

*This opinion is nonprecedential except as provided by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
A22-0018**

State of Minnesota,
Respondent,

vs.

Martha Sisay Abara,
Appellant.

**Filed September 12, 2022
Affirmed in part and remanded
Halbrooks, Judge***

Dakota County District Court
File No. 19WS-CR-20-1640

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

Jerome M. Porter, Inver Grove Heights City Attorney, Meagan Kelley, Assistant City Attorney, Campbell Knutson, P.A., Eagan, Minnesota (for respondent)

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

Considered and decided by Reilly, Presiding Judge; Reyes, Judge; and Halbrooks,
Judge.

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

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

Appellant challenges her conviction of driving while impaired (DWI), arguing that the district court erred by instructing the jury not to evaluate the reliability of the DataMaster (DMT) breath-testing machine. Because appellant failed to present evidence challenging the reliability of the machine, the district court did not abuse its discretion by providing the instruction. We therefore affirm the DWI conviction. However, we remand for correction of the district court's sentencing order.

FACTS

On February 2, 2020, a police officer arrested and cited appellant Martha Sisay Abara with four counts: (1) fourth-degree DWI, (2) DWI—alcohol concentration of 0.08 or more, (3) DWI—under the influence of alcohol, and (4) petty-misdemeanor failure to drive in a single lane. The state later dismissed count one, as it was based on “a penalty statute . . . not a charging statute,” and the matter proceeded to a jury trial on the three remaining counts.

The officer testified that he stopped Abara's vehicle after seeing it drift out of its lane. After approaching, the officer smelled alcohol and observed that Abara's eyes were red and watery. It was Super Bowl Sunday, and Abara admitted to drinking a beer “around half-time.” The officer conducted three field sobriety tests and observed indicia of intoxication during all three tests. He subsequently arrested Abara, transported her to the police station, and administered a DMT breath test, which indicated an alcohol

concentration of 0.15. The officer testified that he had been trained and certified to operate the DMT machine.

During opening statements, the defense argued that the DMT machine was “unreliable” and “not perfect.” But the defense did not present evidence at trial attacking the reliability of the machine. Instead, defense counsel merely questioned the officer about the machine and the testing process that occurred with Abara. During defense counsel’s voir dire on foundational requirements, defense counsel asked some technical questions. For example, defense counsel asked the officer about “infrared light absorption” as a means for alcohol detection. The officer was not knowledgeable about the technical aspects of the DMT machine. Defense counsel later asked, “[W]eren’t you instructed that acetone is one of the things that can block infrared light?” The district court sustained the prosecutor’s objection to that question, stating:

We’re not going to get into the engineering aspect of it because he’s not qualified to talk about it. And the [j]ury is not asked to make that determination.

So I’m going to make it clear. Ladies and gentlemen of the [j]ury, your job is to determine whether or not this witness has been certified to use this machine correctly. You are not to determine whether or not the machine is reliable.

In other words, did this officer use the machine in the way he was trained to use the machine to determine whether or not the machine was working in the manner it was intended to be used.

This witness is not an expert, he’s not an engineer, and we’re not getting into the physics of the machine, nor is that your determination in making a decision whether the machine is reliable; only whether the manner it was operated by this operating officer was reliable on that date.

Defense counsel asserted that her questions concerned the foundational requirements for admission of the DMT results, and she objected to not being able to question the officer “fully about his training.” The district court overruled that objection.

Prior to deliberations, the district court instructed the jury on the elements of DWI—alcohol concentration of 0.08 or more:

Second element. Within two hours of the time the defendant drove or operated a motor vehicle, the defendant’s alcohol concentration was .08 or more. The defendant took a breath test to determine alcohol concentration.

The state has introduced evidence of the testing method used and the results of the test [that] was administered to the defendant. You must evaluate the reliability of the testing method and the test results in determining whether the defendant’s alcohol concentration was .08 or more within two hours of the time of driving.

So that goes back to my instruction yesterday. Going back to this, you evaluate the reliability of the testing method, and the test results, in determining whether the defendant’s alcohol concentration was .08 or more within two hours of the time of driving.

You are not to evaluate the [DMT] machine. That’s already been determined by the State of Minnesota as a machine that can be used in testing people. So you’re not looking at the machine and saying, they didn’t prove to us that the machine was reliable. You’re looking at the element I just read to you.

The defense objected to the instruction, and the district court overruled the objection. The jury returned guilty verdicts on all three counts. The district court immediately proceeded to sentencing, entered judgment of conviction on one of the DWI counts, and stayed imposition of sentence.

This appeal follows.

