

*This opinion is nonprecedential except as provided by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
A24-0825**

State of Minnesota,
Appellant,

vs.

Marcus Devontae Harvey,
Respondent.

**Filed January 21, 2025
Reversed and remanded
Bratvold, Judge**

Scott County District Court
File No. 70-CR-22-14977

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Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Larson,
Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant State of Minnesota charged respondent Marcus Devonte Harvey with
driving under the influence of a controlled substance. The state seeks interlocutory review
of a pretrial order excluding blood-test results and related testimony (blood-test evidence)

by a forensic scientist from the Minnesota Bureau of Criminal Apprehension (BCA) that showed delta-9 tetrahydrocannabinol (THC) in Harvey's blood. The state argues that the pretrial order critically impacted its prosecution of Harvey and that the district court abused its discretion by excluding the blood-test evidence. Because the pretrial order significantly reduces the likelihood of a successful prosecution and the district court abused its discretion by excluding the blood-test evidence as a discovery sanction and under Minn. R. Evid. 403, we reverse and remand for further proceedings consistent with this opinion.

FACTS

The state charged Harvey by complaint with third-degree operating a motor vehicle under the influence of a controlled substance on December 3, 2022, in violation of Minn. Stat. § 169A.20, subd. 1(2) (2022).¹ The issue on appeal stems from an evidentiary ruling on the first day of Harvey's jury trial.

Pretrial proceedings provide helpful background for the evidentiary issue. Harvey moved to suppress all evidence obtained after a City of Savage law-enforcement officer stopped his car; he also moved to dismiss the complaint for lack of probable cause. At an omnibus hearing, the district court heard testimony from a law-enforcement officer (the first officer) and a passenger in Harvey's car. The district court also received a body-camera recording and a report from another law-enforcement officer (the second

¹ Because Harvey had a child in the back seat of the car, the complaint also alleged that this was an aggravating factor under Minn. Stat. § 169A.03, subd. 3 (2022). The state later amended the complaint to add a second charge of child endangerment under Minn. Stat. § 609.378, subd. 1(b)(1) (2022). The district court dismissed the second charge for lack of probable cause.

officer). The district court made written factual findings and determined that the first officer had reasonable suspicion to stop Harvey's car because it had an expired license-plate registration and that the officer had additional suspicion of impaired driving based on the odor of marijuana from the car. The district court also found that probable cause supported the impaired-driving charge, identifying the marijuana odor, Harvey's bloodshot eyes, and the indicia of impairment during Harvey's field sobriety tests.

The following summarizes the district court's factual findings in its omnibus order along with relevant evidence received at the hearing.²

Shortly after midnight on December 3, 2022, the first officer "was on patrol in Savage" and saw a car driving "down the center line of the road, straddling both the left and right lanes."³ The first officer next observed that the driver did not signal when he changed lanes and made a left turn. The first officer then searched the car's "license-plate number and learned that its registration had expired."

² Because this is an appeal by the state involving pretrial proceedings, "the facts depicted here are ascertained from the record available" to this court. *State v. Lessley*, 779 N.W.2d 825, 828 n.1 (Minn. 2010).

³ The district court found that driving down the center of the roadway was not unusual under the snowy road conditions that made the center of the road safer. The district court stated:

[T]he road was snow-covered except for two tracks on the roadway where prior vehicles had driven that night (experienced winter-time drivers in Minnesota recognize the scenario: on a snow-covered, two-lane road, drivers often drive right down the middle to reduce their exposure to the dual perils of running into oncoming traffic on the left or running into the ditch on the right).

The first officer initiated a traffic stop “and went to the driver’s side of the car to speak to the driver, whom he later identified” as Harvey. There were two passengers in the car: an adult in the front passenger seat and a child in the back. The first officer told Harvey that “he smelled the odor of marijuana coming out of Harvey’s car” and “asked Harvey if he had marijuana in the car.” Harvey told the first officer that he did not, but added that he had smoked a “blunt” about four hours earlier. The first officer also noticed that Harvey’s eyes were bloodshot.

The second officer, a drug-recognition evaluator, responded and conducted field sobriety tests. The second officer also spoke to Harvey and “smelled the odor of marijuana coming out of the vehicle and noticed that Harvey’s eyes were bloodshot.” Harvey performed field sobriety tests, and the second officer determined that Harvey showed signs of impairment by a controlled substance. The second officer “concluded that Harvey was driving under the influence of a controlled substance” and “placed [him] under arrest.”

