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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-1592**

State of Minnesota,  
Respondent,

vs.

Brady Edward Speer,  
Appellant.

**Filed June 17, 2019  
Affirmed  
Connolly, Judge**

Olmsted County District Court  
File No. 55-CR-17-4715

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Jason T. Loos, Rochester City Attorney, Christopher K. White, Assistant City Attorney,  
Rochester, Minnesota (for respondent)

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(for appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Stauber,  
Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

## **UNPUBLISHED OPINION**

**CONNOLLY**, Judge

Appellant challenges his conviction for fourth-degree driving while impaired (DWI) and possession of an open container, arguing that (1) the district court abused its discretion in admitting breath-test results that lacked foundational reliability; and (2) he is entitled to a new trial based on prosecutorial misconduct during closing argument. Because the district court did not abuse its discretion in admitting the breath-test results and the prosecutorial misconduct was harmless beyond a reasonable doubt, we affirm.

### **FACTS**

In July 2017, Rochester Police Sergeant Bert Otto stopped a vehicle driven by appellant Brady Edward Speer after observing it cross the fog line several times. When Sergeant Otto spoke with Speer, he could “smell a slight odor of alcohol coming from him and the interior of the vehicle.” When questioned by Sergeant Otto, Speer admitted drinking “two Budweiser beers.” Rochester Police Sergeant Terry Pretzloff arrived on the scene and administered three field sobriety tests. After witnessing signs of impairment during testing, Sergeant Pretzloff arrested Speer for DWI. At Speer’s request, Sergeant Otto parked Speer’s vehicle off of the roadway. While moving the vehicle, Sergeant Otto discovered two open cans of Budweiser beer under the driver’s seat.

Sergeant Pretzloff took Speer to the adult detention center to conduct the DataMaster (DMT) breath test. Sergeant Pretzloff situated Speer in the interview room then entered an adjacent room—separated by a glass partition. Speer agreed to take the DMT breath test. The first sample indicated an alcohol concentration of 0.086. The second

sample indicated an alcohol concentration of 0.090. The final result of the test indicated an alcohol concentration of 0.08. Sergeant Pretzloff did not observe anything that concerned him about the integrity of the test.

The state charged Speer with two counts of fourth-degree DWI under Minn. Stat. § 169A.20, subds. 1(1), (5) (2016), and possession of an open container under Minn. Stat. § 169A.35, subd. 3 (2016). At the jury trial, Speer objected to Sergeant Pretzloff's testimony and the breath-test results based on foundation. When questioned further by the district court, Speer explained that he objected to the observation period. The district court admitted the breath-test results, but agreed to reconsider admissibility after cross-examination of Sergeant Pretzloff. During cross-examination of Sergeant Pretzloff, Speer renewed his objection. The district court denied the objection and allowed the breath-test results to remain in evidence.

During closing argument, the prosecutor suggested that the DMT training manual, which was not admitted into evidence, did not require "constant visual on the Defendant for the full 15-minute period of time." Speer objected arguing that the statement was improper. The district court sustained the objection and allowed the prosecutor to rephrase the argument. Speer did not object to the rephrased argument. During deliberation, the jury asked whether it could view the procedural guidelines for observation in the DMT training manual. The district court responded that the jury could not because the manual was not admitted into evidence.

The jury found Speer guilty of one count of fourth-degree DWI with an alcohol concentration of 0.08 or more (Minn. Stat. § 169A.20, subd. 1(5)) and possession of an

open container (Minn. Stat. § 169A.35, subd. 3), but not guilty of one count of fourth-degree DWI for driving under the influence of alcohol (Minn. Stat. § 169A.20, subd. 1(1)). The district court ordered a one-year stay of imposition. Speer appeals.