DECISION

Abara seeks reversal of her conviction and a new trial on the ground that the district court erred by instructing the jury not to determine whether the DMT machine was reliable. We review a district court's jury instructions for an abuse of discretion. *State v. Koppi*, 798 N.W.2d 358, 361 (Minn. 2011); *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007). A district court abuses its discretion when an instruction "is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Montano*, 956 N.W.2d 643, 649 (Minn. 2021) (quotation omitted). District courts are given "considerable latitude" in selecting language for the jury instructions, but the instructions "may not materially misstate the law." *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "A mistaken jury instruction does not require a new trial if the error was harmless." *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006).

The relevant portion of the standard jury instruction, which the jury was given in this case, instructed the jury to "evaluate the reliability of the testing method and the test results in determining whether the defendant's alcohol concentration was 0.08 or more within two hours of the time of driving." 10A *Minnesota Practice*, CRIMJIG 29.12 (2015). The district court deviated from the standard instruction by adding the following language: "You are not to evaluate the [DMT] machine. That's already been determined by the State of Minnesota as a machine that can be used in testing people. So you're not looking at the machine and saying, they didn't prove to us that the machine was reliable."

“The question of whether a testing instrument is reliable is separate and distinct from the question of how much weight a trier of fact should give to the test results.” *In re Source Code Evidentiary Hearings*, 816 N.W.2d 525, 540 (Minn. 2012). The reliability of a testing instrument is generally an evidentiary issue, a matter for consideration within the context of admissibility. *State v. Ards*, 816 N.W.2d 679, 687 (Minn. App. 2012); *see also Source Code*, 816 N.W.2d at 527 (“[T]he government established by a preponderance of the evidence that Intoxilyzer 5000EN instruments . . . are reliable and unaffected by alleged source code errors.”).

For purposes of admissibility, the proponent of a scientific test “must establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” *Ards*, 816 N.W.2d at 687 (quotation omitted). When performed by a trained person, the results of an approved breath test are admissible without expert testimony that the testing instrument “provides a trustworthy and reliable measure of the alcohol in the breath.” Minn. Stat. § 634.16 (2020). “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.” *Ards*, 816 N.W.2d at 687 (quotation omitted); *see Source Code*, 816 N.W.2d at 538 (noting parties’ reliance on burden-shifting test). “Rebuttal of the state’s prima facie showing of admissibility of [approved testing] results requires more than speculation that something might have occurred to invalidate those results.” *Ards*, 816 N.W.2d at 687 (quotation omitted).

Abara concedes that the DMT machine at issue has been “approved by the commissioner of public safety for determining alcohol concentration.” She further

concedes that Minnesota law relaxes the foundational requirements for the admission of DMT results and that the foundational requirements were met in this case. *See* Minn. Stat. § 634.16. She nonetheless argues that the district court erred because the reliability of a testing machine remains an issue for a jury’s consideration even after a test is properly admitted into evidence and that the jury in this case was misled or confused by the additional instruction on the reliability of the machine.

We agree that the admission of a breath-test result does not foreclose the possibility of challenging a testing machine and that “the reliability of the test” remains “an issue for the jury.” *Ards*, 816 N.W.2d at 687 (quotation omitted). However, the district court in this case specifically instructed the jury that it was to consider “the reliability of the testing method and the test results.” The district court merely removed from the jury’s consideration the issue of the machine. And Abara did not present any expert testimony or evidence at trial to challenge the reliability of the machine. If a party fails to present evidence challenging the reliability of a breath-test machine, a district court properly exercises its discretion by instructing the jury not to consider that issue. *See id.* (noting that after the admission of the test results, the burden shifted to the defendant “to show why the test was not reliable”).

In *Source Code*, the district court excluded evidence challenging a breath-test machine’s source code, and the supreme court upheld that ruling because the appellants were given “ample process” during pretrial proceedings to challenge the testing machine’s reliability based on alleged defects in the source code. 816 N.W.2d at 540. It is therefore clear that a district court may remove from a jury’s consideration the issue of a machine’s

reliability if the challenge to the reliability is baseless. Here, unlike in *Source Code*, in which the appellants offered the testimony of numerous expert witnesses in challenging the reliability of the breath-test machine, Abara failed to offer any meaningful challenge or evidence. *See id.* at 531; *see also Ards*, 816 N.W.2d at 687 (stating that when a prima facie showing of trustworthy administration has occurred, the opponent must provide a reason, beyond mere speculation, why the test was untrustworthy). Under these circumstances, the district court did not abuse its discretion by removing the issue of the DMT machine's reliability from the jury's consideration.

At sentencing, the district court did not specify which of the DWI counts it was entering a conviction on. The district court's sentencing order is clearly incorrect, as it indicates that a conviction was entered on count one, the dismissed count of fourth-degree DWI. We therefore remand for correction of the sentencing order.

Affirmed in part and remanded.