

CONCLUSION

It is the judgment of this court that Smith should be suspended from the practice of law for 6 months, effective immediately, after which period he may apply for reinstatement to the bar, provided that he has returned all fees to Johnson. Smith shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Smith is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, v.
JACOB J. DALY, APPELLANT.

___N.W.2d___

Filed November 20, 2009. No. S-08-192.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Courts: Expert Witnesses.** Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop.*, 262 Neb. 215, 631 N.W.2d 862 (2001), jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
5. ___: ___. In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might bear on a judge's gatekeeping determination. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and

publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.

6. ____: _____. A court performing a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), inquiry should not require absolute certainty. Instead, a trial court should admit expert testimony if there are good grounds for the expert's conclusion, even if there could possibly be better grounds for some alternative conclusion.
7. **Police Officers and Sheriffs: Expert Witnesses.** A law enforcement officer with the training and experience offered by "drug recognition expert" certification is sufficiently qualified to testify, based on his or her evaluation, that a suspect was under the influence of drugs.
8. **Drunk Driving: Words and Phrases.** As used in Neb. Rev. Stat. § 60-6,196 (Reissue 2008), the phrase "under the influence of alcohol or any drug" requires the ingestion of alcohol or drugs in an amount sufficient to impair to any appreciable degree the driver's ability to operate a motor vehicle in a prudent and cautious manner.
9. **Convictions: Drunk Driving: Police Officers and Sheriffs: Evidence.** Whether impairment is caused by alcohol or drugs, a conviction for driving under the influence may be sustained by either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests.
10. **Trial: Expert Witnesses: Appeal and Error.** There is no exact standard for fixing the qualifications of an expert witness, and a trial court is allowed discretion in determining whether a witness is qualified to testify as an expert. Unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
11. **Trial: Expert Witnesses.** Experts or skilled witnesses will be considered qualified if they possess special skill or knowledge respecting the subject matter involved superior to that of persons in general, so as to make the expert's formation of a judgment a fact of probative value.
12. **Trial: Rules of Evidence: Expert Witnesses.** A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field.
13. **Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under rule 403.
14. **Trial: Courts.** A trial court has broad discretion in determining how to perform its gatekeeper function.
15. **Judgments: Evidence: Presumptions: Appeal and Error.** An appellate court presumes in the absence of anything to the contrary that a trial court considered only competent and relevant evidence in rendering a decision.

16. **Constitutional Law: Pretrial Procedure.** Confrontation Clause rights are trial rights that do not extend to pretrial hearings in state proceedings.
17. **Trial: Evidence: Testimony: Proof.** Demonstrative exhibits are admissible if they supplement a witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.
18. ____: ____: ____: _____. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice.
19. **Trial: Evidence: Judgments: Appeal and Error.** A judgment will not be reversed on account of the admission or rejection of demonstrative evidence unless there has been a clear abuse of discretion.
20. **Records: Appeal and Error.** The presentation of an adequate record for appellate review is primarily the responsibility of the parties.
21. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.
22. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, and the evidence is in the record for consideration the same as other evidence.
23. **Trial: Expert Witnesses: Records: Appeal and Error.** A trial court's gatekeeping duty requires it to adequately demonstrate by specific findings on the record that it has performed that duty, because the losing party is entitled to know that the trial court has engaged in the heavy cognitive burden of determining whether the challenged testimony was relevant and reliable and to a record that allows for meaningful appellate review.
24. **Expert Witnesses: Appeal and Error.** Meaningful appellate review requires the court to explain its choices so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise.
25. **Trial: Rules of Evidence: Expert Witnesses.** A trial court adequately demonstrates that it has performed its gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination.
26. **Jurors: Appeal and Error.** The erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.
27. ____: _____. An appellate court will not reverse a conviction based on a challenge to a potential juror if that person was not ultimately included on the jury, even if the defendant was required to use a peremptory challenge to remove the person.
28. **Juror Qualifications.** The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an

- impartial jury. When that end is accomplished, there can be no just ground for complaint against the rulings of the court as to the competency of the jurors.
29. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
 30. **Trial: Motions for Mistrial: Juries.** A mistrial is not necessarily required if the resulting prejudice can be cured by an admonition to the jury.
 31. **Motions for Mistrial: Motions to Strike: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.
 32. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion.
 33. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
 34. **Motions for Mistrial: Motions to Strike: Proof.** A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial, especially when an objection or motion to strike the improper material was sustained and the jury was admonished to disregard such material.