## DECISION

### I.

Speer first argues that the district court abused its discretion by admitting breath-test results that lacked foundational reliability. “Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

A DMT breath test consists of “one adequate breath-sample analysis, one control analysis, and a second, adequate breath-sample analysis.” Minn. Stat. § 169A.51, subd. 5(a) (2018). A sample is considered “adequate if the instrument analyzes the sample and does not indicate the sample is deficient.” *Id.*, subd. 5(b) (2018). The results of breath testing performed by a fully trained person, “are admissible in evidence without antecedent expert testimony that [such] instrument provides a trustworthy and reliable measure of the alcohol in the breath.” Minn. Stat. § 634.16 (2018); see *State v. Birk*, 687 N.W.2d 634, 637 (Minn. App. 2004) (“The results of [a breath] test are admissible as a trustworthy and reliable measure of breath alcohol if a properly certified operator performs the test.”). “Once a prima facie showing of trustworthy administration has occurred, it is incumbent

on the opponent to suggest a reason why the test was untrustworthy.” *Bond v. Comm’r of Pub. Safety*, 570 N.W.2d 804, 806 (Minn. App. 1997) (quotation omitted).

The DMT breath test here was adequate because there was one adequate breath sample, a control analysis, a second adequate breath sample, and the instrument did not indicate a deficiency. *See* Minn. Stat. § 169A.51, subd. 5. The state presented prima facie foundation for admitting the breath-test results because Sergeant Pretzloff testified that he is a certified operator of the DMT instrument. *See Bond*, 570 N.W.2d at 807 (noting that the commissioner established prima facie foundation for admitting the test results by demonstrating that a properly trained person performed the test).

Speer challenged the validity of the breath-test results based on the observation period. The driver may challenge the test’s reliability by establishing that some irregularity occurred during the observation period, which would render the test result invalid. *Kramer v. Comm’r of Pub. Safety*, 706 N.W.2d 231, 237 (Minn. App. 2005). “The purpose of the observation period is to preclude the possibility that the testimony may be affected by mouth alcohol, resulting from burping or vomiting.” *State v. Nelson*, 399 N.W.2d 629, 631 (Minn. App. 1987), *review denied* (Minn. Apr. 17, 1987). A “slight interruption of the observation period or a less than perfect observation does not invalidate the test unless the driver has ingested or regurgitated a substance that affects the results, and the burden is on the driver to present such evidence.” *Kramer*, 706 N.W.2d at 237. “At most, the contention that the observation period was ‘faulty’ goes to the weight and not the admissibility of the test results.” *Nelson*, 399 N.W.2d at 632.

Sergeant Pretzloff testified that the observation period was a necessary scientific safeguard that must be performed properly, and if not performed properly, the breath-test results are not valid. Sergeant Pretzloff testified that during the observation period, he observes whether the person might be putting something in their mouth, burping, belching, or vomiting. He explained that if the suspect belches or burps, the alcohol vapors can go into his mouth and artificially raise the reading. He testified that, after the “mouth check,” the suspect is positioned in an interview cell. He then described the layout of the DMT testing room:

So if you walk into the room, the machine is directly off to the left against the wall . . . . And then off to the right side would be where officers would go to be on the other side of the glass partition from the subject that we’d bring into the jail.

He explained, “I am on the other side of a glass wall from them so I’m observing them the entire time until I walk around to get them out of that room and walk right next door to do the DMT.”

When asked by Speer’s attorney whether he could observe a suspect talking on the phone if he was at the testing instrument, Sergeant Pretzloff responded, “No, because there’s a wall between there.” Sergeant Pretzloff then testified that Speer was on the phone at the time he started operating the breath-test instrument and thus was not in his “area of observation” at that time. Sergeant Pretzloff agreed that it was an improper observation period. It is not clear exactly how long Speer was outside of Sergeant Pretzloff’s area of observation, but Sergeant Pretzloff noted it only takes “two to three seconds” to walk around the glass partition into the interview room.

Moreover, Sergeant Pretzloff testified that he did not observe anything going into Speer's mouth or any indication of vomiting or belching by Speer. He also testified that he did not hear Speer burp. He explained that the DMT instrument has safeguards that indicate if mouth alcohol is an issue, such as indicating an invalid sample, and Speer's breath test did not indicate that mouth alcohol was an issue. He testified that nothing caused him concern about the integrity of the test.

