

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0264**

State of Minnesota,
Respondent,

vs.

Reginald Fanpatrick Wilson,
Appellant.

**Filed January 19, 2021
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-19-12516

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Reginald Fanpatrick Wilson challenges his convictions for two counts of second-degree driving while intoxicated (DWI), arguing that the state failed to prove that the DataMaster (DMT) used in his case had undergone required maintenance, leaving

reasonable doubt that the machine accurately measured his breath's alcohol concentration. Alternatively, Wilson argues—and the state agrees—that, under Minn. Stat. § 609.04, subd. 1 (2018), the district court erred by entering convictions and sentences for both DWI counts. We conclude that the evidence is sufficient to prove the accuracy of the DMT alcohol-concentration test result beyond a reasonable doubt and thus is sufficient to support Wilson's convictions. But we agree with the parties that Wilson should be convicted and sentenced for only one count of DWI. We therefore affirm in part, reverse in part, and remand for the district court to correct the warrant of commitment to vacate one of his DWI convictions.

FACTS

The following facts were established at Wilson's jury trial. Around 11:30 a.m., on May 29, 2019, Golden Valley police responded to a report of a car driving erratically. An officer located the reported car and observed it “nearly striking other vehicles on the roadway” and having “extreme difficulties maintaining its lane.” After conducting a traffic stop of the car, the officer approached the driver's-side window and “immediately detected an overwhelming odor of an alcoholic beverage coming from within the vehicle.” Wilson was the car's only occupant. The officer observed that Wilson's eyes were bloodshot and watery and that his speech was slurred. He asked Wilson to get out of the car so a second officer could administer field sobriety tests. Wilson then failed three field sobriety tests: the horizontal gaze nystagmus test, the one-legged-stand test, and the walk-and-turn test. Wilson was arrested, searched, and taken to the police station.

At the police station, another officer (the testing officer) used a DMT to measure the alcohol content in Wilson's breath sample. The testing officer was a fully trained DMT operator: he had been certified to administer DMTs since 2009, and his most recent recertification training occurred six months before the offense date.

Before administering the DMT test, the testing officer observed Wilson for 15 minutes to ensure that Wilson's alcohol concentration was not affected by any burping or vomiting. Next, the testing officer performed a required diagnostic check on the DMT, which included measuring a known sample and then using an air blank to clear the known sample from the machine. The diagnostic check was passed at 12:23 p.m. Wilson provided his first adequate breath sample, producing a result of 0.212 alcohol concentration, at 12:25 p.m. After the first sample, the officer ran an air blank and a control test on the DMT before Wilson gave a second good breath sample. Wilson's second sample again measured 0.212 alcohol concentration, at 12:30 p.m. The DMT then generated an average alcohol-concentration result of 0.21.

The testing officer testified that, during administration of the diagnostic checks and the testing of Wilson's breath, the DMT's control air sample was not expired and the DMT did not display any error messages. He explained that, if the machine was malfunctioning or Wilson had failed to provide an adequate breath sample, the DMT would have displayed an error message and that, if it had displayed such a message, he would have been unable to perform any DMT test. Without an error message, the testing officer had "no reason to suspect [the DMT test result in Wilson's case] was not [valid]."

Respondent State of Minnesota charged Wilson with two counts of DWI: (1) driving while under the influence of alcohol, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2018); and (2) having an alcohol concentration of 0.08 or more as measured within two hours of driving, in violation of Minn. Stat. § 169A.20, subd. 1(5) (2018). Both counts were enhanced to gross misdemeanors based on the presence of two aggravating factors. *See* Minn. Stat. § 169A.25, subd. 1(a) (2018). The two aggravating factors alleged were a qualified prior impaired-driving incident within the previous ten years and driving with an alcohol concentration of 0.16 or more. *See* Minn. Stat. § 169A.03, subd. 3 (2018) (defining “Aggravating factor”).

At trial, Wilson stipulated to the prior impaired-driving incident, so the state only needed to prove the second aggravated factor of 0.16 alcohol concentration or more. To do so, the state presented a DMT printout and officer testimony that together reported the results of two measurements of Wilson’s breath as having an average alcohol concentration of 0.21. Wilson did not challenge the admissibility of the DMT test result but did challenge its reliability.

The jury found Wilson guilty of both counts of DWI. The district court entered judgment on both DWI counts and sentenced Wilson to a stayed 365-day jail term and four years of probation.

Wilson appeals.

DECISION

I. The evidence is sufficient to prove that Wilson had an alcohol concentration of 0.16 or higher.

Wilson argues that the state failed to prove his guilt beyond a reasonable doubt because it submitted insufficient evidence to prove that the DMT result critical to his convictions was valid and accurate. Specifically, Wilson contends that the state failed to prove the validity and accuracy of the test results because it did not present evidence that the DMT had been regularly maintained.