Law enforcement obtained a blood sample from Harvey pursuant to a valid warrant. The BCA prepared a lab report based on forensic testing of Harvey’s blood sample. The lab report stated that the blood sample showed a concentration of delta-9-THC, 11-hydroxy-delta-9-THC, which is “an active metabolite of delta-9-THC,” and 11-nor-9-carboxy-delta-9-THC, which is “an inactive metabolite of delta-9-THC.” The lab report noted that the concentrations were “expressed to a 95.45% level of confidence.”

Harvey moved in limine to prohibit “the State from introducing the results of any blood test indicating levels of THC, as any levels are irrelevant and, if relevant, are substantially more prejudicial than probative.”

On the first day of Harvey's scheduled jury trial, the district court heard arguments on the motion in limine. The state argued that the blood-test evidence was relevant and "not unduly prejudicial in this case, as the nature of this case is marijuana impairment." Harvey's attorney responded that the blood-test evidence had little probative value, if any, because "there is no legal limit for THC intoxication in this case, like there is for blood alcohol content" in an alcohol driving-while-impaired (DWI) case and the "ultimate question here is whether" Harvey was "impaired as a result of any intoxication." Harvey added that the state had not made "a sufficient offer of proof that the BCA [forensic scientist] can testify" about Harvey's impairment.

After taking a break in the proceedings, the district court asked the state whether it had prepared a report "outlining the proposed testimony" of the BCA forensic scientist. The prosecuting attorney responded that the state did not consider the BCA forensic scientist to be an expert witness but that the BCA forensic scientist is "able to testify to the length that the psychoactive metabolite is in the system" and that "on average it is detected up to 24 hours after last use." Harvey's attorney expressed concern that the state was proposing to offer expert testimony "about issues outside" the BCA forensic scientist's training and experience.

The district court stated that it was also concerned that the state would call the BCA forensic scientist to provide expert testimony on "scientific, biological concepts that are completely foreign to the average person." The district court stated that a juror who "finds out" Harvey had THC in his system will "assume" that "he was impaired." The district court determined, given that Harvey admitted to using marijuana when speaking to the first

officer, that the prejudicial effect of allowing BCA testimony about the blood-test results “outweighs any probative value for the State.” The district court declined to allow the state to file a written brief on the evidentiary issue and ruled that it would not allow the blood-test evidence, excluding both the blood-test results and the BCA forensic scientist’s testimony about the blood test.

After the prosecuting attorney announced that the state would file a pretrial appeal, the district court added that it had a second reason for its ruling: the state’s “failure to provide an expert report” by the BCA forensic scientist as required by Minn. R. Crim. P. 9.01, subd. 1. The district court reasoned that Harvey “is entitled to some disclosure as far as what type of testimony” the state would offer. The district court also expanded on the “limited probative value” of the excluded evidence, explaining that Harvey admitted to using marijuana four hours before driving and that the first officer would testify to the “overwhelming smell of marijuana” in Harvey’s car.

The state appeals.

DECISION

“When the state appeals a pretrial order, it must show clearly and unequivocally (1) that the ruling was erroneous and (2) that the order will have a critical impact on its ability to prosecute the case.” *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quotation omitted). We first consider whether the district court’s evidentiary ruling had a critical impact and then discuss the merits of the evidentiary ruling.

A. The district court’s pretrial evidentiary ruling critically impacted the state’s case.

The exclusion of evidence has a critical impact on the state’s case “when excluding the evidence significantly reduces the likelihood of a successful prosecution.” *Id.* (quotation omitted). At trial, the state must prove beyond a reasonable doubt that Harvey was “driv[ing], operat[ing] or . . . in physical control of any motor vehicle” while “under the influence of a controlled substance.” Minn. Stat. § 169A.20, subd. 1(2); *State v. Papadakis*, 643 N.W.2d 349, 354 (Minn. App. 2002) (“To sustain a conviction, the state must prove all essential elements of the charged crime beyond a reasonable doubt.”). “A person is under the influence when a person does not possess that clearness of intellect and control of himself that he otherwise would have.” *State v. Ards*, 816 N.W.2d 679, 686-88 (Minn. App. 2012) (affirming defendant’s conviction for driving under the influence of alcohol). In 2022, “[m]arijuana, tetrahydrocannabinols, and synthetic cannabinoids” were generally Schedule I controlled substances under Minn. Stat. § 152.02, subd. 2(h) (2022).

The state argues that excluding the blood-test evidence significantly reduces the likelihood that it will successfully prosecute Harvey for impaired driving. Harvey disagrees, arguing that “the test results that show he smoked marijuana are not relevant to whether his driving was impaired” and are “merely cumulative evidence of marijuana use.”

