STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

v.

[redacted]

Defendant.

[redacted]

Hon. Thomas S. Eveland

OPINION

This is an appeal from a denial of [redacted] ("the Defendant") motion for a new trial heard on December 15, 2011. Defendant was found guilty of Operating While Intoxicated on October 18, 2011. The following evidence was presented to the jury at trial:

Deputy Lopez pulled the Defendant over around 7:40pm on May 11, 2011. Deputy Lopez pulled the Defendant over for going 77 mph in a 55mph zone. He smelled a slight odor of intoxicants coming from the Defendant, and noticed that the Defendant had bloodshot and glassy eyes. However, the Defendant's speech did seem normal, his driving was appropriate, and he had a cooperative, if apprehensive, demeanor. Deputy Lopez asked the Defendant if he had been drinking, and the Defendant said that he had had a few beers earlier that day. Due to the Defendant's glassy and bloodshot eyes, as well as his admission to drinking, Deputy Lopez asked the Defendant to perform some standard field sobriety tests ("SFSTs"). The Defendant agreed.

Deputy Lopez administered three SFSTs: the Horizontal Gaze Nystagmus ("HGN"), the Walk and Turn, and the One-Legged Stand. Deputy Lopez noticed "clues" on each test that indicated intoxication. During the HGN test, the Defendant had a "slight lack of smooth pursuit;"[1] during the Walk and Turn, the Defendant "used his hands" to balance and lost his balance while walking, but never actually steped off the "imaginary" line; and, during the One-Legged Stand, the Defendant put his foot down once. Deputy Lopez admitted that he did not know at what point the Defendant put his foot down during the One-Legged Stand, which is a material piece of information in administering SFSTs. Deputy Lopez further testified that the Defendant was facing towards the patrol vehicle while performing the HGN, and that the vehicles overhead lights were on at the time. Finally, Deputy Lopez testified that he failed to demonstrate the complete Walk and Turn, including the pivot, and admits he was supposed to give verbal and visual instructions for this SFST.

After administering the SFSTs, Deputy Lopez believed the Defendant was intoxicated and arrested him on suspicion of operating while intoxicated. Deputy Lopez transported the Defendant back to the Sheriff's office, where the Defendant consented to taking a breath test. The Datamaster results for the Defendant were .08 and .07, respectively. The Datamaster Logs ("Logs"), admitted into evidence during the testimony of Lieutenant Tim Jungel, indicated that at the time of the Defendant's breath test, the Datamaster was operating in accordance with the Administrative Rules. The Logs are records of simulator test run on the Datamaster machine every week to ensure the Datamaster is performing in accordance with the Administrative Rules. Lieutenant

[1] "Lack of smooth pursuit" means the eye jerks or stops as it follows an object across the plain of vision.

Jungel is the "keeper" of the Logs, and reviews the Logs to make sure the simulator tests run on the Datamaster are in compliance with the Administrative Rules.[2] The Logs were admitted without objection by either of attorneys.

Dr. Dennis Simpson ("Dr. Simpson") was qualified as an expert in the fields of breath testing and SFSTs. On behalf of the Defendant, Dr. Simpson testified that SFSTs are medical tests and must be done the same way every time in order for the outcome to be an objective determination of impairment. Dr. Simpson noted errors in the manner in which Deputy Lopez administered the SFSTs. Dr. Simpson stated that Deputy Lopez should not have administered the HGN while the Defendant was facing the overhead patrol lights or the roadway because people's eyes will automatically move toward the most powerful stimuli. During the Walk and Turn, the Deputy noted that the Defendant moved his arms, but never stated how far the Defendant's arms were raised. Anything less than six inches is allowable and not considered a clue. Dr. Simpson also noted that losing one's balance during the Walk and Turn is not one of the eight designated clues to look for when administering the test. Finally, Dr. Simpson testified that Deputy Lopez failed to properly instruct the Defendant on the One-Legged Stand, and should have indicated to the Defendant that he was to hold his foot six inches off the ground and demonstrate that. Based upon his expertise in the area of SFSTs, Dr. Simpson was of the opinion that Deputy Lopez failed to administer the SFSTs properly and the validity of the tests was compromised. Dr. Simpson would not assign probative value toward intoxication.

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[2] To be in compliance with the Administrative Rules, the Datamaster simulator results must be between .076 and .084. See Mich Admin Code R 325.2653(1).

Dr. Simpson also testified about the accuracy of Datamasters from studies that he had performed.[3] Dr. Simpson noted that the accuracy of a Datamaster can be affected by the length of breath blown into the machine. There are statistically significance differences between long and short blows, which have resulted in a standard deviation of 5%, either way. Dr. Simpson stated that the Datamaster itself is not inaccurate and the question here is not about reliability, but about amount of time a person is blowing into it. The longer one blows into the machine, the higher the breath alcohol content.

