IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TAMMY AURORA MANN, Appellant, vs. THE STATE OF OKLAHOMA, Appellee.	)	NOT FOR PUBLICATION No. F-2015-1098

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

Tammy Aurora Mann was tried by jury and convicted of First Degree Manslaughter in violation of 21 O.S.2011, § 711, in the District Court of Canadian County, Case No. CF-2014-40. In accordance with the jury's recommendation, the Honorable Gary E. Miller sentenced Mann to twenty (20) years imprisonment. Mann appeals from this conviction and sentence.

Mann raises four propositions of error in support of her appeal:

I. THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR IN REFUSING TO SUSTAIN DEFENDANT'S MOTION TO SUPPRESS THE RESULTS OF A BLOOD TEST AFTER THE STATE FAILED TO SHOW THAT THE TEST WAS PERFORMED UNDER METHODS APPROVED BY THE BOARD OF TESTS FOR ALCOHOLIC AND DRUG INFLUENCE.

II. THE TRIAL COURT ERRED BY ADMITTING MISLEADING STATEMENTS AND OPINIONS FROM UNQUALIFIED WITNESSES.

III. THE TRIAL COURT ERRED BY ADMITTING THE CRASH DATA BECAUSE IT IS HEARSAY.

IV. THE TRIAL COURT ERRED BY ALLOWING A WITNESS TO TESTIFY FROM WHAT HE COPIED FROM A BOOK REGARDING THERAPEUTIC RANGES.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

We find in Proposition I that the trial court did not abuse its discretion in admitting the results of Mann's blood test. *Cripps v. State*, 2016 OK CR 14, ¶ 6, __ P.3d __. An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. The State must show that the collection and analysis of blood were done in compliance with the Board of Tests for Alcohol and Drug Influence. 47 O.S.Supp.2013, § 759(B); *Westerman v. State*, 1974 OK CR 151, ¶ 11, 525 P.2d 1359, 1361-62. The State may fulfill this by showing that the tests were performed by a laboratory accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). 47 O.S.Supp.2013, § 759(B). *Westerman* held that the State's burden may be satisfied by testimony showing compliance with the regulations. *Westerman*, ¶ 11, 525 P.2d at 1362. Neither *Westerman* nor the statute requires that this determination be made at a pretrial hearing; this Court has noted that claims of error in testing affect the weight, but not the admissibility, of scientific or technical evidence. *Taylor v. State*, 1995 OK CR 10, ¶ 10, n. 13, 889 P.2d 319, 324, n.13.

The State's toxicologist testified that the OSBI laboratory was accredited by the ASCLD. This satisfies the State's burden to show that the laboratory tests were performed in compliance with 47 O.S.Supp.2013, § 759(B). The emergency medical technician who drew the blood testified that he worked in the hospital emergency room and was authorized to draw blood, and described the process he used. The

toxicologist testified at length about the kit adopted by OSBI, OSBI's accreditation with ASCLD, that the accreditation includes a review of the protocols for blood tests, and the relationship of ASCLD accreditation to Board of Tests requirements. In any case, if Mann's claims were correct, she can show no prejudice. Even if the State had not shown the blood was drawn in compliance with § 759(B), and even if ample evidence had not supported the conclusion that Mann was under the influence of some intoxicant, Mann could not prevail. She was charged in the alternative with manslaughter as either the result of driving under the influence, or speeding. The uncontroverted evidence was that Mann was driving at 85 miles per hour in a 35 mile per hour zone at the time of the collision and neither braked nor tried to avoid the crash until the final second. This proposition is denied.

We find in Proposition II that the trial court did not abuse its discretion by allowing lay opinion testimony. Admission of evidence is within the trial court's discretion. *Neloms*, 2012 OK CR 7, ¶ 25, 274 P.3d at 167. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764.

Lay witnesses may testify as to their opinions regarding a defendant's state of intoxication. *Whittmore v. State*, 1987 OK CR 192, ¶ 7, 742 P.2d 1154, 1157; *Stanfield v. State*, 1978 OK CR 34, ¶ 8, 576 P.2d 772, 774; *Britton v. State*, 1970 OK CR 31, ¶¶ 4-6, 467 P.2d 527, 528; *Templeton v. State*, 1956 OK CR 13, ¶ 14, 293 P.2d 636, 638. Mann mistakenly claims that these cases have been superseded by statute. Oklahoma law allows a witness, "qualified by knowledge, skill, experience,