Speer suggests the breath-test results are unreliable because Speer may have burped during the time that Sergeant Pretzloff was not observing him. "A driver will not be successful in challenging [breath-]test results if his arguments rest upon mere speculation that something might have occurred to invalidate those results." *Hounsell v. Comm'r of Pub. Safety*, 401 N.W.2d 94, 96 (Minn. App. 1987). "To impeach the credibility of breath-test results, a driver must prove that he burped during the observation period and must also demonstrate that the burping actually affected the test results." *Junker v. Comm'r of Pub. Safety*, 925 N.W.2d 661, 663 (Minn. App. 2019). Speer offered no evidence that he actually burped during the observation period. Furthermore, even if Speer had offered evidence that he burped during the observation period, Sergeant Pretzloff explicitly testified that the DMT instrument did not indicate that mouth alcohol was an issue during Speer's test administration. Speer offered no evidence to counter this. Therefore, Speer did not "sufficiently demonstrate that the burping, belching, or vomiting actually affected the test results." *Id.* at 661.

Speer cites *McGregor v. Comm'r of Pub. Safety*, as one case in which the breath-test results were deemed inadmissible based on improper observation. 386 N.W.2d 339

(Minn. App. 1986). But the observation in *McGregor* was improper because “the officer had no training, did not know why the driver was to be observed, or what to observe.” *Id.* at 340. This court noted, “The fact [that] the officer worked on her police reports during the observation period is not fatal. We have previously held similar lapses in observation do not invalidate the test, but instead provide the driver with an opportunity to suggest reasons as to why the lapse makes the test unreliable.” *Id.* Distinguishable from *McGregor*, Sergeant Pretzloff was trained in administering DMT breath tests and explained why the observation period was important and what he observes. Thus *McGregor* does not require exclusion of the breath-test results here.

Speer argues that Sergeant Pretzloff’s testimony alone rendered admission of the test results an abuse of discretion because he “testified that a properly conducted observation period is essential to conducting a proper breath test, and admitted that a proper observation period was not conducted with Speer.” But case law establishes that a faulty observation period goes to the weight of the test results, rather than admissibility. *See Nelson*, 399 N.W.2d at 632 (noting that the faulty observation period goes to the weight of the test results rather than admissibility); *Kramer*, 706 N.W.2d at 236 (noting that evidence challenging the trustworthiness of the test results affects the weight of the results, not admissibility). As a faulty observation period does not require exclusion of the breath-test results, we conclude that the district court did not abuse its discretion in admitting them.

## II.

Speer next argues that he is entitled to a new trial because the prosecutor committed misconduct during closing argument by arguing facts not in evidence, which

misrepresented the burden of proof. “A prosecutor should not refer to facts not in evidence.” *State v. Crane*, 766 N.W.2d 68, 74 (Minn. App. 2009) (quotation omitted), review denied (Minn. Aug. 26, 2009). “Arguments that shift the burden of proof to the defendant to prove his innocence are improper.” *State v. Carridine*, 812 N.W.2d 130, 148 (Minn. 2012). The state concedes that the prosecutor’s reference to facts not in evidence was misconduct, but argues it was harmless beyond a reasonable doubt.

During closing argument, the prosecutor argued,

You’ve heard some significant questioning and suggesting that there was something wrong with the observation period in this case. And I would ask that you keep your eye on the ball on this point.

There were suggestions or innuendo that an observation requires very specific certain conduct by an officer. And really, I would suggest, maybe you heard it differently, but it seemed to be a suggestion that the law or the DMT training manual required constant visual on the Defendant for the full 15-minute period of time. *Do you think the DMT manual says that? Do you think if it did the officers would have been asked that exact question, and that part of the DMT manual would have been pointed out to the DMT officers?*

(Emphasis added.) Speer objected, arguing that the statement was improper for closing argument because the prosecutor alluded to facts not in evidence and implied that Speer had been deficient in questioning the witnesses. The district court agreed that the prosecutor was “using the absence of a question to suggest something that’s not in the DMT manual.” The prosecutor asked if he could “address the implication that the officer did something wrong by not having his eyes on [Speer] constantly?” The district court said the prosecutor could if the statement was rephrased to avoid suggesting what the DMT manual required. The prosecutor then stated: “[T]here has been no evidence presented to

you that there is a requirement that the officer maintain continuous visual observation of a subject for 15 minutes. And I would suggest to you that the questioning by Counsel has implied that there is that requirement.” Speer did not object again during closing argument.

“For objected-to prosecutorial misconduct, this court applies a two-tiered harmless-error test, the application of which varies based on the severity of the misconduct.”<sup>1</sup> *State v. Banks*, 875 N.W.2d 338, 348 (Minn. App. 2016) (quotation omitted), *review denied* (Minn. Sept. 28, 2016). “Serious misconduct is ‘harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error,’ while less serious misconduct is harmless unless ‘the misconduct likely played a substantial part in influencing the jury to convict.’” *Id.* (quoting *State v. Powers*, 654 N.W.2d 667, 668 (Minn. 2003)).