In rebuttal to Dr. Simpson, the prosecution called Sergeant Perry Curtis ("Sergeant Curtis"), and he was qualified as an expert in the limited areas of operating the Datamaster, simulator, and administering SFSTs. Sergeant Curtis testified extensively about a study he participated in as a field researcher, but did not author.[4] Defendant's counsel made MRE 702 and 703 objections to Sergeant Curtis' testimony concerning the results of the study because his testimony was not based upon facts or data in evidence, and he did not participate in synthesizing the data collected from his field research. Defendant's counsel also objected to admission of the study as a learned treatise on direct examination under MRE 707. Over Defendant's objection, the court allowed Sergeant Curtis to testify concerning the study and admitted it into evidence.

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[3] Dr. Simpson did not compare his breath test studies against blood alcohol content. Dr. Simpson testified that blood alcohol tests are the most accurate tests to determine the alcohol content in the human body.

[4] Entitled, "Comparison of the Analytical Capabilities of the BAC DataMaster and DataMaster DMT Forensic Breath Testing Devices." ("the study"). On Direct, Dr. Simpson stated that he knew of this study and was familiar with the journal it was published in, the Journal of Forensic Science, as a reputable journal.

Using the study to refresh his memory, Sergeant Curtis testified about the accuracy of the Datamaster based on the results of the study. He noted that in this study there was no increase in reported breath alcohol content from a 12 second blow to a 24 second blow. He also stated that these results were compared against blood test results and, on average, breath alcohol tests reported 3.67% lower than the more accurate blood alcohol tests. Sergeant Cutis stated that, based on the study, the longest blow (24 second) is more in line with the actual blood tests given, and even these long blow results were lower than the blood tests. Sergeant Curtis gave the opinion that based upon the testing he had done and the weekly simulators testified to by Lieutenant Jungel, the Datamaster used in this case was a reliable instrument.

After closing statements, the court instructed the jury that it could find the Defendant guilty if they found that he either a) operated a motor vehicle while under the influence of alcohol, or b) with an unlawful bodily alcohol content. After deliberations, the jury came back with a verdict of Guilty of Operating While Intoxicated. On December 15, 2011, the Defendant motioned for a new trial based on two grounds: 1) the admission of a learned treatise on direct examination as substantive evidence was in error; and 2) the admission of Datamaster Calibration Logs ("Logs") violated the Defendant's right to confrontation because the Logs are testimonial in nature. The Court denied the motion, stating that Sergeant Curtis' name was on the treatise and he was involved in preparing it, so that was adequate for its admission. The court also stated that even if the treatise was admitted in error, it was harmless. Finally, the court noted that the Logs were properly admitted as a business record.

STANDARD OF REVIEW

A new trial may be granted when party's substantial rights are affected by some error of law occurring at trial. MCR 2.611 (1)(g). A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (citing *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003)). An abuse of discretion occurs only "when the trial court chooses an outcome falling outside [the] principle range of outcomes." *Id.* (citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003)). The trial court's decision to admit or exclude evidence is also reviewed for a clear abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005) (citing *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998)). An abuse of discretion in that context exists only where an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *Bauder*, 269 Mich App at 179; 712 NW2d 506 (citing *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996)). However, a trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Bauder*, 269 Mich App at 179; 712 NW2d 506 (citing *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003)).

A. ADMISSION OF THE DATAMASTER LOGS

LAW

The Confrontation Clause provides that in all criminal prosecutions, a defendant shall enjoy the right of confronting the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20. Out-of-court testimonial statements are inadmissible unless the defendant has had a prior opportunity to meaningfully cross-examine the declarant.

Crawford v Washington, 541 US 36, 53-54 (2004); *See Melendez-Diaz v Massachusetts*, 557 US 305, 322 n1 (2009). A testimonial statements are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *People v Nunley*, 491 Mich 686, 699; ___ NW2d ___ (2012) (quoting *Crawford*, 541 US at 51-52). Under MRE 803(6), a record of regularly conducted business activity kept in the ordinary course of business is admissible. A business record is nontestimonial when it is created for primarily administrative reasons, rather than investigative reasons. *Nunley*, 491 Mich at 707.