The state proved Wilson's alcohol content through direct evidence. In considering the sufficiency of direct evidence to support a conviction, we analyze the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that the jury "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that" the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

Wilson challenges the sufficiency of the evidence to prove the aggravating factor of an alcohol concentration of 0.16 or more within two hours of driving. *See* Minn. Stat. § 169A.03, subd. 3. The state's evidence to prove the aggravating-factor element was the DMT test result of a 0.21 alcohol concentration.

By statute, the result of a DMT breath test—if administered by a fully trained person—is admissible without expert testimony to establish that the instrument provides a trustworthy and reliable measure of alcohol in the breath. Minn. Stat. § 634.16 (2018) (providing for admissibility of tests from “approved breath-testing instrument”); Minn. Stat. § 169A.03, subd. 11 (2018) (defining “approved breath-testing instrument”); Minn. R. 7502.0425, subps. 2-3 (2017) (authorizing the DMT as approved breath-testing instrument). Thus, when the test is administered by a properly trained person, the statute establishes a presumption of reliability of the testing instrument, although a driver may challenge that presumption. *State v. Underdahl*, 767 N.W.2d 677, 685 n.4 (Minn. 2009). But, even if the foundational reliability of the instrument is established and the test result is admitted into evidence, the reliability of the test remains an issue for the jury in determining the weight to be given to the evidence. *See State v. Ards*, 816 N.W.2d 679, 688 (Minn. App. 2012) (citing 10A *Minnesota Practice*, CRIMJIG 29.10).

Wilson did not object to admission of the test result at trial, nor does he challenge its admissibility on appeal. Rather, he argues that, although the test result was admissible, the evidence is nevertheless insufficient to prove beyond a reasonable doubt that the test result was accurate. The evidence is insufficient to prove accuracy, he contends, because the state established that a DMT requires regular maintenance but failed to present any evidence that the DMT in this case had undergone its required maintenance.

“Making credibility determinations and weighing evidence are tasks reserved to the jury.” *Ards*, 816 N.W.2d at 687. Here, the jury heard from the testing officer that he was certified to operate the DMT as of 2009 and was most recently recertified as of December

2018, six months before the offense date. The testing officer testified that he had training and field practice in operating a DMT and that he followed the procedure and protocol consistent with his DMT training in administering Wilson's DMT test. The testing officer explained that a DMT requires maintenance if it malfunctions or the air control sample has expired. He stated that he did not observe any malfunction or interference with the DMT machine during Wilson's test and that the air sample in the machine would not expire until 2021. He also testified that, if the DMT errs in any way, the administering officer is unable to conduct the test with that DMT and must use another DMT. The testing officer testified that the DMT used here did not malfunction or err in any way and that it produced the same alcohol-concentration measurement twice. On this record, the jury had sufficient evidence to find that, based on the testing officer's knowledge of the DMT, his administration of the test to Wilson, and the actual operation of the DMT in this case, the accuracy of the test result was proved beyond a reasonable doubt.

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*, 684 N.W.2d at 476-77. On this record, there is sufficient evidence for a jury to reasonably find that Wilson's DMT test result was 0.21 alcohol concentration within two hours of driving. There is therefore sufficient evidence for a jury to reasonably find that the state proved that Wilson was guilty of second-degree DWI beyond a reasonable doubt.

II. The district court committed plain error by convicting Wilson of both counts of second-degree DWI.

Wilson and the state agree that the district court erred by entering convictions and sentences for both counts of DWI. We, too, agree.

Under Minn. Stat. § 609.04, subd. 1, a person “may be convicted of either the crime charged or an included offense, but not both.” The supreme court has interpreted section 609.04 to bar multiple convictions under different sections of the same criminal statute for acts committed during a single behavioral incident. *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). In *State v. Clark*, we applied that rule to bar multiple convictions for driving under the influence of alcohol and driving with an alcohol concentration of 0.10 when both offenses arose out of the same behavioral incident. 486 N.W.2d 166, 170 (Minn. App. 1992). We then vacated one conviction. *Id.* at 171.

Wilson, like Clark, was convicted of driving under the influence of alcohol and driving with an alcohol concentration over the legal limit, in violation of different sections of the same statute, for conduct arising out of a single behavioral incident. *See* Minn. Stat. § 169A.20, subd. 1(1), (5). Accordingly, one of Wilson’s convictions must be vacated.

Because sufficient evidence supports Wilson’s conviction for second-degree DWI, we affirm in part. But, because Wilson should not be convicted of both counts of second-degree DWI, we reverse in part and remand for the district court to determine which of Wilson’s convictions to vacate and to correct the warrant of commitment accordingly, leaving the jury’s finding of guilt for both offenses intact.

Affirmed in part, reversed in part, and remanded.