Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-439

AUGUST TERM, 2004

State of Vermont v. Kelly Hurlbut	} } } } } } } } } }	APPEALED FROM: District Court of Vermont, Unit No. 3, Franklin Circuit DOCKET NO. 1797-11-02 Frcr Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a conviction, based on a jury verdict, of driving under the influence of intoxicating liquor, second offense. She contends the court erroneously: (1) denied her right to cross-examine the State= s expert chemist; and (2) denied her motion for a new trial based on a juror= s alleged awareness that defendant had been previously convicted of DUI. We affirm.

The material facts may be briefly summarized. On November 9, 2002, defendant was stopped by a State police trooper for driving through a blinking red light without stopping. After performing several field dexterity tests, defendant was arrested for DUI and transported to the state police barracks, where a blood alcohol test was administered, yielding a BAC of .129%. In his affidavit of probable cause and at trial the arresting officer stated that, prior to the test, defendant claimed to have burped during the initial fifteen-minute observation period. The officer stated that he then observed defendant for an additional fifteen minutes, observed no burps, and administered the test. Defendant testified at trial that she had burped again during the second fifteen-minute observation period, but failed to so inform the officer because he had threatened that a second burp would be construed as a refusal and result in a jail sentence.

The defense theory at trial was that A mouth alcohol@ from defendant= s burp resulted in a Datamaster reading that was inaccurately high. The State= s expert chemist acknowledged on cross-examination that A mouth alcohol@ could skew a test result, but testified that the Datamaster machine was designed to detect such an occurrence through an A abnormal slope@ in the reading and show that the test result is invalid. The court denied defense counsel= s attempt to question the State= s expert about the so-called Hoffman or Dartmouth study conducted some years earlier, which had found that the silica gel capture system then in use in the Datamaster machines did not reliably capture a breath sample that would match the machine= s infrared results. Defense counsel= s proffer was that A one of the things that came up in the Dartmouth study was that the same person would go to different machines and get different results and then these guys sat around and said how can that be and they decided that the only reasonable explanation was mouth alcohol.@

In precluding counsel= s effort to question the witness about these purported conversations among the Dartmouth study scientists, the court noted that the impact, if any, of mouth alcohol was not the subject of the Dartmouth study, and that the conversations to which counsel referred were not scientific conclusions but assumptions. In denying defendant= s subsequent motion for new trial, the court also explained that the introduction of evidence regarding the Dartmouth study would have needlessly confused or misled the jury, as it had no impact on the reliability of the Datamaster infrared system. The court also noted that the State= s expert had acknowledged that he was aware of at least one prior instance when a defense expert had found that the Datamaster did not invalidate a reading from mouth alcohol B the so-called Cohen study. In addition, defendant= s expert, who had taught for seven years at the police academy, also testified to having observed instances when the Datamaster did not invalidate test results influenced by mouth alcohol.

Accordingly, the proffered evidence relating to the Dartmouth study discussion was largely cumulative.

On appeal, defendant contends that the court= s ruling violated her Sixth Amendment right to confront the State= s expert witness. As we have explained, the Confrontation Clause A guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.@ State v. Washington, 164 Vt. 609, 611 (1995) (mem.) (emphasis omitted) (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)). Thus, the trial court retains broad discretion to impose reasonable limits on cross-examination when there is a risk of prejudice, confusion of the issues, or questioning that is cumulative or marginally relevant. Id. Here, the court reasonably excluded the proffered evidence on the grounds that the influence of mouth alcohol was not the subject of the Dartmouth study, that to put the study and resulting discussion in context could engender delay and confusion, and that both the State= s and defendant= s experts had testified to other instances in which the Datamaster had not invalidated test results influenced by mouth alcohol. Accordingly, we discern no abuse of discretion in the court= s ruling.

Defendant also contends that the court erred in denying her motion for a new trial based on alleged juror bias. Prior to trial, defense counsel had moved for a mistrial based upon a report in the local newspaper the day before listing the district court docket and indicating that defendant was charged with A DWI (second offense).@ The court, in response, individually voir dired the jurors, inquiring whether any of them had read anything about the case since the jury was empaneled. One juror recalled seeing the newspaper notice and the fact that it charged defendant with a second offense. The court excused the juror based on his knowledge, although not before determining that the juror had not discussed the newspaper report with the other jurors. Two other jurors acknowledged seeing the notice, but recalled only that it had mentioned the name of the case. Neither had discussed the matter with other jurors, and neither recalled any conversations with other jurors concerning the matter. Neither believed that what they had read would affect their ability to render a fair and impartial verdict. Both remained on the jury.

Following the verdict, defendant moved for a new trial based, in part, on the two jurors= exposure to the article. The court, in response, conducted a supplemental voir dire of the two jurors. One juror could not recall the article. The second acknowledged that she had read the article, but testified that she did not recall the information indicating that it was defendant= s second offense during the trial and jury deliberations, and further confirmed that there were no discussions among the jurors indicating such an awareness. Based on the jurors= responses, the court denied the motion for a new trial. Although we have indicated that it is error for the jury to be made aware of a defendant= s prior convictions for DUI before the jury renders a verdict on the principal offense, see State v. Bushey, 142 Vt. 507, 510-11 (1983), in this case, the court= s voir dire of the jurors both before and after trial alleviated any such risk. The only juror who recalled reading about the second charge was excused before trial, the other two jurors who had read the article confirmed that neither recalled its substance during the trial, or discussed the article with anyone else. Under the circumstances, we discern no error. See State v. Onorato, 142 Vt. 99, 106-107 (1982) (upholding court= s resolution of potential jury bias question, from disclosure of information that proceeding was defendant= s second trial, by general inquiry into jurors= knowledge and potential bias).

Affirmed.

BY THE COURT:

____

John A. Dooley, Associate Justice

____

Denise R. Johnson, Associate Justice

____

Marilyn S. Skoglund, Associate Justice