No. A-23-787

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

TYLER L. FURMAN,

Appellant.

APPEAL FROM THE DISTRICT COURT OF

LANCASTER COUNTY, NEBRASKA

The Honorable Ryan Post, District Judge

BRIEF OF APPELLEE

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Statement of the Case

A. Nature of the Case

Furman is appealing from his conviction for DUI – 2nd Offense. He was found guilty of DUI after a suppression hearing followed by a jury trial in county court, after which his offense was enhanced to a second offense, and then he appealed and the district court affirmed the county court's judgment. He now appeals from the district court's judgment. This court has jurisdiction.

B. Issues Before the Lower Courts

For purposes of this appeal, the three issues before the lower courts were:

> (1) Whether to grant or deny Furman's motion to suppress, which alleged that he was unlawfully seized and arrested;
>
> (2) Whether Furman's chemical breath test result was admissible at trial; and
>
> (3) Whether an officer's testimony about the signs of impairment observed during Furman's Horizontal Gaze Nystagmus (HGN) field sobriety test was admissible at trial

C. How the Issues Were Decided in the Lower Courts

The county court resolved all three issues against Furman. It denied his motion to suppress; admitted his chemical breath test result; and admitted the testimony about the impairment observed during his HGN test. Furman appealed and the district court affirmed the county court's judgment, finding that each of Furman's claims was without merit. The evidence relevant to these three issues, and the lower courts' findings, are set forth in detail below.

D. Scope of Review

In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion. *State v. Buol*, 314 Neb. 976 (2023). When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court. *Id*.

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Elias*, 314 Neb. 494 (2023). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Id*.

In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. *State v. Simons*, 315 Neb. 415 (2023). Regarding historical facts, an appellate court reviews the trial court's findings for clear error. *Id*. Whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *Id*.

On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Lear*, 316 Neb. 14 (2024).

Propositions of Law

I.

A foundation objection is a general objection, which requires the court to engage in interpretation on appeal rather than be apprised of the real basis for the objection. *State v. Smith*, 292 Neb. 434, 449 (2016). Thus, a party may not normally complain on appeal for an overruled foundation objection unless the grounds for the exclusion are obvious without stating it. *Id.*

II.

It is generally sufficient to make a general hearsay objection to a specific statement, but a general hearsay objection to the entirety of a witness' testimony or to multiple statements in an exhibit, each admissible or objectionable under differing theories, is not usually sufficient to preserve the hearsay objection. *State v. Henry*, 292 Neb. 834, 869-870 (2016). Rather, the opponent to the evidence must identify which statements are objectionable as inadmissible hearsay. *Id.* Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objections and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal. *Id.*

III.

An objection must be specifically stated, and on appeal, a defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact. *State v. Childs*, 309 Neb. 427 (2021).

IV.

Agency regulations that are properly adopted and filed with the Secretary of State have the effect of statutory law. *Saylor v. State*, 306 Neb. 147, 154 (2020); see also Neb. Rev. Stat. § 84-902. An appellate court reviews the admission of the regulations for an abuse of discretion. See *State v. Grosshans*, 270 Neb. 660, 665 (2005).

V.

Every court of this state may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State. See Neb. Rev. Stat. § 84-906.05.

VI.

Plainly, not every police-citizen encounter rises to the level of a seizure. *State v. Lowman, supra.* A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *Id*. In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled. *Id*. A seizure does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, provided the officer does not indicate that compliance with his or her request is required. *Id*.

VII.

When reviewing a trial court's findings of fact on a motion to suppress, an appellate court does not reweigh the evidence or

resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. See *State v. Briggs*, 308 Neb. 84, 103 (2021).

VIII.

In order to seize or detain a person, an officer must have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. See *State v. Saitta*, 306 Neb. 499 (2020). Similarly, in order to detain a person for field sobriety tests, an officer must have reasonable, articulable suspicion that a motorist was driving under the influence. *State v. Lamb*, 280 Neb. 738, 747 (2010), *disapproved on other grounds by State v. Melton*, 308 Neb. 159 (2021). Reasonable suspicion entails some minimal level of objective justification for detention. *Id.* It is something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id.* Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. *Id.* In determining whether a police officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience. *State v. Saitta, supra.*

Statement of Facts

Introduction

On July 21, 2021, an off-duty UNL officer encountered a vehicle parked in the ditch in rural Lancaster County. The off-duty officer reported the situation, after which EMTs and other officers arrived, and then a DUI investigation ensued and the driver of the vehicle, Tyler Furman, was arrested for DUI. Furman moved to suppress the evidence seized, which was denied, and then a jury trial took place in

county court and he was found guilty. He appealed to the district court and the county court's judgment was affirmed. The proceedings and evidence relevant to this appeal, as well as the lower courts' findings, are summarized below.