Even under the higher standard for serious misconduct, the prosecutorial misconduct here was harmless beyond a reasonable doubt. In *State v. Caulfield*, the supreme court noted several factors relevant to this analysis. 722 N.W.2d 304, 314 (Minn. 2006). Appellate courts look at how the evidence was presented, whether the state emphasized it, whether the evidence was highly persuasive or circumstantial, whether the defendant countered it, and whether there was other strong evidence of guilt. *State v. Wren*, 738 N.W.2d 378, 394 (Minn. 2007) (applying the *Caulfield* factors in the context of prosecutorial misconduct). When reviewing claims of prosecutorial misconduct, we

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<sup>1</sup> The supreme court has questioned whether this two-tiered approach is still good law, while declining to decide the question. See *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (noting it has “not yet decided whether this two-tiered approach” remains viable); *State v. Ramey*, 721 N.W.2d 294, 300 n.4 (Minn. 2006) (“We leave for another day the question of whether the . . . two-tiered approach should continue to apply to cases involving objected-to prosecutorial misconduct.”).

consider “the closing argument as a whole, rather than just selective phrases or remarks.” *Banks*, 875 N.W.2d at 348.

Our review of the *Caulfield* factors leads us to conclude that the verdict rendered was surely unattributable to the error. The improper reference to the manual here was brief, spanning only 11 lines of the 12-page closing argument of the 486-page trial transcript. *See, e.g., State v. Matthews*, 779 N.W.2d 543, 552 (Minn. 2010) (holding that the alleged misconduct did not permeate the entire argument because it was “limited to a few lines in a 48-page closing argument”); *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006) (holding that the misconduct was harmless because it was “confined to roughly two pages of transcript of a record comprising over 1,200 pages” and there was other strong evidence of guilt). Following the objection, the prosecutor rephrased the argument, and Speer did not object again. The jury also heard considerable testimony about the observation period requirements and Sergeant Pretzloff agreed that the observation was improper. Speer countered the evidence during closing argument by specifically addressing the prosecutor’s statements and emphasizing that the burden of proof was on the state. And the jury here was properly instructed that the statements of attorneys, including closing argument, were not evidence. *See State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (ruling that attorney argument based on facts not in evidence did not prejudice the defendant because the jury was instructed that attorneys’ arguments were not evidence); *see also Matthews*, 779 N.W.2d at 550 (reiterating presumption “that juries follow instructions given by the court”).

Finally, there was other strong evidence of Speer's guilt. Sergeant Otto observed Speer's vehicle cross the fog line several times. Sergeant Otto smelled a slight odor of alcohol coming from Speer. Speer admitted he had "two Budweiser beers" to drink. There were two open cans of Budweiser beer in Speer's vehicle. Speer exhibited signs of impairment during the three field sobriety tests. The breath-test instrument indicated an alcohol concentration of 0.08 and did not indicate that mouth alcohol was an issue.

Speer argues that "it is impossible to say that the jury's verdict was unattributable to this error" based on its request to "see the procedural guidelines for observation in the DMT manual." But the manual's observation guidelines were referenced several times during trial—not just during closing arguments. So it is not fair to assume that the jury wanted to see the DMT manual *only* because of the prosecutor's statements. And when asked by the jury, the district court responded,

The answer to your question, folks, is no, the manual is not in evidence and therefore is not available for your reference. You have all the evidence that you will be presented for your consideration in deciding this case. You should decide the case based on your recollection of the witnesses' testimony.

This instruction again limited the effect of the prosecutor's statement because it reminded the jury to consider only the record evidence, which we presume they did. *See Matthews*, 779 N.W.2d at 550 ("We presume that juries follow instructions given by the court."). Thus Speer's argument is unpersuasive.

Given the jury instructions, brevity of the statement, defense counsel's opportunity to counter the evidence, and other strong evidence of guilt, the verdict rendered was surely

unattributable to the error. Accordingly, we conclude that the prosecutorial misconduct was harmless beyond a reasonable doubt.

**Affirmed.**