Appeal from the District Court for Lancaster County, STEVEN D. BURNS, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Jacob J. Daly was convicted at a jury trial of, among other things, operating a motor vehicle while under the influence of marijuana.¹ The primary issue presented in this appeal is the

¹ See Neb. Rev. Stat. § 60-6,196 (Reissue 2008).

admissibility of a police officer's opinion that Daly was under the influence of drugs while operating his vehicle. We conclude that the officer's opinion was properly admitted, and we affirm Daly's convictions and sentences.

I. BACKGROUND

The vehicle Daly was driving was stopped after Lincoln police officer Christopher Monico observed Daly's car operating without a headlight. Monico smelled burnt marijuana, and he observed that Daly's eyelids were drooping and that his eyes were watery and bloodshot. Daly admitted to having smoked marijuana earlier that day and gave Monico permission to search the vehicle. Monico found, among other things, plastic bags that contained rolling paper, a small scale, and trace amounts of marijuana.

Monico summoned Officer Jesse Hilger, who had completed instruction as a "drug recognition expert" (DRE). After Hilger arrived, Monico conducted field sobriety tests. Daly's results were mixed, and Monico concluded that Daly was unable to safely operate a motor vehicle. Daly was arrested, and Hilger conducted further drug tests pursuant to standardized DRE protocol. A chemical breath test gave no indication that Daly was under the influence of alcohol, but evidence of marijuana use was found in Daly's urine.

Daly was charged by complaint with one count of driving under the influence (DUI), one count of possession of 1 ounce or less of marijuana, and one count of possession of drug paraphernalia. Daly filed a pretrial *Daubert/Schafersman*² motion to determine the admissibility of the State's opinion that Daly had been under the influence of a drug. After an extensive hearing, the county court overruled Daly's motion, and the matter proceeded to a jury trial. Hilger testified at trial to his opinion, based upon Daly's poor coordination and matrix of physical symptoms, that Daly's marijuana usage had impaired him to the point that he was unable to operate a motor vehicle

² See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

safely. Daly was convicted on all charges and appealed his DUI conviction to the district court, which affirmed the county court's judgment.

II. ASSIGNMENTS OF ERROR

Daly assigns, consolidated and restated, that the trial court erred in the following respects:

(1) Overruling his motion in limine and objection to the admissibility of Hilger's DRE testimony.

(2) Allowing, at the pretrial *Daubert/Schafersman* hearing, expert testimony from several witnesses who testified regarding the DRE protocol. Generally, Daly argues that these witnesses were not qualified to offer the testimony that the trial court accepted for purposes of the *Daubert/Schafersman* hearing.

(3) Allowing, at the pretrial *Daubert/Schafersman* hearing, several exhibits that were supporting materials for the testimony of the witnesses to whom Daly also objected.

(4) Refusing Daly's offer of the resume of Gregory Cody, and refusing to receive cross-examination testimony of Cody and Darrell Fisher, at the pretrial *Daubert/Schafersman* hearing. The trial court held a consolidated hearing relating to several DUI cases. Because the State proffered Cody's and Fisher's testimony in another case, not Daly's, the court rejected Daly's proffer of evidence relating to their testimony.

(5) Taking the State's offer of two particular exhibits under advisement, but never ruling on the offer or Daly's objections to the exhibits.

(6) Overruling Daly's motion for further "findings of fact" in association with the overruling of his motion in limine.

(7) Overruling Daly's motion to strike a juror for cause because the juror, a parole officer, was an employee of the State of Nebraska.

(8) Initially overruling his Neb. Evid. R. 404³ objection to the admission of the scale found in Daly's car then, after reconsidering the objection and excluding the evidence, denying his motion for mistrial.

³ Neb. Rev. Stat. § 27-404 (Reissue 2008).

(9) Overruling a motion for mistrial that Daly claims he made during closing argument.

(10) Overruling Daly's motion for new trial and committing cumulative error.

III. STANDARD OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.⁴ The standard for reviewing the admissibility of expert testimony is abuse of discretion.⁵ An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.⁶

IV. ANALYSIS

1. *DAUBERT/SCHAFFERSMAN* RELIABILITY OF HILGER'S DRE TESTIMONY

Daly's principal contention on appeal is that the court erred in permitting Hilger to testify that in his opinion, Daly was impaired by the use of marijuana. This contention primarily rests on two general contentions—first, that the DRE protocol is unreliable, and second, that Hilger's training and experience with the DRE protocol did not provide sufficient foundation for him to render an expert opinion. And Daly makes several other arguments about the conduct of the *Daubert/Schaffersman* hearing. We address Daly's arguments in turn.