Motion to Suppress

Furman's motion to suppress generically alleged that the warrantless stop, seizure, arrest and collection of evidence in this case was all unlawful in violation of the Nebraska and U.S. Constitutions. (T5) The county court held a hearing on the motion and the defense clarified that they were challenging the validity of the seizure and subsequent arrest of Furman. (4:1-5:11)

The evidence at the suppression hearing established that on July 21, 2021, at about 5:30 a.m., Captain Jon Backer of the UNL Police Department (UNLPD) was driving on Waverly Road in Lancaster County when he saw a silver Jeep in the ditch, parked perpendicular to the road. (6:16-21:19) Backer stopped to check on the Jeep, which was still running, and saw that the lone occupant was "slumped down" in the driver's seat and appeared to be asleep or unconscious. (*Id*.) Backer called the non-emergency line to report the incident and then waited at the scene until medical personnel and officers arrived. (*Id*.) A copy of Backer's phone call to dispatch was received into evidence. (E1)

While Backer waited for other personnel to arrive, the driver of the Jeep woke up and got out of his vehicle to speak with Backer. (6:16-21:19) Backer testified that the driver, who was later identified as Furman, smelled of alcohol and appeared disheveled and groggy when he got out of the Jeep. (*Id*.) Furman said that he must have fallen asleep and Backer told Furman that he was an off-duty officer and called for emergency crews to come check on him. (*Id*.) Backer was asked if he told Furman that he would not be allowed to leave until officers showed up and Backer replied, "I did not say that." (19:14-22) Backer was asked if he may have said something to that effect but

wasn't remembering it and Backer replied, "No, I'm very clear that I did not tell him anything about he had to stay or anything like that." (*Id*.)

Soon after that, medical personnel and other officers arrived on the scene. (93:16-103:10) The first officer to arrive, Deputy Sturdy of the Lancaster County Sheriff's Office, testified that volunteer EMTs were already there when he arrived. (*Id*.) Deputy Sturdy spoke with Furman, who smelled of alcohol and identified himself as the driver of the Jeep, and Furman said that he was on his way home from a work function and intentionally parked on the side of the road because he is "a heavy sleeper." (*Id*.) Deputy Sturdy asked Furman to have a seat in his cruiser while he spoke with the EMT's and Backer, and then additional officers arrived on the scene. (*Id*.) Deputy Sturdy testified that Furman was not under arrest at that point, he never told Furman he was under arrest, and Furman never asked to leave. (*Id*.) Sturdy's initial encounter with Furman was recorded by his cruiser video, a copy of which was received into evidence. (*Id*.; E6)

Two additional officers, Deputies Schneider and Hoggins, also arrived to assist with the situation. (22:22-48:17; 50:18-92:21) Deputies Schneider and Hoggins spoke with Furman, who was in the back of Deputy Sturdy's cruiser at that point, and they noticed that he smelled of alcohol, had red/watery eyes, and slurred speech. (*Id*.) The officers asked Furman if he had been drinking and Furman said that he was at Blue Sushi the night before and had two beers as well as two "sake bombs" (a shot containing beer and sake) and said his last drink was around 10:30 or 11:00 p.m. (22:22-39:6; E6) The officers asked Furman if he "would like to submit to some tests" to see if he was good to drive home and Furman said, "That'd be great, I need to get home." (E6 @ 11:00) The officers asked Furman if he was suffering from any medical issues, to which Furman said no, and then field sobriety tests (FSTs) were administered. (50:18-77:24) The FSTs were recorded by Deputy Hoggins' cruiser camera, a copy of which was received into evidence. (E4)

Deputy Schneider, who has been an officer since 2013 and has administered FSTs "hundreds of times," administered three FSTs: the horizontal gaze nystagmus (HGN) test, the one-leg stand test, and the walk-and-turn test. (50:18-77:24) Furman showed signs of impairment on all three tests and then a preliminary breath test (PBT) was administered, which also showed the presence of alcohol. (50:18-77:24) Deputy Schneider testified that in his opinion, based on their observations and all of the information known to them, Furman was under the influence of alcohol to the point that he was unable to safely operate a motor vehicle. (50:18-77:24) Furman was ultimately arrested for DUI and transported to Lincoln for a chemical breath test. (E4) Deputies Schneider and Hoggins also prepared police reports about the incident, copies of which were received into evidence. (E3; E5)

