

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gustavo Salgado,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

October 2, 2023

Court of Appeals Case No.
22A-CR-2738

Appeal from the Elkhart Superior
Court

The Honorable David C.
Bonfiglio, Judge

Trial Court Cause No.
20D06-1911-CM-1974

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Gustavo Salgado appeals his conviction for Class C misdemeanor operating a vehicle with an alcohol concentration equivalent (“ACE”) of at least 0.08 grams of alcohol but less than 0.15 grams of alcohol per 210 liters of breath. Salgado raises the following three issues for our review:

1. Whether the trial court abused its discretion when it permitted the State to present the Department of Toxicology’s breath-test-program supervisor as an expert on the issue of a retrograde extrapolation from a breath-test result.

2. Whether the trial court erred when it denied Salgado’s request to present surrebuttal evidence to challenge the State’s expert’s retrograde-extrapolation testimony.

3. Whether the State presented sufficient evidence to support Salgado’s Class C misdemeanor conviction.

[2] We affirm.

Facts and Procedural History

[3] Around 2:40 a.m. on November 3, 2019, Elkhart County Sheriff’s Department Officer Justin Scott observed a blue Toyota RAV4 swerving in its lane on westbound County Road 20. The vehicle then made a quick left turn onto County Road 105 without properly signaling. On that road, the vehicle crossed the center line at least three times.

[4] Officer Scott initiated a traffic stop and observed Salgado in the driver’s seat of the vehicle. Salgado’s wife, Isabel, was in the front passenger seat. Officer Scott observed that Salgado’s eyes were glassy and bloodshot and that he moved and

spoke slowly. Officer Scott also smelled the odor of alcohol emanating from the vehicle. Officer Scott asked Salgado where he was coming from, and Salgado identified a nearby bar.

[5] Officer Scott radioed for other officers to assist at the scene, and Officer Richard Jasinski arrived shortly thereafter. Officer Jasinski confirmed Officer Scott's observations of Salgado's appearance and the odor of alcohol around the vehicle. Officer Jasinski then asked Salgado to participate in three field sobriety tests. The result of each of those tests indicated to Officer Jasinski that Salgado was impaired. Officer Jasinski then transported Salgado to the Elkhart County Correctional Facility for a certified chemical breath test. There, Salgado stated that he had had one and one-half bottles of Modelo beer around 11:30 or 11:45 p.m.

[6] Around 3:40 a.m., Officer James Garris administered the certified chemical breath test. Prior to the test, Salgado asked Officer Garris if Salgado "could have a piece of gum." Tr. Vol. 2, p. 203.¹ Officer Garris said no and asked Salgado if Salgado had gum in his mouth. Salgado responded that he did not, but Officer Garris did not inspect Salgado's mouth to be sure. *Id.* at 175, 185, 203. Salgado's ensuing first breath sample returned an insufficient result, and Officer Garris was required to discard the mouthpiece used on that sample, wait three minutes for the instrument to clear itself, and try again. Officer Garris

¹ Our citations are to the .pdf page numbers of the record materials.

then proceeded through a department checklist for using the instrument, administered a second breath test, and received a result that showed Salgado to have an ACE of 0.091 grams of alcohol per 210 liters of breath.

[7] The State charged Salgado with Class A misdemeanor operating a vehicle while intoxicated and Class C misdemeanor operating a vehicle with an ACE of at least 0.08 grams of alcohol but less than 0.15 grams of alcohol per 210 liters of breath. At Salgado's ensuing jury trial, the State presented the testimony of Officers Scott, Jasinski, and Garris. The State also presented the testimony of Dr. Dana Bors.

[8] Dr. Bors has a Ph.D. in analytical chemistry from Purdue University and is the breath-test program supervisor at the Indiana State Department of Toxicology, which makes her "responsible for everything breath[-]test related in Indiana," including "the maintenance and certification of the State's breath[-]test instruments." *Id.* at 210. Dr. Bors likewise oversees "the training and certification of the State's breath[-]test operators" and related staff. *Id.* During the State's case-in-chief, she testified to the reliability of the breath-test instrument at the Elkhart correctional facility and its ensuing result from Salgado's test. And, because the State's certified breath-test result was within three hours of the officers' assessment of probable cause against Salgado, as a matter of law the State was entitled to a rebuttable presumption that Salgado had an ACE of at least 0.08 grams of alcohol but less than 0.15 grams of alcohol per 210 liters of breath "at the time [Salgado] operated the vehicle" approximately one hour before the test. [Ind. Code § 9-30-6-15\(b\) \(2019\)](#).

