IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDY LYNN MOONEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87897-COA

ORDER OF AFFIRMANCE

Randy Lynn Mooney appeals from a judgment of conviction, pursuant to a jury verdict, of driving under the influence (DUI) with a prior felony conviction. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

In October 2019, Nevada Highway Patrol (NHP) Trooper Logan Dean was dispatched to the scene of an injury accident on Interstate 80 east of Winnemucca.[1] Upon arrival, Dean noticed a tractor-trailer parked on the side of the road with front end damage, as well as Mooney's extensively damaged vehicle overturned in the median with Mooney still in the driver's seat. Dean noted the scent of alcohol coming from the vehicle as well as from Mooney's person. Paramedics extracted Mooney from his vehicle and transported him to Humboldt General Hospital. Dean stayed on the scene to investigate the accident including nearby debris in the "slow lane" and tire marks as well as to speak to witnesses.

Meeting Mooney at the hospital was NHP Trooper Levi Duroy, who asked Mooney if he recalled anything about the accident. Mooney said he did not remember much except that he was en route to Elko, Nevada

[1]We recount the facts only as necessary for our disposition.

from Burns, Oregon and that he probably drank too much "Mike's Hard" while driving. Mooney initially refused a blood draw to test for alcohol, then submitted after Duroy told him that he would have to obtain a warrant pursuant to NRS 484C.160(9) if Mooney refused, which could result in three blood draws.[2] However, by the time the testing materials arrived, more than two hours had passed since the accident, so three staggered draws were taken as allowed by NRS 484C.160(5)(c). During one of the draws, Mooney exclaimed, "Why are we doing this anyway? Everybody knows I've been drinking . . . ." Duroy secured the blood tests into evidence and arrested Mooney upon his discharge from the hospital. The State charged Mooney with one felony count of DUI with a prior felony conviction. Before trial, Mooney moved to exclude his prior felony convictions, which the district court granted.

At trial, the State called Dean as its first witness. He testified about his accident investigation qualifications but explained that he did not perform any "speed workup" on this accident, nor did he measure any tire marks on the highway. However, he generally described the tire marks, the damage to the vehicles, the debris on the roadway, and his conclusion that Mooney left his travel lane and collided with the tractor-trailer; thus, Mooney was the at-fault driver. When he explained that he reached this conclusion partially based on statements he collected from witnesses, Mooney lodged a hearsay objection. The district court overruled the

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[2]Mooney would later move to suppress the statements he made to Duroy as well as the results of the blood test arguing that he did not voluntarily consent to the blood draws and that he was subjected to custodial interrogation without being first given a *Miranda* warning. The district court denied the motion and Mooney does not appeal the court's ruling; therefore, we do not address it further.

objection but instructed Dean not to tell the jury what the witnesses said, but rather to talk about what his investigation revealed. Dean proceeded to discuss his investigation and did not testify concerning the witnesses' actual statements.

On cross-examination, Mooney asked Dean how he came to his conclusion about the cause of the accident. Dean reiterated that he drew his conclusion partially from witness statements. Mooney then moved to strike Dean's testimony as those witnesses would not be testifying, but the district court again overruled the objection. However, Dean did not repeat the witnesses' actual statements.

The State then called Duroy, who testified that he smelled alcohol on Mooney's person and observed him with watery eyes, both indicia of possible intoxication. He also testified that since the blood draws occurred more than two hours after the accident, the crime lab had to use retrograde extrapolation to establish Mooney's blood alcohol content (BAC) at the time of the accident.[3]

Nadia Castellanos, the Washoe County Sheriff's Office criminalist who analyzed Mooney's blood samples, also explained how she used retrograde extrapolation to estimate Mooney's BAC at 0.199 grams per milliliter at the time of the accident, which is more than twice the legal limit. On cross-examination, she testified that it is not necessary to know

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[3]Retrograde extrapolation is the computation back in time of a person's BAC, that is, the estimation of the BAC at the time of driving based on a test result from some later time. *State v. Eighth Jud. Dist. Ct.*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011). Here, the three samples revealed decreasing BACs post-accident of 0.173, 0.168, and 0.164.

the subject's age, weight, last food consumed, type of alcohol consumed, or drinking pattern to accurately perform retrograde extrapolation.