Furman also testified at the suppression hearing. He testified that, on the morning in question, he was asleep in his vehicle and woke up to a guy checking on him. (108:13-111:10) According to Furman, he told the guy that he was fine and was going to take off but the guy firmly responded, "You're not going anywhere" and said "I'm an officer, and I have called this in. And you're going to wait right here until respondents get here." (*Id.*) Furman acknowledged that he heard the testimony of Captain Backer, who said he never told Furman that he couldn't leave, which Furman claimed was a lie. (*Id.*)

Following the suppression hearing, the county court allowed the parties to file briefs on the motion and then it took the matter under advisement and ultimately denied the motion to suppress. (T7-11) The county court's findings can be summarized as follows:

- There was no evidence that UNLPD Officer Backer was outside of his jurisdiction given that there was no evidence on the limits of his jurisdiction, but even if he was outside of his jurisdiction, he was not relieved of his duty to preserve the peace.

- The initial encounter between UNLPD Officer Backer and Furman was a tier one encounter given that Furman's vehicle

was already parked on the side of the road and Furman was not awake when Backer arrived. To the extent there was a conflict between the testimony of Backer and Furman as to whether Backer detained Furman and prevented him from leaving after Furman woke up, the county court found Backer's testimony to be more credible.

- The Lancaster County Sheriff's Deputies had authority to detain Furman for a DUI investigation given the circumstances, their observations of Furman, and his admission to drinking.

- The Lancaster County Sheriff's Deputies had authority to arrest Furman for DUI based on the information obtained during their DUI investigation, the signs of impairment observed during FSTs, and the PBT result.

(T10-11)

Jury Trial

After Furman's motion to suppress was denied, a jury trial took place in county court. Furman renewed his motion to suppress prior to trial, which was again denied, and he was granted a continuing objection based on his motion. (139:3-10) Most of the State's evidence at trial again consisted of testimony from UNLPD Captain Backer and Deputies Sturdy, Schneider and Hoggins, whose testimony was generally cumulative of their testimony from the suppression hearing about their initial interactions with Furman on the day on the day in question, the ensuing DUI investigation, and the arrest of Furman. (225:8-231:9; 239:5-255:8; 274:15-305:25; 333:18-345:21) The noncumulative evidence adduced at trial is summarized below.

During the testimony of Deputy Sturdy, the State introduced pictures of the scene that Schneider took as part of the investigation. (274:15-299:19; E20) Deputy Sturdy explained that, as reflected by the pictures, there were tire tracks that ran across or perpendicular to the road then into the ditch where the Jeep was parked. (246:16-250:17)

He testified that the tracks went all the way up to a line of cedar trees and the Jeep had pieces of a cedar tree on the bumper, so it appeared that the Jeep went all the way up to the cedar trees and then it rolled backward and came to a stop about 10 to 12 feet from the road. (*Id.*)

During the testimony of Deputy Hoggins, the State introduced evidence about the chemical breath test that was administered in Lincoln after Furman was arrested. (333:18-345:21) Deputy Hoggins, who administered the test, testified that he has a Class B permit to operate DataMaster breath testing machines and followed all of the protocols in Title 177 when administering Furman's breath test. (*Id.*) Furman's breath test result, which was admitted over the defense's objections of foundation and relevance, reflected that he had an alcohol concentration of .125 at 7:09 a.m., about an hour and a half after he was found asleep on the side of the road in his Jeep. (*Id.*; E19; E23)

The State also adduced testimony from Kayla Puhrmann, who is a lab specialist for LPD and serves as a maintenance officer for the DataMaster machine that was used to test Furman on July 21, 2021. (156:9-217:10) She testified that the machine has been maintained in accordance with Title 177 and passed maintenance tests in April 2021 and June 2021, prior to it being used to test Furman, and it also passed a maintenance check on July 27, 2021, about a week after it was used to test Furman. (*Id.*) Puhrmann acknowledged that the DataMaster machine was taken out of service back in April 2021 due to an issue, but it was put back into service that same month and has passed all maintenance and calibration checks since then. (*Id.*) She testified that, in her opinion, the DataMaster machine has been working properly since it was put back into service and it was working properly when it was used to test Furman on July 21, 2021. (*Id.*)

After this evidence was adduced, the State rested its case and Furman moved for a directed verdict, which was denied, and then Furman call two witnesses on his behalf: Robert Belloto Jr. and Anthony Palacios. Their testimony, in summary, was as follows.