(a) DRE Protocol

The DRE program is a nationally standardized protocol for identifying drug intoxication based upon a program first designed by the Los Angeles Police Department. The protocol is designed to identify seven different categories of drugs and the physical symptoms associated with each category. For

⁴ *State v. Edwards*, ante p. 55, 767 N.W.2d 784 (2009).

⁵ *Id.*

⁶ *Id.*

example, the behavioral symptoms associated with marijuana intoxication are

impaired attention, impaired attention spans, forgetting to do things, forgetting [things] in mid-sentence . . . ; inappropriate euphoria, such as laughing or smiling during an incident that's fairly serious; an impaired ability to divide attention, to do more than one thing at the same time, maybe concentrating on colors or lights rather than the overall environment.

Symptoms also include bloodshot eyes; an elevated heart rate; and sometimes, body tremors. Under the DRE protocol, officers are trained in a step-by-step procedure to examine various clinical or physiological indicators to determine what drugs a suspect might have used.

A field DRE examination generally involves making three determinations: first, that a person is impaired and that the impairment is not consistent with alcohol intoxication; second, the ruling in or out of medical conditions that could be responsible for the signs and symptoms; and third, what type of drug is responsible for the impairment. The process is systematic and standardized. A DRE officer uses a "face sheet" to record his or her observations—a standardized form with prepared entries for the various tests and observations the officer must perform.

The process begins with a breath alcohol test; then, if the DRE officer is not the arresting officer, the DRE officer interviews the arresting officer about the circumstances of the arrest and the suspect's behavior. The DRE officer then conducts the preliminary examination. The DRE officer checks the suspect's pulse, does an initial check of the nystagmus (involuntary jerking movements) of the eyes, and checks the suspect's pupil size. And a series of medical questions is typically asked.

Assuming that the suspect appears to be under the influence of drugs and no medical condition is present, the DRE officer proceeds to conduct an eye examination. The officer administers horizontal and vertical gaze nystagmus tests in each eye, and checks for a lack of convergence, or the eye's ability to converge on an object approaching the face. The next step is

to conduct the “divided attention” tests, composed of four different tests that are similar to familiar field sobriety tests. The suspect is asked to estimate a period of time while balancing in a particular way, perform a “walk-and-turn” or “walk-the-line” test, perform a one-leg stand test, and perform a “finger-to-nose” test.

The DRE officer then conducts a vital signs examination. The officer rechecks the suspect’s pulse and measures the suspect’s body temperature and blood pressure. Then the officer conducts a “dark room examination,” during which the suspect’s pupils are examined under different light conditions. After that, the officer uses a penlight to examine the suspect’s mouth and nose for debris, drugs, or physiological changes that can take place with repeated drug use. The next step is a check for muscle tone—the officer evaluates the suspect’s voluntary muscles to see if they are abnormally rigid or flaccid. The officer then checks for injection sites and takes the suspect’s pulse again. Finally, the examination concludes with an interview of the suspect.

When the examination is concluded, the DRE officer forms an opinion based on his or her observations. Then, the final step in the process is the use of toxicology to analyze samples taken from the suspect for the presence of drugs.

In other words, the underlying principles of the DRE protocol are basic and familiar: Gather information from the suspect and measure fundamental physical symptoms and then derive a conclusion about drug or alcohol intoxication from that data. Dr. Zenon Zuk testified for the State that the DRE protocol is based on the well-established concept that drugs cause observable signs and symptoms, affecting vital signs and changing the physiology of the body.

A 1984 study, conducted by the Johns Hopkins University School of Medicine in conjunction with the National Highway Traffic Safety Administration, concluded that under laboratory conditions, the DRE protocol

showed a high degree of accuracy in correctly identifying the drug classes which had been administered to those subjects judged to be intoxicated. Of subjects judged to be intoxicated the correct drug class was identified on 91.7%

of occasions. Overall, in 98.7% of instances of judged intoxication the subject had received some active drug. On 7% of occasions of judged intoxication the incorrect drug class was identified, and on 1.3% of occasions the subject had received no active drug

A field study conducted by the Los Angeles Police Department and the National Highway Traffic Safety Administration found that when DRE's claimed drugs other than alcohol were present, they were detected in blood tests 94 percent of the time. A study performed by the State of Minnesota from 1991 to 1993 found that at least one DRE-predicted drug category was present in 84.5 percent of cases and that the protocol for detecting cannabis intoxication was the most reliable, corroborated by toxicology in 91.8 percent of cases. And a 1994 study performed by the State of Arizona found that DRE decisions were "highly accurate" and that the DRE program, supported by the toxicology laboratory, was "a valid method for detecting and classifying drug-impaired individuals."