Following the State's case-in-chief, Mooney called his only witness, Dr. Jay Gehlhausen, a forensic toxicologist. After detailing his credentials and experience, Mooney asked the district court to "recognize [Dr. Gehlhausen] as an expert in the field of toxicology."[4] The district court stated "[t]he Court is not going to recognize this witness as an expert. He may testify." Although the district court did not specifically state that Dr. Gehlhausen could testify as an expert, this was the only means by which Dr. Gehlhausen could provide testimony because he was neither a party nor a percipient or lay witness. Mooney did not object and Dr. Gehlhausen proceeded to testify about issues he perceived with the blood draw, including syringe placement, the testing machine potentially mislabeling vials, and the lack of reliability with retrograde extrapolation generally. He also contradicted Castellanos's testimony, stating that factors such as age, weight, drinking habits, and gender are relevant to the reverse extrapolation calculation. He ultimately concluded that the crime lab's estimate of 0.199 g/mL was inaccurate, but did not state that Mooney's BAC was below the legal limit at the time of the accident, nor did he otherwise conduct or offer a retrograde calculation.

Following closing arguments and deliberations, the jury found Mooney guilty of DUI. The district court subsequently sentenced Mooney

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[4]The trial transcript reads "Your Honor, we would ask the Court to recognize Mr. Mooney as an expert in the field of toxicology," but it is clear from the context that Mooney is referring to Dr. Gehlhausen as the witness to be recognized.

to serve a term of 36 to 108 months in prison after the State proved he had a prior felony DUI conviction.

First, Mooney contends that the district court abused its discretion by declining to recognize Dr. Gehlhausen as an expert and, in so doing, only permitting him to testify as a lay witness. The State contends there was no abuse of discretion as Castellanos was not recognized either. "[T]he admissibility of expert testimony is a matter for the sound discretion of the trial judge." *Townsend v. State*, 103 Nev. 113, 119, 724 P.2d 705, 709 (1987). While NRS 50.320 and prior caselaw refer to a witness being "qualified" by the district court, "the district court does not actually declare a witness qualified." *Cramer v. State, Dep't of Motor Vehicles*, 126 Nev. 388, 395 n.5, 240 P.3d 8, 12 n.5 (2010) (internal quotation marks omitted). "Rather, the district court makes a determination that the witness's qualifications allow him to testify as an expert in a particular area of expertise." *Id.* "It is a function of the jury, not the court, to determine the weight and credibility to give such testimony." *Mulder v. State*, 116 Nev. 1, 13, 992 P.2d 845, 852 (2000).

Here, the district court properly recognized that it is not the role of the district court to qualify a witness as an expert, but rather to decide whether to let the witness give expert testimony upon consideration of the witness's qualifications.[5] After declining to recognize Dr. Gehlhausen as a qualified expert, the court allowed Dr. Gehlhausen to give expert testimony. Specifically, Dr. Gehlhausen testified about retrograde

[5]We note that the district court's admonishment that "[t]he court is not going to recognize this witness as an expert" was in direct response to Mooney's request that the court recognize his witness as a qualified expert. The court's refusal to do so was proper under *Cramer* as discussed herein.

extrapolation, perceived flaws with the blood draws, issues with the testing machine, and Castellanos's failure to consider relevant factors such as age, weight, drinking habits, and gender when estimating Mooney's BAC. This goes far beyond lay testimony. And because Dr. Gehlhausen could not be considered a lay witness in this case, his testimony was that of an expert. *See Allen v. State*, 99 Nev. 485, 487, 665 P.2d 238, 239 (1983) (noting that the assistance of expert testimony "should be in an area foreign to the jury's knowledge").