training or education," to testify "in the form of an opinion or otherwise solely on the issue of impairment, but not on the issue of specific alcohol concentration level. . . ." 47 O.S.Supp.2013, § 11-902(N). The testimony may include the witness's opinion whether a defendant "was under the influence of one or more impairing substances and the category of such impairing substance or substances." 47 O.S.Supp.2013, § 11-902(N)(2). The reference to a "qualified" witness does not mean that the trial court must have qualified the witness as an expert; it is sufficient if the evidence, including trial testimony, establishes that a witness's knowledge, skill, experience, training or education supports his or her testimony. The statute also provides that a person certified as a drug recognition expert "shall be qualified" to testify that a defendant was under the influence, and to the category of impairing substances that was, in the witness' opinion, involved. 47 O.S.Supp.2013, § 11-902(N)(2). This means only that witnesses with such certification will always be qualified to give such testimony. The statute does not say that other persons, qualified as provided in subsection (N), cannot also give such testimony. To find otherwise would render that earlier qualification provision useless. We will not interpret a statute in a way that renders any of its provisions superfluous or useless. *Leftwich v. State*, 2015 OK CR 5, ¶ 15, 350 P.3d 149, 155. The provisions of § 11-902(N) reinforce and complement existing case law. One witness described her observation of Mann's eyes and disoriented behavior, explaining the facts and circumstances which led her to believe Mann was under the influence of an intoxicant. *Templeton*, 1956 OK CR 13, ¶ 14, 293 P.2d at 638. The officer's testimony about the blood kit was

properly based on his training and experience as an officer. This proposition is denied.

We find in Proposition III that the trial court did not abuse its discretion in admitting data from the air bag control module in Mann's car. *Neloms*, 2012 OK CR 7, ¶ 25, 274 P.3d at 167. This evidence was not testimonial hearsay. Where a particular person has conducted an examination or test – such as a medical examiner, or laboratory technician – for use in a criminal prosecution, and prepared a report describing that examination and its results and reaching a conclusion, the Sixth Amendment requires that a defendant have the opportunity to cross-examine the person who did the examination, reached the conclusion, and prepared the result. *See, e.g., Miller v. State,* 2013 OK CR 11, ¶¶ 105, 113, 313 P.3d 934, 971, 973-74; *Cuesta-Rodriguez v. State,* 2010 OK CR 23, ¶ 39, 241 P.3d 214, 229; *Bullcoming v. New Mexico,* 564 U.S. 647, 663-65, 131 S.Ct. 2705, 2716-17, 180 L.Ed.2d 610 (2011). Information from an air bag control module is objective data gathered by a machine. The programmers who create the programs which gather and download the data have no contact with or control over the data gathered, and reach no conclusions regarding it. The machine reaches no conclusions regarding the data. One may copy an image of the data, but cannot change or alter it. Once an airbag is deployed, the information is locked; while it might be destroyed in a crash it cannot be overwritten or deleted. One cannot cross-examine a machine. Mann could, and did, cross-examine Trooper Moser, who copied an image of the machine's data onto his laptop, drew conclusions, and wrote a report based on the data and his conclusions from it. That is all the Sixth Amendment requires; Mann

offers no cases from any jurisdiction which would support any other finding.[1] This proposition is denied.

We find in Proposition IV that the trial court did not abuse its discretion in allowing the OSBI toxicologist to testify regarding the standard therapeutic range of Oxycodone. *Marshall v. State*, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474. We first note that testimony clearly qualified the toxicologist as an expert witness and jurors were properly instructed on expert testimony. The Evidence Code does not require the trial court to formally qualify a witness as an expert, and Mann offers no authority for her insistence otherwise. 12 O.S.2011, §§ 2702-2705. Contrary to Mann's argument, the Evidence Code clearly allows an expert witness to rely on facts or data "perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." 12 O.S.2011, § 2703. Nothing in this suggests or implies that, if an expert has consulted written authorities as a resource, he is prohibited from sharing that information in giving his opinion. In fact, the statute would appear to encourage precisely that. The toxicologist consulted a treatise as well as a literature review, both items reasonably relied on by experts in that field to form opinions or inferences on the therapeutic treatment dosage of Oxycodone. 12 O.S.2011, § 2703. This proposition is denied.

DECISION

[1] As Mann admits, two courts have found that admission of crash date retrieval reports does not violate the Confrontation Clause. *See, e.g., Peterson v. State*, 129 So.3d 451, 452-53 (Fla. App. 2014); *Minnesota v. Ziegler*, 855 N.W.2d 551, 556 (Minn. App. 2014).

The Judgment and Sentence of the District Court of Canadian County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY
THE HONORABLE GARY E. MILLER, DISTRICT JUDGE

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JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR
HUDSON, J.: CONCUR