The state relies on a nonprecedential opinion from this court, *State v. Schultz*, in which this court determined that critical impact supported the pretrial appeal of a district court’s decision to exclude blood-test results showing a defendant’s alcohol concentration

in a DWI case. No. A18-0303, 2018 WL 4056591, at *1-3 (Minn. App. Aug. 27, 2018).⁴ This court reasoned that the state had the burden to show that “Schultz was under the influence of alcohol, not merely that he had consumed some alcohol or driven carelessly” and that, therefore, “[w]hile the state may present other evidence that Schultz drove while under the influence of alcohol, such as the absence of skid marks and the odor of alcohol, the additional evidence is weak.” *Id.* at *3 (quotation omitted).

In *Schultz*, this court distinguished *State v. Hicks*, 222 N.W.2d 345, 347-48 (Minn. 1974), in which the Minnesota Supreme Court determined that excluding a blood-alcohol test did not critically impact the state’s DWI case. *Id.* In *Hicks*, the supreme court considered that other evidence of intoxication was available. 222 N.W.2d at 347. For example, the state had evidence that Hicks’s breath smelled of alcohol, he had difficulty balancing, and he slurred his speech. *Id.* This court also noted in *Schultz* that, “since the supreme court decided *Hicks*, it has relaxed the critical impact standard.” *Schultz*, 2018 WL 4056591, at *3 (quotation omitted) (citing *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998)).

When *Hicks* was decided, the critical-impact standard was different from the standard we apply here. As explained in *Hicks*, critical impact required that the state “show that the trial court’s adverse order has *effectively prevented the chance* of a successful prosecution.” 222 N.W.2d at 347 (emphasis added) (quotation omitted). Under the current

⁴ *Schultz* is a nonprecedential opinion “cited for [its] persuasive value.” *State v. Jonsgaard*, 949 N.W.2d 161, 169 n.9 (Minn. App. 2020); see Minn. R. Civ. App. P. 136.01, subd. 1(c). *Schultz* is persuasive here because it is legally and factually similar to this case.

standard, however, “[t]he state can show that evidence that has been excluded has a critical impact not only when excluding the evidence completely destroys the state’s case, but also when excluding the evidence significantly reduces the likelihood of a successful prosecution.” *McLeod*, 705 N.W.2d at 784 (quotation omitted).

We determine the critical impact of the excluded evidence in light of the state’s burden to prove beyond a reasonable doubt that Harvey was driving while under the influence of a controlled substance. The record includes the following evidence that Harvey was under the influence of marijuana: (1) Harvey admitted that he had smoked “a blunt” four hours before being pulled over, (2) the presence of a strong odor of marijuana in Harvey’s car, (3) Harvey’s eyes were bloodshot, (4) Harvey failed field sobriety tests, and (5) forensic testing detected an active metabolite of delta-9 THC in Harvey’s blood. We note that, in support of his pretrial motion to dismiss, Harvey argued that the adult passenger could have been the source of the marijuana odor.

Critical impact here is a closer call than in *Schultz*. There is more evidence that Harvey used a controlled substance before driving than there was that the driver in *Schultz* had consumed alcohol. In *Schultz*, the only evidence of alcohol use was the blood test, the odor of alcohol, and the absence of expected skid marks. 2018 WL 4056591, at *3. The evidence of Harvey’s impairment is similar to the evidence in *Hicks*, in which the driver showed visible signs of impairment, but in *Hicks*, the supreme court applied a stricter standard for critical impact. 222 N.W.2d at 347.

While some evidence suggests that Harvey had consumed marijuana before driving and was impaired, we conclude that excluding the blood-test evidence significantly reduces

the state’s likelihood of success in prosecuting Harvey. The blood-test evidence is the only scientific evidence that Harvey had a controlled substance in his system and, specifically, that he had an active delta-9 metabolite in his system. And the presence of an adult passenger suggests that the marijuana odor in Harvey’s car may be attributable to the passenger, not Harvey. Therefore, the exclusion of the blood-test evidence critically impacted the state’s ability to prosecute Harvey.

B. The district court abused its discretion by excluding the blood-test evidence.

“Evidentiary rulings rest within the sound discretion of the district court, and [appellate courts] will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted).

The district court excluded the blood-test evidence as a discovery sanction under Minn. R. Crim. P. 9.01, subd. 1(4)(c), and as more prejudicial than probative under Minn. R. Evid. 403. The state challenges both grounds, which we discuss in turn.

1. Minnesota Rule of Criminal Procedure 9.01, subd. 1(4)(c)

Under Minn. R. Crim. P. 9.01, subd. 1(4)(c),

[a] person who will testify as an expert but who created no results or reports in connection with the case must provide to the prosecutor for disclosure to the defense a written summary of the subject matter of the expert’s testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert’s qualifications.