No published cases in Michigan address whether Datamaster Logs are testimonial or business record, but the unpublished opinion of *People v Hagadorn* does specifically address this issue. Unpublished opinion per curiam of the Court of Appeals, at 10, issued August 21, 2007 (Docket No 269825). In *Hagadorn*, the Court determined that Datamaster Logs are admissible, nontestimonial business records under MRE 803(6). *Id* at 10-11. In doing so, the Court reasoned that "the Datamaster logs did not pertain to defendant, but were maintained merely as a record evidencing the routine testing of the machine." *Id* at 11; *see also People v Jambor*, 273 Mich App 477, 484; 729 NW2d 569 (2007) (Finger print cards collected to identify suspects were *not* testimonial because the cards were "not prepared specifically in anticipation of litigation against defendant, " and "[n]o adversarial relationship existed between defendant and law enforcement at the time the fingerprint cards were prepared."). In the recent case of *People v Nunley*, the Supreme Court overturned a Court of appeals decision, which stated that admission of a certificate of notice for suspension of a driver's license is

testimonial because proof of notice is an element of the offense for DWLS.[5] *Nunley,* 491 Mich at 692. The Supreme Court found the certificate to be "a routine, objective cataloging of an unambiguous factual matter, documenting that the DOS has undertaken its statutorily authorized bureaucratic responsibilities," and its admission did not violate the Defendant's right to confrontation. *Id* at 707. The Court found most significant, the fact that the certificate of notice was "created *before* the commission of any crime that they may later be used to help prove." *Id* (emphasis in original).

ANALYSIS

The admission of the Logs was proper under MRE 803(6) and did not violate the Defendant's right to confrontation. The Logs were maintained in accordance with the administrative rules, and maintained merely [6] The Logs were not prepared specifically in anticipation of the Defendant's trial, and "[n]o adversarial relationship existed between [D]efendant and law enforcement at the time the [Logs] were prepared." *See Jambor,* 273 Mich App at 484; 729 NW2d 569. The Logs were prepared in a routine manner to comply with the administrative rules, just as the certificate of notice in *Nunley*, and do not meet the definition of testimonial statements as described by *Crawford* and its progeny. The Logs are properly admitted nontestimonial business records, and their admission did not violate the Defendants right to confrontation.

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[5] The Court of Appeals reasoned that admitting the certificate without testimony violated the Defendant's right to Confrontation because "the certificate of mailing was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Nunley,* 491 Mich at 693 (quoting People v Nunley, 294 Mich App 274, 285; ___ NW2d ___ (2011)).

[6] Under the Michigan Administrative Code, a Datamaster must be verified for accuracy once a week by one specifically authorized to operate the machine. *See* Mich Admin Code R 325.2653(1). To be considered "accurate," the test results must be within .076 and .084. *Id.*

B. ADMISSION OF LEARNED TREATISE

LAW

""An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, . . . or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). If evidence is erroneously admitted to the court, reversal is warranted only where the error appears more probable than not to be outcome determinative, i.e.: prejudicial. *People v Whittaker*, 465 Mich 422, 426-27; 635 NW2d 687 (2001). "A finding of prejudicial error depends on the circumstances of each case; the excessiveness or unfairness of the verdict; the intent of counsel in introducing such evidence; and whether the evidence went to the substantive issues of the case." *Sponenburgh v County of Wayne*, 106 Mich App 628, 645; 308 NW2d 589 (1981).

Evidence admitted in error is harmless when the same facts are shown by other competent testimony. *People v Mock*, 108 Mich App 384, 388; 310 NW2d 390 (1981). A reviewing court must determine whether the erroneous admission was "offensive to the maintenance of sound judicial process," or harmless beyond a reasonable doubt. *People v Aden*, 83 Mich App 326, 333; 268 NW2d 397 (1978). An error is not harmless beyond a reasonable doubt where it is reasonably possible one of the jurors would have voted to acquit had such evidence not been admitted. *Id* at 334; 268 NW2d at 400. However, if the proof of guilt is "so overwhelming, aside from the taint of error, that all reasonable jurors would find guilt beyond a reasonable doubt, then the conviction must stand." *People v Christensen*, 64 Mich App 23, 33; 235 NW2d 50 (1975). Where more than one error exists, the cumulative effect of the errors may amount to reversible error,

while any one error taken individually may not. *People v Morris*, 139 Mich App 550, 564; 362 NW2d 830 (1984).

A witness qualified as an expert may testify in his or her particular area of expertise if "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." MRE 702. "The facts or data . . . upon which an expert bases an opinion or inference shall be in evidence." MRE 703. "[A]n expert witness may not base his or her testimony on facts that are not in evidence." *People v Unger*, 278 Mich App 210, 248; 749 NW2d 272 (2008).

