IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1111

Filed: 17 July 2018

Cabarrus County, No. 13CRS053341

STATE OF NORTH CAROLINA

v.

SONYA ALEASE WADE, Defendant.

Appeal by Defendant from judgment entered 10 April 2017 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for the Defendant.

DILLON, Judge.

Sonya Alease Wade ("Defendant") appeals from the trial court's judgment entering a jury verdict finding her guilty of driving while intoxicated ("DWI"). Defendant alleges that the trial court allowed a witness to provide expert testimony containing an erroneous legal opinion. After careful review, we hold the trial court did not err.

I. Background

This case arises out of a traffic stop in Midland. The evidence at trial tended to show as follows:

Around 2:00 a.m. on 14 July 2013, an officer noticed a dark-colored Acura "weaving within its lane of travel" on the highway. He then saw the Acura "start crossing over the center line with both of the driver[-]side tires crossing the line in addition to the side mirror of the vehicle." The officer initiated a traffic stop.

As he approached the vehicle, the officer saw several people inside, including Defendant in the driver's seat, three girls under the age of eighteen (18), and an unrestrained toddler in the back seat. The officer initially issued Defendant a citation for driving with an unrestrained toddler in the car. When the officer asked Defendant to step out of the vehicle to receive the citation, he noticed a strong odor of alcohol. Defendant acknowledged having consumed some alcohol at her cousin's house "about an hour" before she began driving. The officer performed standard field sobriety tests and subsequently arrested Defendant for DWI.

A superior court jury found Defendant guilty of DWI, and Defendant stipulated to the grossly aggravating factor that she committed the offense with a child under 18 years of age in the vehicle. Defendant timely appealed.

II. Analysis

Defendant contends the trial court committed error, or plain error, by allowing into evidence a portion of a written report by an expert witness, Mr. Glover, in which he proffers an "erroneous *legal opinion*" outside of his area of expertise. (Emphasis added). Specifically, Defendant excepts to certain statements in the written report that "[the North Carolina Court of Appeals] has determined that 0.0165 grams of alcohol per hour is a reasonable elimination rate to use in retrograde extrapolation" as a matter of law. Defendant points to two sentences in the nine-page report which claim this legal standard, maintaining that such standard is nonexistent. *But see State v. Turbyfill*, 243 N.C. App. 183, 194, 776 S.E.2d 249, 257 (2015) (stating "that the conservative alcohol elimination rate of 0.0165 has been reliably used in North Carolina for decades").

Assuming it was error for the trial court to admit these statements contained in the report and that Defendant sufficiently preserved her argument on appeal by properly objecting, we hold that the error did not rise to the level of prejudicial error in this case for the reasons stated below.

We note that Defendant does not contend the entirety of the report was inadmissible, merely two offending sentences that were not mentioned by Mr. Glover or otherwise called to the attention of the jury or the trial court. Although the report was published to the jury, the transcript reflects that jurors reviewed the document

only briefly at the conclusion of Mr. Glover's direct examination and after receiving the following limiting instruction:

> Ladies and gentlemen, in just a moment you're going to be given a report. The beginning of this report says, "facts and data." The facts and data in this first paragraph is [sic] not admitted for the truth of the matter asserted. You're going to have to determine what the facts are in the case. This is being admitted to demonstrate . . . part of the information this witness relied on as an expert in forming his opinion in this case.

Neither party questioned Mr. Glover about the report while it was in the jury's possession. On this record, we conclude that it is not reasonably possible that the challenged passages in the written report had any effect on the jury's verdict.

Further, in addition to explaining the scientific basis for applying an elimination rate of 0.0165 BAC per hour, a rate he described as "certainly conservative and . . . realistic," Mr. Glover provided the jury a range of retrograde extrapolation results using elimination rates as high as 0.0250 and as low as 0.0100. Even using the low end rate of 0.0100 BAC per hour, Mr. Glover calculated Defendant's BAC at the relevant time as 0.10, above the statutory threshold of 0.08 for DWI. *See* N.C. Gen. Stat. § 20-138.1(a)(2) (2017).

Also, the record shows that the officer who initiated the traffic stop testified that he observed Defendant's Acura weave across the center line of the highway "two or three times" in a span of three miles; that the Acura "stopped just off the roadway," rather than turning onto an available side road; and that he discovered a strong odor

of alcohol when Defendant got out of the vehicle. Defendant admitted to the officer and in her testimony at trial that she had consumed three glasses of "[three] ounces or maybe [four] ounces of wine," the latest around an hour before the traffic stop. Based on these observations, the officer formed the opinion that Defendant's faculties were appreciably impaired by alcohol.

Given the officer's independently derived opinion of Defendant's impairment, *see* N.C. Gen. Stat. § 20-138.1(a)(1), and the other evidence before the jury cited above, we conclude that Defendant has failed to show prejudicial error.

NO ERROR.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).