approved three such instruments: “[t]he Intoxilyzer 5000EN,” “[t]he DataMaster DMT-G with Fuel Cell Option,” and “[t]he DataMaster DMT-G with Rev A Fuel Cell Option.” Minn. R. 7502.0425, subps. 1-3 (2017).

Abduljabbar argues that the district court erred in admitting the results of the breath test without the state first (1) laying foundation that the machine used was one of the models approved by the Commissioner of Public Safety or (2) if it was not one of those models, laying foundation that the machine used provides a trustworthy and reliable measure of the alcohol in breath. He asserts the error was plain because, under Minn. R. Evid. 702 and Minn. Stat. § 634.16, an expert opinion based on a breath test “*must* have foundational reliability” unless an “approved breath-testing instrument” is used. And Abduljabbar argues that the plain error affected his substantial rights because the test result was the only evidence establishing that Abduljabbar had an alcohol concentration of more than 0.08.

We need not decide whether admitting the test result without foundation meets the first three prongs of the plain-error test because the error, if any, does not satisfy the fourth prong. Under the fourth prong, we may exercise our discretion to correct “only particularly egregious errors” when a “miscarriage of justice” would otherwise result. *Huber*, 877 N.W.2d at 528 (quotation omitted). Abduljabbar argues such a miscarriage would occur because “[t]he erroneous admission of the breath test result tainted the very foundation of

the state's theory of guilt. . . . Without the breath-test evidence, he would have been acquitted of all the charges."

We see no particularly egregious error causing a miscarriage of justice here. Rather, this case is analogous to *State v. Manthey*, 711 N.W.2d 498 (Minn. 2006). In that case, the Minnesota Supreme Court reviewed the unobjected-to admission of several hearsay statements, which, based on the foundation laid, did not comport with any hearsay exception under Minn. R. Evid. 803. *Id.* at 503-04. In declining to reverse for plain error, the court noted that, due to the "complexity and subtlety of the operation of the hearsay rule and its exceptions," it was "particularly important that a full discussion of admissibility be conducted at trial." *Id.* at 504. Because the defendant did not object, "the state was not given the opportunity to establish that some or all of the statements were admissible under one of the numerous exceptions to the hearsay rule." *Id.*

Similar circumstances are present here. Although there is no on-the-record foundation that makes Abduljabbar's breath-test result admissible under Minn. R. Evid. 702 (or that exempts it from the rule's foundation requirement under Minn. Stat. § 634.16), as in *Manthey*, this foundation is lacking because Abduljabbar did not object and force the state to lay it. Had Abduljabbar done so, the state could have asked the arresting officer what model of breath-test machine was used or else called an expert to testify as to the reliability of the device. Indeed, Abduljabbar is unable to cite any case where a Minnesota appellate court has, on plain-error review, reversed a conviction on the basis that otherwise admissible testimony was improperly admitted because the requisite foundation was not presented to the district court.

A defendant may have strategic reasons for not making foundational objections to expert testimony—especially expert testimony that is routinely admitted in DWI cases. For example, a defendant may wish to avoid bolstering the credibility of the evidence by insisting on testimony establishing the reliability of the testing device, or a defendant may wish to keep the testimony as brief as possible when the defendant believes admission of the evidence is inevitable anyway. A district court does not commit a particularly egregious error, much less one rendering a trial unfair, by not insisting on foundational testimony that the defendant himself is apparently willing to forgo.

Because a new trial is not necessary to ensure the fairness or integrity of judicial proceedings regardless of whether admission of the breath-test result was plain error, we affirm Abduljabbar's conviction.

Affirmed.