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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1756**

Daniel James Murtha, petitioner,
Appellant

vs.

Commissioner of Public Safety,
Respondent.

**Filed July 15, 2013
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 27CV1122779

Richard C. Kenly, Kenly Law Offices, Backus, Minnesota (for appellant)

Lori Swanson, Minnesota Attorney General, James Eric Haase, Assistant Attorney
General, St. Paul, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Johnson, Chief Judge;
and Willis, Judge.*

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant challenges the district court order sustaining revocation of his driving
privileges under the implied-consent law, arguing that the district court committed

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

reversible error by excluding medical records and the testimony of an expert witness who would have testified about the effects of gastroesophageal reflux disease on appellant's Intoxilyzer 5000 test results. We affirm.

FACTS

Appellant Daniel James Murtha challenges the revocation of his driving privileges by respondent Minnesota Commissioner of Public Safety based on the results of a November 11, 2011 breath test on the Intoxilyzer 5000. At trial, Murtha challenged only the accuracy of the test results. He attempted to introduce copies of medical records from a June 24, 2004 clinic visit to support his testimony that he suffers from gastroesophageal reflux disease (GERD) and that he experienced symptoms of acid reflux during the arrest and just prior to the administration of the breath test. The district court sustained respondent's hearsay objection to introduction of the records.

Murtha's expert witness, forensic toxicologist Thomas Burr, testified about the potential effect of mouth alcohol caused by GERD on Intoxilyzer test results. Mouth alcohol consists of alcohol that is regurgitated into the mouth from one's stomach. Burr testified that if mouth alcohol is present when the test is conducted, the results show a higher alcohol concentration than would be shown absent mouth alcohol. Burr testified that he had reviewed the police reports, Intoxilyzer record, and Murtha's medical records. But the district court sustained respondent's objection to a question calling for Burr's opinion "on [Murtha's] test itself on this particular [I]ntoxilyzer test." The district court agreed with respondent that the question called for speculation and Burr, who was not present at the time of testing, lacked a proper foundation to render an opinion.

Officer Jeremiah Jessen, who administered the Intoxilyzer test to Murtha, testified that he observed Murtha for 15 to 20 minutes before the test and did not observe Murtha belch, burp, or vomit. He testified that Murtha did not complain of indigestion, acid reflux, or any other medical condition at the time of the test. Murtha provided two deep-breath samples and the Intoxilyzer reported an alcohol concentration of .093 for each sample.

Respondent's expert, Bureau of Criminal Apprehension toxicologist David Edin, testified that if one of Murtha's breath samples had been "fortified" by transient mouth alcohol, one would expect a greater variance between the alcohol concentration of the two samples. He also testified that the Intoxilyzer will not accept a breath sample if the alcohol concentration rises then drops off as one would expect if a sample is fortified by transient mouth alcohol. Edin reviewed Murtha's test record and opined that he saw no reason to believe that mouth alcohol was present.

The district court found Officer Jessen's testimony credible and Murtha not credible and sustained the revocation. This appeal followed.

D E C I S I O N

I. Standard of review

"The district court's findings of fact must be sustained unless clearly erroneous Findings of fact are clearly erroneous when they are 'manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.'"

Schulz v. Comm'r of Pub. Safety, 760 N.W.2d 331, 333 (Minn. App. 2009) (quoting *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985)). "Due regard is

given the district court's opportunity to judge the credibility of witnesses.” *Snyder v. Comm’r of Pub. Safety*, 744 N.W.2d 19, 22 (Minn. App. 2008). “Rulings on evidentiary matters rest within the sound discretion of the district court and will not be reversed on appeal absent a clear abuse of discretion.” *In re Source Code Evidentiary Matters*, 816 N.W.2d 525, 537 (Minn. 2012). The admission of expert opinion testimony generally rests within the discretion of the district court. *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984).

II. Exclusion of medical records

Respondent argues that Murtha failed to lay a proper foundation for admission of the medical records as business records. But Murtha did not offer the records as business records and does not argue on appeal that the records were admissible as business records.

Murtha argues that the district court abused its discretion by excluding copies of his medical records because Minn. R. Evid. 803(4) specifically permits admission of statements made for purposes of medical diagnosis or treatment.¹ But Murtha sought admission of the medical records to prove a diagnosis of GERD, and the diagnosis is

¹ Although Murtha claimed during oral argument that he made an offer of proof about the medical records, the record does not reflect that he did so, and the records are not in the district court file. *See State v. Wolf*, 605 N.W.2d 381, 385 (Minn. 2000) (“[A] party fails to preserve for appeal a ruling excluding evidence when that party fails to make an offer of proof showing the nature of the evidence excluded.”). But because the commissioner does not argue that the issue was not preserved for appeal, we will address the merits.

hearsay. On this record we conclude that exclusion of the records was not an abuse of discretion.²

III. Exclusion of expert testimony

Murtha's challenge to the exclusion of Burr's opinion regarding the results of Murtha's test results is similarly without merit. An expert witness may testify in the form of an opinion, but that opinion "must have foundational reliability." Minn. R. Evid. 702. Murtha asserts that his testimony that he was experiencing symptoms of GERD at the time of testing provided a sufficient foundation for Burr's opinion about his test. But the district court found Murtha's testimony that he was experiencing GERD at the time of testing not credible. Without credible testimony that Murtha was experiencing GERD at that time, there is no foundation for an expert opinion that GERD affected Murtha's test. Even if the district court had allowed Burr to state his opinion, the district court would have rejected the opinion as lacking foundation based on its credibility determinations. The district court did not abuse its discretion or commit reversible error by excluding Murtha's expert's opinion in this case.

Affirmed.

² Even if the record could be construed to support Murtha's argument that he offered the records under the business-records exception to the rule against admission of hearsay, Murtha failed to provide a proper foundation for admission under the exception. See Minn. R. Evid. 803(6) (setting out the requirements for admission of a business record).