- [9] After the State rested its case-in-chief, Salgado called Isabel as his first witness. She testified – contrary to Salgado’s statements to officers at the correctional facility – that Salgado had had “four and [one-]half beers” at the bar on the night in question. *Id.* at 234. That included Salgado drinking the last half of her bottle of Modelo “right before [they] left” the bar at 2:30 a.m. *Id.*
- [10] Salgado then called Dr. Harry Plotnick as a witness. Dr. Plotnick has a Ph.D. in toxicology from the University of Cincinnati and is a forensic toxicologist. The point of Dr. Plotnick’s testimony was to rebut the statutory presumption that the breath-test instrument’s result at 3:40 a.m. demonstrated that Salgado had an ACE of at least 0.08 grams of alcohol but less than 0.15 grams of alcohol per 210 liters of breath at the time Salgado had operated his vehicle one hour before that test.
- [11] To get to that conclusion, Dr. Plotnick engaged in a retrograde extrapolation from the 3:40 a.m. test result, which result Dr. Plotnick took as accurate. Specifically, Dr. Plotnick’s retrograde extrapolation used a mathematical tool called the Widmark formula, the 3:40 a.m. breath-test result, and Isabel’s testimony that Salgado had had four and one-half bottles of beer that evening, with Salgado’s last drink being one-half of a bottle of a 4.4% alcohol-by-volume beer at 2:30 a.m. Dr. Plotnick also used a body weight for Salgado of 170 pounds along with a male-specific constant.
- [12] In explaining his use of those numbers, Dr. Plotnick assumed that Salgado’s body had fully absorbed the four initial beers by the time Salgado had left the

bar. Dr. Plotnick then detailed the importance of the timing of Salgado's last drink:

the latest beer would be the one that was primarily being absorbed at the time. . . . [The traffic stop was twelve] minutes after he consumed that six ounces, which is a very short period of time [T]hat alcohol would not have been absorbed in the period of time between [the] time he stopped drinking and the time that he was stopped [twelve] minutes later. So . . . that was the most important part of this [and] is what was being added to the [ACE at the time of the breath test].

Tr. Vol. 3, p. 28. In other words, Dr. Plotnick testified that Salgado's last purported drink would not have been relevant to Salgado's operation of the vehicle but would have been relevant to the breath-test results one hour later. As Salgado circled back to emphasize later in his questioning of Dr. Plotnick: "what I'm hearing you say is that the [last drink] was not fully absorbed so his [ACE] would have continued to rise for . . . another 30 to 60 minutes?" *Id.* at 30-31. Dr. Plotnick responded, "Yes." *Id.*

[13] Based on Dr. Plotnick's calculations, the 3:40 a.m. breath-test result overstated Salgado's ACE at the time of his operation of the vehicle by 0.015 grams of alcohol per 210 liters of breath. Thus, according to Dr. Plotnick, Salgado's actual ACE at the time of his operation of the vehicle was 0.076 grams of alcohol per 210 liters of breath.

[14] Following Dr. Plotnick's testimony, the State recalled Dr. Bors to provide rebuttal testimony. As the State began to ask Dr. Bors about her own

retrograde-extrapolation calculations, Salgado objected on the ground that Dr. Bors was not qualified to testify to such an analysis. The trial court overruled Salgado's objection. Dr. Bors later explained that, as part of her training with the Department of Toxicology, she had to learn "calculations, back extrapolations[,] and . . . interpretation[s] of impairment, including some blood alcohol calculations[, a]nd . . . being able to explain these calculations and understand exactly what they mean." *Id.* at 89.

[15] According to Dr. Bors's written summary of her retrograde extrapolation, which was admitted as an exhibit during her rebuttal testimony:

If [Salgado] was in elimination only, meaning all alcohol had been absorbed [by his body] at the time of the observed driving, he could have been between a 0.101 g/210 L and 0.115 g/210 L [to test at 0.091 g/210 L one hour later]

On the other hand, if [Salgado] was still absorbing alcohol at the time of the observed driving, in order to be below a 0.080 g/210 L at that point in time[] he would had to have had approximately 0.75 to 1.27 standard drinks, or approximately 9 to 15.24 ounces of 5% ABV beer, unabsorbed in his body at the time of the observed driving and then absorbed by the time of the breath test. The beer that was consumed, Modelo, is 4.4% ABV

Ex. Vol. 4, pp. 12-13.² And Dr. Bors stated that, if Salgado's last drink had in fact been around 11:30 p.m., his body almost certainly would have been in

² Dr. Bors based her initial calculations on Salgado having a weight of 160 pounds at the time of the offense, which was in accordance with the information in the probable cause affidavit. However, when she later

elimination-only by the time he was driving the vehicle some three hours later.
See Tr. Vol. 3, p. 83.