Belloto, who is a pharmacist in Ohio and does consulting work on the side, testified that the DataMaster chemical breath test result obtained from Furman in this case was not reliable. (366:4-389:17) According Belloto, for a DataMaster breath test to be reliable, at least two tests should be administered so that the result can be analyzed for consistencies or variances, which was not done here, so the test result is unreliable. (*Id.*) He also claimed that the test result was unreliable because the graph of the test result was a straight line up followed by a few downslopes, which indicates a problem with the machine's reading and likely suggests that the beath sample was contaminated by reflux. (*Id.*) On cross examination, however, Belloto acknowledged that obtaining one test result comports with Nebraska's protocols for chemical breath tests. (380:17-389:17) He also acknowledged that a person would typically have no reflux issues if their stomach has gone through the emptying process, which usually takes about 3 ½ hours, so the stomach should be empty and any reflux would be dissipated when, as in this case, more than 6 hours has passed between the time the person reportedly last drank or ate and the time they were tested. (*Id.*)

Palacios, who is a former law enforcement officer, lives in Georgia and now does DUI training and consultation work in DUI cases. (401:14-437:4) He testified that he reviewed the videos of the DUI investigation in this case and could not confirm or deny the fact that Furman smelled of alcohol and had bloodshot eyes, because he was only reviewing videos, but from his review of the videos there was not enough evidence to conclude that Furman was impaired. (*Id.*) According to Palacios, Furman did not exhibit slurred speech, his mental and physical faculties were good, and the FSTs did not establish impairment. (*Id.*) As far as the FSTs, he testified that the HGN results were not valid because that test was not properly administered, there were no signs of impairment on the one-legged stand, and there were a few signs of impairment on the walk-and-turn test but that test is less reliable than other FSTs and was insufficient to establish impairment here. (*Id.*) Palacios acknowledged, however, that his opinion was based solely on the videos, that he did not

personally observe Furman during the DUI investigation, that he did not personally speak to any of the officers involved in this case, and that someone who is intoxicated can physically function properly. (*Id*.)

Following this evidence, the case was submitted to the jury and Furman was found guilty of DUI. (487:23-488:17) An enhancement hearing was held and the DUI was found to be a second offense. (T19) The county court sentenced Furman to 60 days in jail, a $500 fine, and an 18-month revocation of his driver's license. (T19)

Appeal to District Court

Furman perfected a timely appeal with the district court and raised five errors on appeal, which presented three overarching claims. (T25; T33) His three overarching claims, summarized and restated, alleged that:

> 1. The county court erred by admitting his chemical test result because (a) the copy of Title 177 admitted at trial was hearsay and lacked sufficient foundation given that it was not certified, and (b) the State failed to prove that the chemical test result was obtained in accordance with the methods approved by the Department of Health and Human Services.
>
> 2. The county court erred by overruling his motion to suppress, which should have been sustained because (a) Furman was seized by an officer who was outside of his primary jurisdiction, (b) the seizure of Furman was not justified by reasonable suspicion, (c) the field sobriety tests (FSTs) were not justified by reasonable suspicion, and (d) the arrest of Furman was not supported by probable cause.
>
> 3. The county court erred by allowing an officer to give opinion testimony at trial that a person who is not impaired will not have Horizontal Gaze Nystagmus (HGN).

(T33)

The district court held a hearing on the appeal and then took the matter under advisement and affirmed the county court's judgment. (T36-51) On the three overarching claims presented, the district court found that:

- Furman's chemical breath test result was properly admitted at trial. As far as Furman's assertion that Title 177 (Exhibit 14) was improperly admitted over his hearsay and foundation objections, he failed to sufficiently present and preserve this claim at trial because his general "hearsay" and "foundation" objections did not alert the county court to or obtain a ruling on the alleged certification problem with the copy of Title 177 received at trial, but in any event, the document was self-authenticating under § 27-902(5) and was therefore properly admitted over such objections. As far as Furman's assertion that his breath test was not shown to have been obtained in accordance with the current methods approved by DHHS because the copy of Title 177 admitted at trial is not current, this assertion is without merit because the version of Title 177 admitted at trial does contain the current methods and lists the DataMaster as an approved device for chemical breath tests.

