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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-995

Filed: 6 June 2017

Wake County, No. 13 CRS 224736

STATE OF NORTH CAROLINA

v.

CHARLES ROBERT YOUNG

Appeal by defendant from judgment entered 17 February 2016 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 8 May 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.*

*Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.*

ZACHARY, Judge.

Charles Robert Young (“defendant”) appeals from a judgment entered upon his conviction for driving while impaired. Defendant argues on appeal that the trial court committed reversible error by admitting certain testimony during cross-examination of defendant. We conclude that defendant’s argument lacks merit and that defendant

is not entitled to relief on appeal. Because defendant has raised no other challenges to his conviction, we find no error in the conviction or judgment.

I. Factual and Procedural Background

On 8 October 2013, defendant was charged with driving while impaired. Defendant pleaded guilty in District Court and appealed to Superior Court for a trial *de novo*. At trial, Lieutenant Steven Bailey of the Knightdale Police Department testified that on the night of 7 October 2013 he was on patrol in Knightdale. At around 11:00 p.m., Lieutenant Bailey was following a vehicle that had only one operational headlight. The vehicle stopped in the parking lot of a gas station and defendant, the driver of the vehicle, got out and started walking toward the gas station. Officer Bailey called to defendant that he had a headlight out. When Defendant walked toward Officer Bailey to discuss the defective headlight, Officer Bailey noticed a moderate to strong odor of alcohol on defendant's breath. Defendant also had red, glassy eyes and somewhat slurred speech.

Officer Bailey advised defendant that he could smell alcohol. Defendant admitted to drinking one beer. Officer Bailey asked defendant to perform several field sobriety tests and administered a portable breath test, which was positive for the presence of alcohol. Based on his observations of defendant and on the results of the field sobriety tests, Officer Bailey arrested defendant and charged him with driving while impaired. Defendant was transported to the law enforcement center,

where an intoxilyzer test showed defendant's blood alcohol concentration ("BAC") to be 0.09.

Defendant testified that he had consumed one beer on the night of the offense, but did not believe that his blood alcohol level had been above the "legal limit" of .08. On cross-examination, defendant acknowledged that the intoxilyzer test results showed his blood alcohol level to be .09. On 17 February 2016, the jury found defendant guilty of driving while impaired. The superior court sentenced defendant to a suspended term of 12 months and placed him on probation for 18 months. Defendant appeals.

## II. Cross-examination of Defendant

On direct examination, defendant's counsel asked defendant the following questions:

DEFENSE COUNSEL: Back on October 7, 2013, you had had a drink, hadn't you?

DEFENDANT: Yes.

. . .

DEFENSE COUNSEL: Did you believe you had had enough that you were going to have your alcohol concentration in your body *above the legal limit*?

DEFENDANT: No.

. . .

Q. Do you believe you could tell if you were *over the*

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*legal limit or under the legal limit?*

A. Yes.

Q. And by that night, on October 7, do you believe you were *over or under that legal limit?*

A. Under.

(emphasis added). Defendant's sole argument on appeal is that the trial court erred by allowing the following cross-examination of defendant:

PROSECUTOR: And [your attorney] asked you if you believed that you were over the legal limit. Do you remember him asking you that?

DEFENDANT: Yes.

PROSECUTOR: Okay. And in your opinion, you didn't think that you were over the legal limit; correct?

DEFENDANT: Correct.

PROSECUTOR: But, in fact, you did blow a .09 so that would mean you were over the legal limit; correct?

DEFENSE COUNSEL: Objection. He's stating that the evidence means something, which is in the purview of the jury to find whether it means that or not.

THE COURT: Well, that objection will be overruled. . . . You can go ahead and ask your question.

PROSECUTOR: So, in fact, you were over the legal limit because you blew a .09; correct?

DEFENDANT: Correct. . . .

Defendant argues that by asking whether he was over the “legal limit,” the State introduced improper testimony which invaded the province of the jury. We are not persuaded.

N.C. Gen. Stat. § 20-138.1(a)(1)-(2) (2015) provides, in relevant part, that a person commits the offense of impaired driving if he or she drives “(1) [w]hile under the influence of an impairing substance; or (2) [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration[.]”

Defendant contends that the “State’s case rested entirely on convincing the jury that the Intoxilyzer test was accurate” and that the prosecutor’s questions, which elicited an admission from defendant that the Intoxilyzer test showed him to have a BAC of .09, prejudiced defendant. However, defendant has not advanced any argument in support of his assertion that the cross-examination of defendant had any bearing on the accuracy of the test results. We also note that the State introduced other evidence of defendant’s impairment in addition to the Intoxilyzer results, including the officer’s observation that defendant had an odor of alcohol, slurred speech, and that his eyes were red and glassy.

Moreover, even assuming, *arguendo*, that it would have been improper in other circumstances for the prosecutor to use the phrase “legal limit” in his cross-

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examination of defendant about the results of the Intoxilyzer test, in the present case the record establishes that defendant opened the door to the State's questions. As discussed above, on direct examination defendant's counsel asked defendant a number of questions about defendant's belief that his BAC was below "the legal limit." By eliciting this testimony regarding the legal limit on direct examination, defendant opened the door to the State's line of questioning on cross-examination regarding whether defendant was over the legal limit:

North Carolina has long recognized in trial practice a doctrine known as opening the door. . . . [I]f one party without objection first introduces certain testimony the door is opened and he cannot later complain of the other party's similar evidence. . . . [The] party who opens up an improper subject is held to be estopped to object to its further development or to have waived his right to do so.

*State v. Reavis*, 207 N.C. App. 218, 226, 700 S.E.2d 33, 39 (2010) (internal quotation omitted). Indeed, immediately prior to the objected-to question, the State asked virtually the same questions asked by defense counsel. Therefore, defendant cannot now complain that the State's use of the term "legal limit" usurped the role of the judge and jury. Accordingly, we find that the trial court did not err in overruling defendant's objection.

NO ERROR.

Judges BRYANT and DAVIS concur.

Report per Rule 30(e).