[4] Based largely on that data, every court to have considered the issue has concluded that testimony based upon the DRE protocol is admissible into evidence.⁷ In Nebraska, our analysis of the issue is governed by the principles announced by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and adopted by this court in *Schafersman v. Agland Coop.*⁸ Under our *Daubert/Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether

⁷ See, *U.S. v. Everett*, 972 F. Supp. 1313 (D. Nev. 1997); *State v. Baity*, 140 Wash. 2d 1, 991 P.2d 1151 (2000); *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997); *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994); *Wooten v. State*, 267 S.W.3d 289 (Tex. App. 2008); *State v. Aleman*, 145 N.M. 79, 194 P.3d 110 (N.M. App. 2008), *cert. denied* 145 N.M. 255, 195 P.3d 1267; *State v. Kanamu*, 107 Haw. 268, 112 P.3d 754 (Haw. App. 2005); *State v. Sampson*, 167 Or. App. 489, 6 P.3d 543 (2000); *Williams v. State*, 710 So. 2d 24 (Fla. App. 1998).

⁸ See, *Daubert*, *supra* note 2; *Schafersman*, *supra* note 2.

that reasoning or methodology properly can be applied to the facts in issue.⁹

[5] In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might bear on a judge's gatekeeping determination. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.¹⁰

(i) *Persuasiveness of Supporting Studies/Risk of Error*

Daly makes several arguments with respect to the reliability of the DRE protocol. His primary argument seems to be that the studies mentioned above were not peer reviewed and were methodologically flawed. Daly contends that other studies, suggesting that the DRE protocol is less reliable, were peer reviewed and used more sound methodology.

[6] To begin with, we note that although Daly attacks the credibility of the literature supporting the reliability of the DRE protocol, he cannot contest its existence.¹¹ And we have observed that a court performing a *Daubert/Schafersman* inquiry should not require absolute certainty.¹² Instead, a trial court should admit expert testimony if there are good grounds for the expert's conclusion, even if there could possibly be

⁹ *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

¹⁰ *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004). See, also, *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

¹¹ See *Sampson*, *supra* note 7.

¹² *King*, *supra* note 10.

better grounds for some alternative conclusion.¹³ And as other courts have noted, the research validating the DRE protocol has been carefully scrutinized at scientific conferences, conventions, workshops, and other forums for the exchange of ideas among those interested in the physiological consequences of drug use.¹⁴ The reason that peer-reviewed publication is valuable is that it places research in the public domain and permits evaluation and criticism. Although not always published in a peer-reviewed journal per se, DRE research has been the subject of considerable scientific scrutiny.¹⁵ As the court in *U.S. v. Everett*¹⁶ observed, “These writings began in the late 1970’s and have continued to the present. The use of the protocol and its various elements has certainly not been kept a secret nor is there evidence that its proponents have attempted to avoid the limelight.”

Nor are the studies that Daly depends upon as dispositive as he asserts. The feature of those studies upon which he relies—their blind design—has been criticized by others as a fundamental flaw in their methodology.¹⁷ Daly refers us primarily to studies conducted by Stephen J. Heishman and his colleagues from 1996 to 1998.¹⁸ Daly suggests that the Heishman studies indicated at best a 51-percent success rate for DRE accuracy and indicated a success rate of only 44 percent when alcohol-only decisions were excluded.¹⁹

But in order to make those studies “blind,” the DRE protocol was used incompletely. The DRE examiners did not question

¹³ See *id.*

¹⁴ See, *Everett*, *supra* note 7; *Aleman*, *supra* note 7.

¹⁵ See *Aleman*, *supra* note 7.

¹⁶ *Everett*, *supra* note 7, 972 F. Supp. at 1324.

¹⁷ See, *id.*; *Sampson*, *supra* note 7; *Williams*, *supra* note 7.