Under MRE 707, statements in learned treatises, publications, or other periodicals concerning science, are only admissible on cross examination for impeachment purposes. Prior to admittance, the source of the statements must be "established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." MRE 707. Statements from learned treatise may only be read into evidence and cannot be received as exhibits. MRE 707. In *Lockridge v Oakwood Hosp,* erroneous admission of a learned treatise was harmless when the witness was questioned concerning a learned treatise in a brief and isolated manner, and other properly admitted evidence went to the fact at issue. 285 Mich App 678, 691; 777 NW2d 511 (2009). In *Bivens v Detroit Osteopathic Hosp*, the Supreme Court reversed the lower courts finding that admission of learned treatise was harmless error. 403 Mich 820 (1978). In doing so, the Court stated: "Given counsel's extended references to the textbook during his closing argument, we cannot agree with the Court of Appeals that the effect of this evidence 'was probably minimal.'". 403 Mich at 820.

ANALYSIS

Sergeant Curtis was not qualified as a scientist in the field of breath analysis. He participated in a study as a field researcher, but did not participate in synthesizing any data or applying that data to scientific theory. *See* MRE 702. A proper foundation for the admission of this study was not laid before Sergeant Curtis testified to their contents. Sergeant Curtis did not have personal knowledge of the results of the study beyond his personal collection from the Datamaster. Sergeant Curtis was not qualified to speak on such scientific results and had no personal knowledge from which to base the findings testified to in the study. The study was erroneously admitted on direct examination as substantive evidence. *See* MRE 707. The study is a learned treatise, contained within a periodical journal, and was improperly admitted in its entirety as substantive evidence, contrary to MRE 707.

The error is prejudicial and is not harmless beyond a reasonable doubt. The evidence of the Defendant's guilt was not overwhelming, and it is reasonably possible that without the prejudicial testimony of Sergeant Curtis concerning the study, a juror would have voted to acquit. *Christensen*, 64 Mich App 23, 33; 235 NW2d 50; *Aden*, 83 Mich App at 334; 268 NW2d 397.

Sergeant Curtis' testimony relied heavily upon the study in order to contradict Dr. Simpson's opinion concerning the long blow, short blow affect on results. Sergeant Curtis reference blood tests comparisons from the study to show that the Datamaster, if there are any issues with its accuracy, would *under report* the actual alcohol present in the body. This testimony would call into question Dr. Simpson's testimony as Dr. Simpson did not use blood tests comparisons in his studies. Without Sergeant Curtis'

tainted testimony using the study as substantive evidence to contradict Dr. Simpson, there remains a close question of fact concerning which of the Datamaster results is the correct one, the .08 or .07. Without the erroneous testimony, there is no "overwhelming evidence" that Defendant is guilty of having blood alcohol content of .08 or above. The jury was also presented with evidence that Deputy Lopez performed SFSTs and determined the Defendant to be operating while intoxicated. Deputy Lopez's administration of the SFSTs was brought under fire by Dr. Simpson, an expert in the administration of SFSTs. Dr. Simpson gave the opinion that Deputy Lopez failed to administer the SFSTs properly and the results of those tests should not be probative weight. This evidence, together with Dr. Simpson's testimony about his long blow, short blow studies, does not show overwhelming evidence of guilt. The erroneous admission of substantive evidence was not harmless beyond a reasonable doubt. *See Christensen*, 64 Mich App 23, 33; 235 NW2d 50.

The trial court abused its discretion when it determined the admission of the study as harmless error. Based upon all the facts in the record, there was no justification or excuse for the trial court finding of harmless error beyond a reasonable doubt. *See Bauder*, 269 Mich App at 179; 712 NW2d 506. The admission of the study contravened MRE 707, and was erroneous on its face. The study was testified to at length in a case where there was a close factual issue of intoxication and reliability of the Datamaster. The trial court abused its discretion when it allowed inadmissible evidence to be presented to the jury on a substantive issue of fact, and it abused its discretion by determining this error to be harmless and denying the Defendant's motion for a new trial.

CONCLUSION

The Court did not err went it admitted the Logs into evidence. The Logs are admissible business records under MRE 803(6), and their admission does not violate the Defendant's right to confrontation. The admission of the study as a learned treatise on direct examination for substantive purposes was error. The erroneous testimony was excessive, went to a substantive issue in the case, and the prosecution intended it to be considered as substantive proof of reliability of the Datamaster. Without the tainted evidence, it is reasonably possible one juror would have voted to acquit. Such an error cannot be harmless, and the court abused its discretion for finding the error harmless beyond a reasonable doubt. The denial of the motion for a new trial fell outside the principled range of outcomes, and was an abuse of discretion. The district court's denial of Defendant's motion for a new trial is reversed.

Dated: 10/16/12

Thomas S. Eveland
Circuit Judge

PROOF OF MAILING

STATE OF MICHIGAN)

) SS

COUNTY OF EATON)

Caitlin Keene, being first duly sworn, deposes and says that on the 16th day of October, 2012 she served a copy of an Opinion dated October 16th, 2012 upon the following parties by mailing same to them at the addresses shown, First Class Mail, postage fully prepaid.

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