Thus, the district court properly assessed Dr. Gehlhausen's qualifications and then permitted him to testify based on those qualifications, leaving it for the jury to determine how much weight to give his testimony. This is all that *Cramer* requires, and Mooney provides no cogent argument or relevant authority showing that the district court was required to do more. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that appellate courts need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Further, Dr. Gehlhausen's curriculum vitae and expert report were admitted into evidence thereby ensuring Mooney was able to fully present to the jury all qualifications and opinions. Thus, the district court did not abuse its discretion, and Mooney is not entitled to reversal on these grounds.

Second, Mooney argues that the district court abused its discretion and violated Mooney's constitutional rights by admitting testimonial hearsay in the form of Dean's testimony that statements from non-testifying witnesses informed his investigation. The State contends the district court did not commit error because any alleged hearsay was not

offered for the truth of the matter but only as "course-of-investigation" testimony. Further, the State contends that any error was harmless.

Hearsay is an out-of-court "statement offered in evidence to prove the truth of the matter asserted," NRS 51.035, and is generally not admissible unless an exception applies, NRS 51.065(1). In addition, "*Crawford v. Washington* holds that the Confrontation Clause bars the use of a testimonial statement made by a witness who is unavailable for trial unless the defendant had an opportunity to previously cross-examine the witness regarding the witness's statement." *Medina v. State*, 122 Nev. 346, 353, 143 P.3d 471, 476 (2006). The supreme court has held that "course-of-investigation" testimony is not barred by the hearsay rule or the Confrontation Clause, so long as it is offered to show why the officer pursued a particular course of action. *Collins v. State*, 133 Nev. 717, 725-27, 405 P.3d 657, 665-66 (2017); *see also Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

Dean's testimony and the district court's instruction to Dean not to tell the jury what the witnesses said and its related decision allowing him to testify as to the conclusion of his investigation undermines Mooney's argument that the State was offering statements of witnesses for their truth. In fact, no out-of-court statements were admitted. Rather, Dean described the various aspects of his investigation and referred generally to obtaining statements from witnesses and stated that they formed part of the rationale for his conclusions about how the accident occurred. Because no out-of-court statements were presented or admitted, and Dean testified about how the witnesses' statements led him to pursue a particular

investigative course, the district court acted within its discretion when it allowed his course-of-investigation testimony. There was thus no violation of either the hearsay rule or the Confrontation Clause.[6]

Additionally, any alleged error was harmless because of the physical evidence at the accident scene, Mooney's incriminating statements, his appearance of intoxication, the blood test results, and that Mooney did not respond in his reply brief to the State's harmless error argument. *See Schoels v. State*, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999) (noting that an error is harmless if in absence of the error the outcome would have been the same); *see also Hubbard v. State*, 134 Nev. 450, 459, 422 P.3d 1260, 1267 (2018) (stating an error is harmless "if it did not have a substantial and injurious effect or influence in determining the jury's verdict"); *Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position"). Therefore, the district court did not abuse its discretion, and Mooney is not entitled to relief based on this argument.

Third, Mooney argues he is entitled to relief based on cumulative error. However, as there was no error, there can be no cumulative error as "cumulative-error analysis should evaluate only the

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[6]We note that Mooney did not object on confrontation grounds below and he does not argue plain error on appeal. Therefore, we decline to further consider his Confrontation Clause arguments. *See Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (recognizing that, in order to properly preserve an objection, a defendant must object at trial on the same grounds he asserts on appeal); *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018) ("[T]he decision whether to correct a forfeited error is discretionary.").

effect of matters determined to be error, not the cumulative effect of non-errors." *Chaparro v. State*, 137 Nev. 665, 674, 497 P.3d 1187, 1195 (2021) (quoting *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990)); *see also Belcher v. State*, 136 Nev. 261, 279, 464 P.3d 1013, 1031 (2020) (stating that when there is only one error, which itself is harmless, "there is nothing to cumulate"). Accordingly, we

ORDER the judgment of conviction AFFIRMED.[7]

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Michael Montero, District Judge
Nevada State Public Defender's Office
Humboldt County Public Defender
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk

[7]Insofar as Mooney has raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.