- Furman's motion to suppress was properly denied. There was nothing unlawful about the initial contact between Furman and UNLPD Captain Backer because, even if Back was outside his jurisdiction, this interaction did not amount to a seizure and did not implicate the Fourth Amendment. There was nothing unlawful about the detention or the administration of the FSTs when the deputy sheriffs arrived because there was reasonable suspicion to conduct a DUI investigation. And there was nothing unlawful about Furman's arrest because there was probable cause to believe he operated a motor vehicle while under the influence given the circumstances, the information obtained during the DUI investigation, and the signs of impairment observed on the FSTs.

> ▪ The officer's testimony about HGN was properly admitted. The officer did not necessarily opine that the presence of HGN "equates to impairment," as Furman suggest, but even if such an opinion had been given it is generally permissible pursuant to *State v. Baue*, 258 Neb. 968 (2000), which held that when the HGN test is given in conjunction with other field sobriety tests, "the results are admissible for the limited purpose of establishing that a person has an impairment which may be caused by alcohol."

(T36-51)

This appeal followed.

Argument

Furman assigns five errors on appeal to this court, which are the same five errors (and three overarching claims) that he presented in his appeal to the district court. See Appellant's Brief at 5-6, 12-29. Each of his claims is without merit. The State, like the district court, will address Furman's claims as three overarching claims.

I. Admission of Furman's chemical breath test result

Furman's first overarching claim alleges the county court erred by admitting his chemical breath test result at trial, and relatedly, the district court erred on appeal by not finding error on this claim. Furman argues, as he did before the district court, that his chemical breath test should have been excluded at trial because the State was required to introduce a valid copy of Title 177, which is a foundational requirement for the admission of a chemical test, and in this case the copy of Title 177 (Exhibit 14) introduced at trial was not valid because it was not shown to be current or certified, So, according to Furman, his chemical breath test should not have been received into evidence. See Appellant's Brief at 5, 13-16. The State disagrees.

As an initial matter, as with the district court, the State questions whether Furman's objections to Exhibit 14 were specific enough to sufficiently raise this claim and preserve it for appeal. When the State introduced Title 177 at trial, it was offered during the testimony of Kayla Puhrmann, one of the maintenance officers for the DataMaster machine in question. (164:11-165:5) The State offered Title 177 as part of a group of exhibits, Exhibits 14 through 18, which included Title 177 (Exhibit 14), the Class B permit for Puhrmann (Exhibit 15), a DHHS form designating Puhrmann as a maintenance officer (Exhibit 16), a DHHS Certification of Accuracy form for the DataMaster machine in question (Exhibit 17), and a Certificate of Analysis for the simulator solution used to maintain the DataMaster machine in question (Exhibit 18). When this group of exhibits was offered, Furman's counsel stated, "Objection: foundation, hearsay." (164:20) The county court overruled Furman's objection with respect to Exhibits 14 and 15 but sustained his foundational objection to Exhibits 16 through 18 and required the State to lay additional foundation and then those were admitted as well. (164:21-179:12) There were no further objections, rulings or discussions on the copy of Title 177 in Exhibit 14.

As our case law explains, a foundation objection is a general objection, which requires the court to engage in interpretation on appeal rather than be apprised of the real basis for the objection. *State v. Smith*, 292 Neb. 434, 449 (2016). Thus, a party may not normally complain on appeal for an overruled foundation objection unless the grounds for the exclusion are obvious without stating it. *Id.*

Similarly, in the context of hearsay objections, our case law explains that it is generally sufficient to make a general hearsay objection to a specific statement, but a general hearsay objection to the entirety of a witness' testimony or to multiple statements in an exhibit, each admissible or objectionable under differing theories, is not usually sufficient to preserve the hearsay objection. *State v. Henry*, 292 Neb. 834, 869-870 (2016). Rather, the opponent to the evidence must

identify which statements are objectionable as inadmissible hearsay. *Id*. Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objections and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal. *Id*.

Here, as the record reflects, Furman raised the same general hearsay and foundation objection to five different exhibits and never specified or elaborated on his objections to Title 177. In other words, as the district court put it, he "did not even alert the county court to the certification issue he raises on appeal." (T42-43) The State agrees. Especially when, even on appeal to this court, his argument is not entirely clear and he vacillates between arguing that the State's copy of Title 177 was inadmissible because it was hearsay, it lacked sufficient foundation, and it was not properly authenticated. None of these arguments were presented below. Therefore, the State agrees with the district court's conclusion that Furman's claim regarding the alleged lack of certification was not sufficiently raised or preserved below. See *State v. Childs*, 309 Neb. 427 (2021) (An objection must be specifically stated, and on appeal, a defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact.).