[16] Dr. Bors explained that her calculations were run through an Excel spreadsheet. She acknowledged that she did not create the spreadsheet or input its formulas, and that the spreadsheet had multiple formulas within it. But she added that she was familiar with the Widmark formula and that the formula she used in the spreadsheet was “based on the Widmark” formula. *Id.* at 93. Dr. Bors later clarified:

this template is able to calculate backwards, so, adding back to that test result if the person was in elimination only. But it is also able to calculate the number of standard drinks or the number of ounces of a particular beverage that would need to be unabsorbed in order for that individual to be below [0.08 ACE]. It is all of it.

Id. at 97.

[17] Following the close of the State’s rebuttal, Salgado sought to recall Dr. Plotnick to provide surrebuttal testimony. The court asked Salgado what “the purpose” of that additional testimony would be, and Salgado responded: “We just had . . . testimony of a completely different way of calculating,” and Dr.

learned for trial that his weight may have been 170 pounds, she re-ran her calculations. The revised calculations did not alter the outcome for the elimination-only result and produced a slightly less favorable result for Salgado in the scenario where there remained an “amount . . . unabsorbed in his system.” Tr. Vol. 3, pp. 102-03. That is, under Dr. Bors’s calculation, the amount of unabsorbed alcohol Salgado would have needed in his system at 170 pounds to produce the breath-test result would have needed to have been “raised . . . very slightly” from the amount identified in her written report under the 160-pound analysis. *Id.*

Plotnick’s additional testimony was needed to “respond as to why that is not the correct way to calculate it.” *Id.* at 106. Salgado also wanted to have Dr. Plotnick explain “why the time of the last drink is the most critical element . . . in the Widmark equation.” *Id.* at 146. The court denied Salgado’s request for surrebuttal.

[18] After closing arguments, the jury found Salgado not guilty of the Class A misdemeanor allegation but guilty of the Class C misdemeanor allegation. The court entered its judgment of conviction and sentenced Salgado accordingly. This appeal ensued.

1. The trial court did not abuse its discretion when it permitted Dr. Bors to testify on the issue of retrograde extrapolations.

[19] On appeal, Salgado first asserts that the trial court abused its discretion when it permitted Dr. Bors to testify on the issue of retrograde extrapolations. Trial courts have broad discretion to admit or exclude evidence, and our review is limited to whether the trial court abused that discretion. *Satterfield v. State*, 33 N.E.3d 344, 352 (Ind. 2015). We consider all the facts and circumstances surrounding the trial court’s decision to determine whether it is clearly against the logic and effect of what those facts and circumstances dictate. *Id.* (quotation marks omitted). And we may affirm a trial court’s judgment on any theory supported by the evidence. *Id.* (quotation marks omitted).

[20] Salgado’s essential argument on this issue is that the trial court abused its discretion when it found Dr. Bors to be an expert under [Indiana Evidence Rule 702\(a\)](#) on the issue of retrograde extrapolations. Evidence [Rule 702\(a\)](#) states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

According to Salgado, Dr. Bors “is an expert in the field of breath[-]test machines but not forensic toxicology,” and her “in-house introductory training” and course work with the Department of Toxicology is insufficient to demonstrate the necessary “education or experience in forensic toxicology.” Appellant’s Br. at 12. Salgado continues that Dr. Bors’s use of an Excel spreadsheet that she did not create with formulas she did not input demonstrates her lack of expert qualifications.

[21] We cannot agree with Salgado. The record demonstrates that, while Dr. Bors is certainly an expert in the use of breath-test instruments, part-and-parcel with that expertise is her knowledge of the “calculations, back extrapolations[,] and . . . interpretation[s] of impairment, including some blood alcohol calculations[, a]nd . . . being able to explain these calculations and understand exactly what they mean.” Tr. Vol. 3, p. 89. Indeed, Dr. Bors’s limited use of the Excel spreadsheet to focus on the proper formulas and exclude the unnecessary ones, coupled with her ability to explain how the formula she used worked and its relationship to scientific principles, made her expertise clear. We therefore

cannot say that the trial court abused its discretion when it found Dr. Bors to be an expert on the issue of retrograde extrapolations.

2. The trial court did not abuse its discretion when it denied Salgado’s request to present cumulative evidence on surrebuttal.

[22] Salgado next contends that the trial court abused its discretion when it denied him the opportunity to recall Dr. Plotnick to present surrebuttal testimony following Dr. Bors’s testimony on rebuttal. Although Salgado references constitutional principles in this part of his argument, he recognizes that this issue was a discretionary question for the trial court. *See I.C. § 35-37-2-2(3) (2022)*; Appellant’s Br. at 15. We therefore review the trial court’s decision only for an abuse of that discretion.³ *See Smith v. State*, 609 N.E.2d 1088, 1091 (Ind. 1993).