¹⁸ See, Stephen J. Heishman et al., *Laboratory Validation Study of Drug Evaluation and Classification Program: Alprazolam, d-Amphetamine, Codeine, and Marijuana*, 22 J. Analytical Toxicology 503 (1998); Stephen J. Heishman et al., *Laboratory Validation Study of Drug Evaluation and Classification Program: Ethanol, Cocaine, and Marijuana*, 20 J. Analytical Toxicology 468 (1996).

¹⁹ See *id.*

subjects about recent drug use, nor did they interrogate the subjects to solicit admissions about drug use. Nor was evidence from the arrest available. This means that the blind studies could not realistically predict the scientific reliability of the DRE program in the field because they examined an abbreviated evaluation that is different from the standardized protocol that is actually used.²⁰

As the *Everett* court observed, this “defies the centuries old practice of physicians to take a history of patients in connection with a physical examination.”²¹ To remove that aspect of the protocol does not provide an accurate test of the protocol itself. Simply put, the fact that suspects may admit to using drugs or may have drug paraphernalia on their persons does not make a protocol that includes those facts *less* reliable as a diagnostic tool. And more to the point, when the issue is the reliability of the complete DRE protocol as a diagnostic tool for law enforcement officers in the field, the county court did not abuse its discretion in being more persuaded by studies that actually measured the reliability of the complete protocol under field conditions.

We also note that even the 1998 Heishman study concluded that the DRE protocol “is a valid test to identify recent drug use.”²² That study also found that when DRE evaluations were inconsistent with toxicological testing, false negatives were substantially more likely than false positives, including with respect to marijuana use.²³ And even using an incomplete protocol, “DREs are able to detect drug-induced impairment in general,” even when they have difficulty discriminating between various drugs.²⁴

In other words, to the extent the Heishman studies indicate a higher rate of error than the studies relied upon by the State, that risk is mitigated by the fact that an erroneous DRE

²⁰ See *Williams*, *supra* note 7. See, also, *Everett*, *supra* note 7.

²¹ *Everett*, *supra* note 7, 972 F. Supp. at 1322.

²² Heishman et al., *supra* note 18 at 513.

²³ See *id.*

²⁴ See *id.*

evaluation will probably err on the side of the suspect.²⁵ The risk of a false *positive* is low. Any risk is mitigated further by the fact that identifying the specific drug that caused a driver's impairment is inessential—the DUI statute only requires proof that the defendant was under the influence of “any drug” and does not require the drug to be identified by the arresting officer.²⁶ And finally, we note that the final step in the DRE protocol is the use of chemical testing to confirm the officer's evaluation. In the end, it was not an abuse of discretion to conclude that the available scientific literature supported the admission of DRE-based testimony.

(ii) *General Acceptance in Scientific Community*

Daly also argues that the DRE protocol is not generally accepted in the scientific community. To support this argument, Daly contends that because the DRE protocol is a technique based upon the human body's reaction to drugs, “the relevant scientific community must include Pharmacologists, Neurologists, Toxicologists, Behavioral Research Psychologists, Forensic Specialists, and Medical Doctors concerned with the recognition of alcohol and drug intoxication.”²⁷ And Daly suggests that the DRE protocol as a whole is the single “theory or technique” that must be generally accepted.

But the DRE protocol, while based in scientific principles, is a program designed to meet the specific needs of law enforcement. The medical community would rely on toxicological testing, because medical diagnosis and treatment require neither evaluation of a patient's impairment at a particular time nor probable cause to perform a chemical test. And scientists interested in the effects of drugs on the human body would test those effects under controlled conditions, rather than collecting research subjects out of motor vehicles. In other words, the DRE program as a whole cannot be evaluated based on

²⁵ See, *Everett*, *supra* note 7; *Sampson*, *supra* note 7; *Williams*, *supra* note 7. Cf. *Aleman*, *supra* note 7.

²⁶ See, § 60-6,196; *State v. Falcon*, 260 Neb. 119, 615 N.W.2d 436 (2000).

²⁷ Brief for appellant at 35.

whether it is used in the scientific community, because it is uniquely tailored to the exigencies of law enforcement.

Instead, the relevant question is whether the tests that make up the protocol are generally accepted. In that regard, Zuk testified that each step in the DRE protocol reflected techniques that were accepted in the medical community for diagnostic purposes and were either consistent with the medical community's method of performing those examinations or based on a sound understanding of the central nervous system. And as previously noted, the entire protocol is based on the generally accepted principle that drugs affect vital signs and change the physiology of the body.