In any event, though, even if this claim had been raised and preserved below, there was nothing improper with the admission of the copy of Title 177 in Exhibit 14. The only dispute here – whether its in the context of hearsay, foundation or authentication – is whether the copy of Title 177 is properly certified. See Appellant's Brief at 13-16. The State submits that it is.

Agency regulations that are properly adopted and filed with the Secretary of State have the effect of statutory law. *Saylor v. State*, 306 Neb. 147, 154 (2020); see also Neb. Rev. Stat. § 84-902. An appellate court reviews the admission of the regulations for an abuse of discretion. See *State v. Grosshans*, 270 Neb. 660, 665 (2005).

In this case, the copy of Title 177 received into evidence at trial contains several official stamps and signatures. The first and last page of the document have a stamp dated March 23, 2016 which states "Approved by Douglas J. Peterson Attorney General" and contains a signature of an Assistant Attorney General. (E14, pp.1, 13) The first and last page of the document also have a stamp dated June 14, 2016 which states "Approved" and contains the signature of Governor Pete Ricketts. (E14, pp.1, 13) The first and last page of the document also have a stamp dated June 14, 2016, and while the text of the stamp is either faded or did not copy well when the exhibit was scanned, the stamp appears to say "FILED" and is presumably a file-stamp from the Nebraska Secretary of State. (E14, pp.1,13) The last page of the document also states: "These Amended Regulations Replace Title 177, Chapter 1, Rules and Regulations Relating to Analyses for Determination of the Alcohol Content in Blood or Breath, last effective date May 4, 2014." (E14, p.13) Additionally, while testifying at trial, Puhrmann was shown a copy of Title 177 in Exhibit 14 and she confirmed that it is a fair and accurate copy of the rules approved by the Governor and the Attorney General. (163:5-10; 180:1-16) This was sufficient to establish that the copy of Title 177 in Exhibit 14 is a certified copy of the rules. Especially when, as the district court noted, such documents are self-authenticating under Neb. Rev. Stat. § 27-902. (T43)

Moreover, as a matter of completeness, the State notes that a copy of Title 177 is not actually required in a DUI case because it's a public regulation and is subject to judicial notice. By statute, "*[e]very court of this state* may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State." See Neb. Rev. Stat. § 84-906.05 (emphasis added). This means that a court may take judicial notice of Title 177 when it's necessary or relevant. Indeed, Title 177 has been judicially noticed by our trial and appellate courts in several prior cases. See e.g., *Morrissey v. Dep't of Motor Vehicles*, 264 Neb. 456, 460 (2002), *disapproved of on other grounds by Hahn v. Neth*, 270 Neb. 164 (2005); *State v. Pester*, No. A-17-779,

2018 WL 2768952 (Neb. Ct. App. 2018), *review denied* (July 19, 2018); *Porter v. Neth*, No. A-04-1386, 2006 WL 1319396 (Neb. Ct. App. 2006). So, contrary to Furman's assertion, the State's exhibit containing a copy of Title 177 was not a "necessary foundational requirement" to the admissibility of his chemical breath test result.

In sum, the county court did not err by admitting Furman's chemical breath test result at trial and the district court did not err by finding no error on this claim. Furman has failed to show otherwise. His first overarching claim is without merit.

II. Denial of Furman's motion to suppress

Furman's second overarching claim alleges that the county court erred by denying his motion to suppress, and relatedly, that the district court erred on appeal by not finding error on this claim. Furman argues, as he did before the district court, that the county court should have granted his motion to suppress because (A) UNLPD Captain Backer was outside his primary jurisdiction and had no authority for the initial seizure of Furman, and (B) the officers lacked reasonable suspicion to detain Furman or conduct field sobriety tests. See Appellant's Brief at 5-6, 16-27. The State disagrees.

A. Validity of the initial contact with Furman

Furman maintains that he was unlawfully seized by Backer, who was outside his jurisdictional limits as an officer and had no authority to seize Furman under § 29-215. So, according to Furman, the initial seizure was unlawful and any evidence obtained as a result of that seizure and the subsequent investigation should have been suppressed as fruit of the poisonous tree. Appellant's Brief at 16-20. This claim is without merit because, as the lower courts concluded, the initial interaction between Backer and Furman was not a seizure and did not implicate the Fourth Amendment.

Under Nebraska and federal law, there are three tiers of police-citizen encounters in the context of the Fourth Amendment:

> The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection.
>
> The second tier, the investigatory stop, as defined by the U.S. Supreme Court in *Terry v. Ohio*, is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a seizure sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime.
>
> The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.

State v. Lowman, 308 Neb. 482 (2021).