[23] The Indiana Supreme Court has long held that a trial court does not abuse its discretion when it denies a defendant’s request for surrebuttal where the evidence that would be presented in the surrebuttal is cumulative of earlier evidence. *Shields v. State*, 490 N.E.2d 292, 296 (Ind. 1986); *see also Sipress v. State*, 562 N.E.2d 758, 761 (Ind. Ct. App. 1990) (same). Here, Salgado sought to recall Dr. Plotnick on surrebuttal to have him challenge Dr. Bors’s “different way of calculating” the retrograde extrapolation. Salgado also sought to have

³ We reject the State’s assertion that Salgado failed to preserve this issue for our review.

Dr. Plotnick emphasize on surrebuttal “why the time of the last drink is the most critical element . . . in the Widmark equation.” Tr. Vol. 3, pp. 106, 146.

[24] But Salgado’s proposed bases for recalling Dr. Plotnick would not have added anything new for the jury. First, Salgado vigorously cross-examined Dr. Bors’s calculations during her rebuttal testimony. Relatedly, while Salgado asserts that Dr. Bors used a formula other than the Widmark formula in her retrograde extrapolation, Salgado’s assertion is contrary to the record. Dr. Bors made clear in her rebuttal testimony that the formula she used was “based on” the Widmark formula, with the only difference being that she did not need to run two calculations—as Dr. Plotnick had to do—both to determine Salgado’s ACE if his body was in elimination-only at the time he operated the vehicle and also to determine the amount of alcohol that would have needed to have been unabsorbed for Salgado to have a legal ACE at that time.

[25] That is, Dr. Bors’s formula simply made her use of the Widmark formula more efficient for her purposes; it was not something *other than* the Widmark formula. And the real difference between Dr. Plotnick’s conclusion and Dr. Bors’s conclusion was not the formula or the calculations. Rather, the real difference was that Dr. Plotnick assumed Isabel’s statements regarding Salgado’s alcohol consumption to be true, and Dr. Bors did not. Recalling Dr. Plotnick would not have added new information for the jury in that regard.

[26] Similarly, in his testimony for Salgado during the defense’s case-in-chief, Dr. Plotnick made clear why the timing of a defendant’s last drink is a critical

element in the Widmark formula. That point was emphasized and then re-emphasized by Salgado during his examination of Dr. Plotnick. Accordingly, recalling Dr. Plotnick on surrebuttal would not have added anything new here, either.

[27] Salgado’s attempt to recall Dr. Plotnick on surrebuttal would have simply presented cumulative evidence to the jury. We therefore cannot say that the trial court abused its discretion when it denied Salgado’s request to recall Dr. Plotnick.

3. The State presented sufficient evidence to support Salgado’s Class C misdemeanor conviction.

[28] Last, Salgado asserts that the State failed to present sufficient evidence to support his Class C misdemeanor conviction. As our Supreme Court has made clear:

On a fundamental level, sufficiency-of-the-evidence arguments implicate a “deferential standard of review,” in which this Court will “neither reweigh the evidence nor judge witness credibility,” but lodge such matters in the special “province” and domain of the jury, which is best positioned to make fact-centric determinations. *See Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018). In reviewing the record, we examine “all the evidence and reasonable inferences supporting the verdict,” and thus “will affirm the conviction if probative evidence supports each element of the crime beyond a reasonable doubt.” *Id.*

Carmack v. State, 200 N.E.3d 452, 459 (Ind. 2023).

[29] Salgado argues that no reasonable juror would have relied on the 3:40 a.m. breath-test result because Officer Garris did not visually verify that Salgado's mouth was free of gum or any other substance prior to conducting the breath test. We initially note that much of Salgado's argument on this issue appears to be that the breath-test result should have been found to be inadmissible. However, Salgado did not object to the admission of the results and, thus, that question has not been preserved for appellate review.

[30] As for whether a reasonable juror could rely on the test results, Officer Garris testified that, while he did not visually inspect the inside of Salgado's mouth, he did ask Salgado if Salgado had anything in his mouth, and Salgado responded that he did not. Officer Garris further testified that he thought that Salgado had asked if he could have a piece of gum, not that Salgado had said that he had gum in his mouth. And none of the officers testified that they observed Salgado chewing on anything while he was in their custody.

[31] All of that evidence was before the jury, and it was for the jury to weigh the credibility of the test results accordingly. We will not second guess its determination on appeal. Thus, we conclude that the State presented sufficient evidence to support Salgado's Class C misdemeanor conviction.

Conclusion

[32] For all of the above-stated reasons, we affirm Salgado's Class C misdemeanor conviction.

[33] Affirmed.

Vaidik, J., and Pyle, J., concur.