Nonetheless, Daly takes issue with several of the particular components of the DRE protocol. He argues, for instance, that nystagmus testing is an unreliable gauge of a suspect's impairment. He argues that several of the physical sobriety tests have not been proved reliable. And he takes particular issue with the examination of a suspect's mouth and nose for evidence of drug use.

We have, however, previously held that nystagmus testing is generally accepted in the relevant scientific community as an indicator of impairment, although that result standing alone is insufficient to support a conviction for DUI.²⁸ It is also within the expertise of a veteran police officer to have observed that repeated drug use can have physical manifestations such as scarring or discoloration around the mouth. And the variables that could account for anomalous results on any one aspect of the DRE examination are precisely why the protocol exists—to promote a systematic approach that considers a number of different factors.²⁹ The issue is not whether any single observation is reliable enough to be dispositive—instead, it is whether an opinion based upon all of the relevant observations is reliable enough to be admissible. And, as discussed above, the scientific literature supports the conclusion that it is.

In sum, we conclude that the county court did not abuse its discretion in concluding that the DRE protocol was a

²⁸ See *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

²⁹ See, *Everett*, *supra* note 7; *Klawitter*, *supra* note 7.

sufficiently valid methodology to support Hilger's opinion testimony.

(b) Expert Witness Testimony

Daly makes several arguments with respect to the testimony of the State's various expert witnesses. Primarily, of course, he focuses on Hilger's opinion testimony. So we begin by examining the standards for training a DRE.

(i) *Hilger's DRE Training and Opinion Testimony*

The first step in training a DRE officer is a 2-day preliminary training program, called "preschool," which prepares students for the more rigorous training to follow. DRE school itself involves 7 days of classroom instruction, including lectures on physiology and toxicology, specific training on the effects of particular drugs, hands-on exercises in implementing the DRE procedure and interpreting the results, and oral and written examinations. Finally, the certification phase of the training requires students to apply the training in real-world settings on actual suspects under the supervision of a DRE instructor. For a student to be certified, a minimum of 12 evaluations must be completed, involving at least three different categories of drug, and verified by toxicology in at least 75 percent of the cases. At least two different DRE instructors must approve and recommend the student for certification. Certification requires the student to pass a comprehensive, 3- to 4-hour final examination. And continuing education is required to maintain certification.

The record establishes that Hilger had been trained in accordance with national standards. And Hilger testified that he performed the DRE protocol as he had been trained to do. Daly does not argue on appeal that Hilger performed the protocol deficiently. Instead, Daly simply asserts that a police officer is not qualified to opine on drug intoxication, because a police officer is not a medical doctor or other expert in "drugs, the eyes, vital signs, psychomotor capabilities, symptomology of drugs, [or] human physiology."³⁰

³⁰ Brief for appellant at 30.

But in this case, Hilger was not asked to opine as to why or how Daly's use of marijuana caused symptoms of intoxication. It is well established, for instance, in the context of alcohol intoxication, that sufficient foundation may be laid for a police officer to testify to his or her opinion that a driver was under the influence of alcohol.³¹ In that context, acceptable foundation includes training to detect the physical and mental effects of alcohol, experience in doing so, and the officer's account of the procedures undertaken to evaluate the driver's intoxicated condition.³² This is because a police officer need neither explain nor know why consumption of alcohol causes certain symptoms in order to be able to identify those symptoms and reach a conclusion based upon them.

[7] Daly offers us no persuasive basis to distinguish drug intoxication, other than taking issue with the substance of the officer's training and procedures. But we conclude that a law enforcement officer with the training and experience offered by DRE certification is sufficiently qualified to testify, based on his or her evaluation, that a suspect was under the influence of drugs. Hilger had successfully completed DRE training, and his opinion was admissible.

[8,9] In a related contention, Daly claims that there is a difference between intoxication and impairment and that Hilger should not have been permitted, based on a DRE examination, to testify that Daly's ability to drive was impaired. We have said that as used in § 60-6,196, the phrase "under the influence of alcohol or any drug" requires the ingestion of alcohol or drugs in an amount sufficient to impair to any appreciable degree the driver's ability to operate a motor vehicle in a prudent and cautious manner.³³ And we have held that whether impairment is caused by alcohol or drugs, a conviction for DUI may be sustained by either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's

³¹ See, *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997); *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988).

³² See *id.*

³³ See, *Falcon*, *supra* note 26; *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991).