Plainly, not every police-citizen encounter rises to the level of a seizure. *State v. Lowman, supra*. A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *Id*. In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled. *Id*. A seizure

does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, provided the officer does not indicate that compliance with his or her request is required. *Id.*

Here, as the record reflects, Furman was parked in a ditch and was not awake when Backer arrived. (6:16-19:22) Backer, who was in plain clothes and was not in a police cruiser, walked up to Furman's vehicle to speak with him but Furman appeared to be asleep or unconscious, so Backer called the non-emergency line for assistance and then waited for officers and EMTs to arrive. (*Id.*) Furman eventually woke up and got out of his Jeep to speak with Backer, who told Furman that he was an officer and called for emergency crews to come check on him, but Backer unequivocally testified that he never told Furman he was not free to leave or anything to that effect. (*Id.*) This was a tier one encounter, as the lower courts concluded, so there was no seizure and the Fourth Amendment was not implicated.

Furman argues that this was a tier two encounter because, per his own testimony at the suppression hearing, Backer told Furman that other officers were on their way and Furman was not free to leave. Appellant's Brief at 16-20. But Furman's testimony obviously conflicted with Backer's and the county court expressly addressed this conflict and found that Backer's testimony was more credible. (T10) Furman has not shown that this finding of fact was clearly erroneous. Especially when it is well established that, when reviewing a trial court's findings of fact on a motion to suppress, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. See *State v. Briggs*, 308 Neb. 84, 103 (2021). This principle, and the record before us, refutes Furman's assertion that he was seized by Backer.

Furman's motion to suppress was properly denied on this claim. His argument to the contrary is without merit.

B. Validity of the subsequent seizure and FSTs

Furman also maintains that when the Lancaster County Sheriff's Deputies arrived, he was unlawfully seized because the officers lacked reasonable suspicion to detain him or conduct FSTs. See Appellant's Brief at 6, 21-27. This claim is also without merit. The officers had reasonable suspicion to do both.

As a preliminary matter, before addressing this claim, the State notes that Furman devotes a significant portion of his brief to arguing that he was effectively arrested when the deputies arrived and he was placed into a police cruiser. He claims that this amounted to an arrest, not just a detention, which was unlawful because the officers lacked probable cause to arrest him at that point. Appellant's Brief at 21-26. This claim is not properly before this court because it was not presented to or addressed by the county court, nor has it been assigned as error on appeal. See *State v. Hammond*, 315 Neb. 362, 375 (2023) (declining to address a Fourth Amendment claim raised for the first time on appeal because it was not presented to the trial court or assigned as error on appeal). The only claims that Furman has *assigned and argued* on this issue are that the officers lacked authority to "seize [him] and place him in the patrol car" and then subsequently request him to do FSTs. See Appellant's Brief at 6. Those are the only claims properly before this court, so the State will limit our response to those claims. See *State v. Hammond, supra* (an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court).

In order to seize or detain a person, an officer must have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. See *State v. Saitta*, 306 Neb. 499 (2020). Relatedly, in order to detain a person for field sobriety tests, an officer must have reasonable, articulable suspicion that a motorist was driving under the influence. *State v. Lamb*, 280 Neb. 738, 747 (2010), *disapproved on other grounds by State v. Melton*, 308 Neb. 159 (2021). Reasonable suspicion entails some minimal level

of objective justification for detention. *Id.* It is something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id.* Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. *Id.* In determining whether a police officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience. *State v. Saitta, supra.*

Here, as the record reflects, there was ample evidence which justified the detention of Furman and the administration of FSTs. He was found parked in the ditch with his vehicle running; he was asleep or unconscious when Backer arrived; the tire tracks showed that he drove perpendicular across the road and then went into the ditch and up to or into the trees; he had bloodshot eyes and smelled of alcohol; and he admitted he was drinking at a work function the night before. This evidence, viewed collectively, provided reasonable suspicion to believe that he operated a motor vehicle while under the influence. The detention and FSTs were clearly lawful.

Furman's motion to suppress was properly denied on this claim. His argument to the contrary is without merit.

In sum, the county court did not err by denying Furman's motion to suppress and the district court did not err by finding no error on this claim. Furman's second overarching claim is without merit.

III. Admission of HGN testimony

Furman's third overarching claim alleges that the county court erred by overruling his objection at trial to testimony that the presence of HGN "equates to impairment," and relatedly, the district court erred on appeal by not finding error with this claim. Furman claims that this testimony was improper under *State v. Baue*, 258 Neb 968 (2000), so the county court should have sustained his objection and excluded this at trial. See Appellant's Brief at 6, 28-29. The State disagrees.

