IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502017AP000049AXXXMB
L.T. NO.: 502014CT024689AXXXSB

GABRIEL DEAN LOUIS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: JUL 2 6 2018

Appeal from the County Court in and for Palm Beach County,
Judge Sheree Cunningham.

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PER CURIAM.

Appellant Gabriel Dean Louis was convicted of Driving under the Influence. On appeal, he claims that the trial court reversibly erred by admitting improper expert testimony on the subject of alcohol absorption and elimination during trial. Although we agree with Appellant that the relevant testimony was improperly admitted expert testimony, we conclude such error was harmless.

Appellant was tried and convicted of Driving under the Influence ("DUI"). Prior to trial, Appellant filed a motion in limine seeking to limit the testimony of State witness Corporal Gregory Croucher of the Palm Beach County Sherriff's Office. Cpl. Croucher is the individual who was responsible for maintaining the breathalyzer machine at the time Appellant was arrested. The motion sought to preclude Cpl. Croucher from offering expert testimony on any subject on which he is not an expert, specifically including "human physiology, alcohol consumption, elimination rates, 'deep lung air,' etc." The motion in limine further provided that Cpl. Croucher's expert testimony should be limited to topics that he is qualified to testify on as a breathalyzer maintenance technician and nothing more. A brief hearing on Appellant's motion in limine was held at which the State agreed to the preclusion of such testimony at trial.

During trial, however, while the State was questioning Cpl. Croucher on the breath test samples Appellant provided, the following exchange took place:

STATE:	Is it possible for someone to have a lower breath alcohol content two hours after their – I'm sorry a higher breath alcohol content two hours after their last drink?
DEFENSE COUNSEL:	Objection, improper expert opinion.
THE COURT:	Objection overruled.
CPL. CROUCHER:	Yes, they will – due to absorption and elimination in the body, and how alcohol works –
DEFENSE COUNSEL:	Objection, improper expert –
THE COURT:	Objection overruled.
CPL. CROUCHER:	– they will have absorbed and started eliminating alcohol well within that time. Two hours after an event, they would

definitely be on their way down.

STATE: No further questions. May I approach to retrieve the affidavit?

THE COURT: Certainly. All, right. Defense?

DEFENSE COUNSEL: Yes, your Honor. Before I begin may we approach?

THE COURT: Sure, come on up.

(Whereupon, a bench conference was had as follows:)

THE COURT: Present at the bench is State and Defense. Yes, sir?

DEFENSE COUNSEL: Yes, your Honor. In my motion in limine, which was agreed upon by the parties before we entered – before the trial began, issue number three was concerning Cpl. Croucher testifying to issues of alcohol elimination rates, alcohol absorption, peak alcohol rates, stuff like that. Both parties agreed to that. Cpl. Croucher has just testified to that and my objection was overruled. So the Defense is moving for a mistrial based on improper expert opinion and violation of my motion in limine, Judge, that was agreed upon.

THE COURT: Motion for mistrial is denied.

The State later referenced the aforementioned testimony in its closing argument:

STATE: In fact, there was a witness that you remember this morning, Croucher, that said he was on his way down. Meaning that he was coming down from being intoxicated. Two hours after this, after this roadside exercise, he was on his way down. He wasn't on his way up.

The jury subsequently found Appellant guilty of DUI. The trial judge adjudicated Appellant and

sentenced him to twelve (12) months of probation, with standard DUI conditions, and eight long-weekends in Palm Beach County Jail. Appellant thereafter filed this appeal.

A witness may qualify as an expert in areas of his or her specialized knowledge, training, or education. *Chavez v. State*, 12 So. 3d 199, 205 (Fla. 2009). But, it is improper to allow an expert to testify beyond the scope of his or her expertise. *See, e.g.*, *Jordan v. State*, 694 So. 2d 708, 716 (Fla. 1997); *Hall v. State*, 568 So. 2d 882, 884 (Fla. 1990). The purpose of the motion in limine granted by the trial court was to limit the scope of the testimony provided at trial by *precluding* any testimony from Cpl. Croucher "on any subject which he is not an expert on such as human physiology, alcohol consumption, elimination rates, 'deep lung air,' etc." Even though the State agreed to that limitation, during Cpl. Croucher's direct examination, he discussed alcohol absorption and elimination, specifically testifying that two hours after drinking, a person "would definitely be on their way down" with respect to breath alcohol concentration. We find that the admission of this portion of Cpl. Croucher's testimony was improper because it constituted expert testimony pertaining to matters that were both outside the scope of his expertise as a breathalyzer maintenance technician and specifically precluded by the pretrial motion in limine.

However, although we find it was error for the trial court to permit this testimony, we also find the error was harmless because the primary conclusion provided by Cpl. Croucher's improper testimony—that Appellant was "on his way down"—is one the jurors could have drawn from the evidence on their own based on the breath test results introduced at trial. Appellant's first breath sample, provided at 4:20 a.m., yielded a breath alcohol level of 0.119; the second sample, provided at 4:29 a.m., yielded a breath alcohol level of 0.116. Thus, the breath test results reflect a .003 decrease within the span of nine minutes. Given the decrease in Appellant's breath test results and

the amount of time that had elapsed since Appellant had consumed his last alcoholic beverage, the jury, on its own, could have inferred from the evidence that two hours earlier, Appellant would have possessed a higher blood alcohol level than at the time the test was administered.

Moreover, other evidence presented at trial pointed to Appellant's impairment. Trooper Escaran testified to smelling an unknown alcoholic beverage when he entered Appellant's vehicle, the jury was shown video footage of Appellant's poor performance on the field sobriety tests, and, as stated above, Appellant's breath test yielded results of 0.119 and 0.116. *See Lopez v. State*, 478 So. 2d 1110, 1111 (Fla. 3d DCA 1985) (finding improper admission of expert testimony on average alcohol absorption rate was harmless when considered in light of testimony describing defendant's condition and blood tests measuring his alcohol level at 0.13 and 0.11).

Accordingly, we find that the trial court's admission of Cpl. Croucher's testimony regarding alcohol absorption and elimination, though improper, was harmless error.

Affirmed.

FEUER, KELLEY, and COLBATH, JJ., concur.

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Opinion/Decision filed: JUL 26 2018

Appeal from County Court in and for
Palm Beach County, Florida;
Judge Sheree Cunningham

Appealed: March 30, 2017

DATE OF PANEL: APRIL 23, 2018

PANEL JUDGES: FEUER, KELLEY, COLBATH

AFFIRMED/REVERSED/OTHER: AFFIRMED

DECISION BY: PER CURIAM

CONCURRING:	DISSENTING: With/Without Opinion	CONCURRING SPECIALLY: With/Without Opinion
DATE: 7/10/18 J.	J.	J.
DATE: 7/10/18 J.	J.	J.
DATE: 7/19/18 J.	J.	J.