When a party “fails to comply with a discovery rule or order, the court may, on notice and motion, order the party to permit the discovery, grant a continuance, or enter any order it deems just in the circumstances.” Minn. R. Crim. P. 9.03, subd. 8.⁵

The parties disagree about whether the state proposed to offer expert opinion testimony from the BCA forensic scientist. Minnesota Rule of Evidence 702 states that, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

On the first day of trial, the prosecuting attorney stated that the BCA forensic scientist would testify about “what the blood test results mean,” “explain what it means [when] there is a psychoactive metabolite present in the blood,” and explain “that the psychoactive metabolite is in the system, on average . . . up to 24 hours after last use.” This testimony by the BCA forensic scientist about her scientific knowledge would veer into opinion testimony if framed in terms of Harvey’s impairment. We therefore address

⁵ The state first argues that Harvey did not claim a discovery violation and that, even if Harvey had raised the issue, the district court disregarded relevant caselaw. The state is correct. *State v. Lindsey* articulated four relevant factors for a district court to consider before excluding evidence as a discovery sanction. 284 N.W.2d 368, 373 (Minn. 1979) (stating that district courts should consider “(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors”). We need not consider whether the district court’s failure to apply *Lindsey* was an abuse of discretion because we determine that the district court abused its discretion on other grounds.

whether the state violated Minn. R. Crim. P. 9.01 and assume, without deciding, that the BCA forensic scientist would provide expert opinion testimony.

The disclosure requirement under Minn. R. Crim. P. 9.01, subd. 1(4)(c), applies to “[a] person who will testify as an expert but who *created no results or reports* in connection with the case.” (Emphasis added.) Here, the BCA forensic scientist prepared a “result or report in connection with the case” and the state disclosed the forensic scientist’s lab report with Harvey’s blood-test results. Additionally, the legislature has expressly recognized the admissibility of a BCA lab report. Under Minn. Stat. § 634.15, subd. 1(a)(1) (2022), “[i]n any hearing or trial of a criminal offense . . . a report of the facts and results of any laboratory analysis or examination” is admissible “if it is prepared and attested by the person performing the laboratory analysis or examination in any laboratory operated by” the BCA. Caselaw applying section 634.15 clarifies that it is not a rule of admission but a “presumption of admissibility under certain circumstances,” including when “it is prepared and attested by the preparer.” *State v. Flermoen*, 785 N.W.2d 787, 791 n.2 (Minn. App. 2010) (citing *State v. Caulfield*, 722 N.W.2d 304, 310 (Minn. 2006)).

The district court’s ruling excluded the BCA forensic scientist’s testimony about the lab report and test results, which were disclosed to Harvey before trial. Based on this record, we discern no violation of Minn. R. Crim. P. 9.01, subd. 1(4)(c). Therefore, the district court abused its discretion by excluding the blood-test evidence—the test results and the BCA testimony—on this ground.

2. Minnesota Rule of Evidence 403

Minnesota Rule of Evidence 403 states that, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “Unfair prejudice under rule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage.” *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

The district court excluded the blood-test evidence under Minn. R. Evid. 403 for two reasons: (1) the jury would “assume” that Harvey was impaired and (2) the unfair “prejudicial effect of allowing testimony or evidence of that test outweighs any probative value for the State.” During oral argument to this court, Harvey’s attorney pointed out that the risk of prejudice is greater when blood-test evidence is used to prove marijuana impairment because no statute establishes an impairment level for THC by concentration, as the statutes do for alcohol. *See* Minn. Stat. § 169A.20, subd. 1(5) (2022) (stating that “[i]t is a crime for any person to drive, operate, or to be in physical control of any motor vehicle” when “the person’s alcohol concentration at the time . . . is 0.08 or more”).

The issue is whether the blood-test evidence is unfairly prejudicial, and we conclude that it is not. First, the blood-test evidence supports the same inference as the other evidence the state will offer: the strong odor of marijuana coming from Harvey’s car, Harvey’s failure of the field sobriety tests, and Harvey’s admission to the first officer that he had smoked “a blunt” four hours before driving. Second, the blood-test evidence is similar to

other scientific evidence that jurors regularly evaluate. Third, whether Harvey was impaired while driving is the central issue in this case. The blood-test evidence would aid in the jury's decision on this issue. We therefore conclude that the district court abused its discretion by excluding the blood-test evidence—the test results and the BCA testimony—as more prejudicial than probative.⁶

Reversed and remanded.

⁶ The state's offer of proof for the excluded evidence was that the BCA forensic scientist's testimony would "explain what the test results mean." Nothing in this opinion precludes Harvey from objecting should the BCA forensic scientist's testimony exceed or stray from the state's offer of proof.