This evidence was admissible under *Baue*, so Furman's objection was properly overruled.

Years ago, in *State v. Borchardt*, 224 Neb. 47 (1986), the Nebraska Supreme Court addressed the admissibility of HGN tests in a DUI trial and held that such evidence was not admissible because there was no evidence the test was valid, i.e., "that it in fact reveals the presence of intoxication." See *Borchardt* at 58-59. The court revisited this issue in *State v. Baue, supra* and held that HGN results satisfy the scientific standards set forth in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), explaining that:

> Based upon our review of the evidence adduced at the pretrial hearing, we conclude that the basic scientific principle upon which the HGN field sobriety test is based, i.e., that alcohol consumption causes nystagmus, is generally accepted in the relevant scientific community. However, in light of evidence in the record that nystagmus can be caused by factors other than alcohol and that intoxication cannot be established by the HGN test alone, we agree with other courts which have placed limitations upon the purposes for which HGN test results are admissible. Accordingly, we hold that the HGN field sobriety test meets the *Frye* standard for acceptance in the relevant scientific communities, and when the test is given in conjunction with other field sobriety tests, the results are admissible for the limited purpose of establishing that a person has an impairment which may be caused by alcohol. *State v. Borchardt,* 224 Neb. 47, 395 N.W.2d 551 (1986), is overruled to the extent that it is inconsistent with this holding.

State v. Baue, *supra*, at 985 (internal citations omitted).

Baue went on to explain that, as long as sufficient foundation is laid, a police officer may testify to the results of HGN testing if it is shown that the officer has been adequately trained in the administration and assessment of the HGN test and has conducted the

testing and assessment in accordance with that training. *Id*. at 987. *Baue* reiterated, however, that "while an HGN test result is relevant to show that an individual is impaired, such a result, standing alone, is insufficient to prove the offense of DUI as defined by § 60–6,196 beyond a reasonable doubt." *Id*. at 985.

Here, as in *Baue*, the HGN test was administered in conjunction with other field sobriety tests and there was sufficient foundation to admit the HGN results. Deputy Schneider, who administered each of the field sobriety tests, testified that he has been an officer since 2013, he is trained in DUI enforcement and the administration of FSTs, including the HGN test, and he has personally administered FSTs "[w]ell over 500 times" (274:16-285:8) He testified that, in this case, he administered the HGN in accordance with his training and the standardized procedure established by the National Highway Traffic Safety Administration. (285:9-291:12) The test is designed to detect "nystagmus," he explained, which is "the inadvertent bouncing of someone's eyes under the influence of a depressant such as alcoholic beverage." (*Id*.) He explained the process for administering the test, which he followed in this case, and testified that he observed 6 out of 6 clues of impairment in Furman. (*Id*.) He then went on to administer two additional FSTs, the one-leg stand and the walk-and-turn test, and Furman showed signs of impairment on those as well. (291:13-298:14) Deputy Schneider opined that, based on his experience and all of his observations, Furman was under the influence of alcohol to the point that he was unable to safely operate a motor vehicle. (298:15-22) All of this evidence, including the HGN test and Schneider's opinion, was admissible under *Baue* and was properly admitted at trial.

Furman does not take issue with Deputy Schneider's qualifications to administer FSTs or that there was sufficient foundation for his opinion, but maintains that Schneider's testimony was improper because *Baue* precludes testimony which equates HGN to impairment. Furman argues that, "[w]hen the HGN is properly administered, there are no indicators of impairment, but only the

results that go into the opinion of possible impairment. Any opinion that states the presence of HGN establishes impairment is improper." See Appellant's Brief at 28. But this is not what *Baue* says or suggests. *Baue* clearly and unequivocally says that, if there is sufficient foundation for the HGN results and the test was administered in conjunction with other FSTs, the HGN results "are admissible for the limited purpose of establishing that a person has an impairment which may be caused by alcohol." See *id*. at 985. All of this occurred here, which complied with *Baue*. Furman has failed to show otherwise.

In sum, the county court did not err by admitting the HGN results and the district court did not err by finding no error on this claim. Furman's third overarching claim is without merit.

Conclusion

For the reasons above, the State requests that this court affirm the judgment of the district court.

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Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 8,269 words, excluding this certificate. This brief was created using Word Microsoft 365.

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Certificate of Service

I hereby certify that on Thursday, March 21, 2024 I provided a true and correct copy of this *Brief of Appellee State of NE* to the following:

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