IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-852

Filed: 20 August 2019

Buncombe County, No. 17CRS084185

STATE OF NORTH CAROLINA

v.

CECIL DEWAYNE MCANINCH, Defendant.

Appeal by defendant from judgment entered 15 November 2017 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 14 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Ryan Zellar and Special Deputy Attorney General Daniel P. O'Brien, for the State.

Sarah Holladay for defendant-appellant.

BERGER, Judge.

On November 15, 2017, a Buncombe County jury found Cecil Dewayne McAninch ("Defendant") guilty of driving while impaired. On appeal, Defendant argues that the trial court erred by (1) allowing a lay witness to testify regarding Defendant's medical condition, and (2) expressing an impermissible opinion in response to a jury question. We disagree.

Factual and Procedural Background

On April 15, 2017, Trooper Richard M. Lancaster ("Trooper Lancaster") of the North Carolina State Highway Patrol reported to the parking lot of a Dollar General store. Upon arrival, Trooper Lancaster noticed a moped facing towards an exit of the parking lot and that Defendant was lying beside the moped. When Trooper Lancaster approached the moped, he observed a strong odor of gasoline, and "a strong odor of alcohol coming from [Defendant]." Trooper Lancaster also noticed that Defendant "had red glassy eyes," and that he had "slurred speech" and a "thick tongue" when he responded to questions.

Defendant admitted to Trooper Lancaster that "he had been drinking Vodka all morning" at his house, left his house on his moped, stopped at a gas station—where he spilled gasoline on his pants—and then drove to the Dollar General. Defendant was attempting to leave the Dollar General parking lot when he fell off his moped. Trooper Lancaster testified that he found a half-full bottle of Vodka under the driver's seat. His visual observation of the moped revealed that it was operable and that everything was intact. Trooper Lancaster did not observe any cuts, scrapes, or bruising on Defendant, and Defendant did not indicate that he was injured or in pain.

Trooper Lancaster testified that based on his training and experience, the "collision investigation, the red glassy eyes, the unsteadiness on his feet, slurred

speech, [and] the . . . horizontal gaze nystagmus test," Defendant had consumed a sufficient quantity of alcohol to cause impairment. Defendant submitted to an Intoximeter breath test which showed that Defendant had an alcohol concentration of 0.31 grams of alcohol per 210 liters of breath. Trooper Lancaster was asked if Defendant could have suffered a seizure. He responded that Defendant exhibited "[n]o signs of any type of seizure activity."

Defendant testified that he was found at the Dollar General parking lot because he had walked his moped to the parking lot once he realized the belt breaks in his moped had broken. Defendant also testified it was only after he arrived at the parking lot that he had started drinking, and that he had been found lying on the ground next to his moped because he had suffered a seizure.

Defendant was charged with impaired driving and having an open container. At the close of the State's evidence, Defendant moved to dismiss the charges. The open container charge was dismissed. Defendant was found guilty of driving while impaired, and he received an active sentence of twenty-four months. Defendant appeals.

Analysis

I. Lay Witness Testimony

Defendant argues that the trial court abused its discretion when it allowed Trooper Lancaster to testify concerning Defendant's description of the type of seizure

he had purportedly suffered. Specifically, Defendant contends that Trooper Lancaster's testimony was neither based on his perception nor helpful to the jury's understanding of the issues. We disagree.

"We review the admission of opinion testimony by expert and lay witnesses under an abuse of discretion standard." *State v. Faulkner*, 180 N.C. App. 499, 512, 638 S.E.2d 18, 27 (2006). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Lay witness "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2017). "Although a lay witness is usually restricted to facts within his knowledge, 'if by reason of opportunities for observation he is in a position to judge … the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion.' " *State v. Friend*, 164 N.C. App. 430, 437, 596 S.E.2d 275, 281 (2004) (quoting *State v. Lindley*, 286 N.C. 255, 257-58, 210 S.E.2d 207, 209 (1974)). "[T]he essential question in determining the admissibility of opinion evidence is whether the witness, through study and experience, has acquired such

skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies." *State v. Phifer*, 290 N.C. 203, 213, 225 S.E.2d 786, 793 (1976) (citation omitted).

> A lay witness is competent to testify whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him. The conditions under which the witness observed the person, and the opportunity to observe him, go to the weight, not the admissibility, of the testimony.

State v. Norman, 213 N.C. App. 114, 119, 711 S.E.2d 849, 854 (2011) (citations and quotation marks omitted). The fact that witnesses do not have "the opportunity to observe defendant immediately before the crime does not require exclusion of their testimony[,]" especially when their testimony is "based upon their respective personal experiences with defendant at a time sufficiently proximate to the crime." *State v. Davis*, 321 N.C. 52, 57, 361 S.E.2d 724, 727 (1987). Moreover, "[i]n the past this Court has upheld a police officer's lay opinion testimony based upon his 'personal observations at the scene and his investigative training background as a police officer.' " *State v. Howard*, 215 N.C. App. 318, 325, 715 S.E.2d 573, 578 (2011) (quoting *State v. Ray*, 149 N.C. App. 137, 145, 560 S.E.2d 211, 217 (2002)).

In addition, "[w]hile the better practice may be to make a formal tender of a witness as an expert, such a tender is not required." *Faulkner*, 180 N.C. App. at 512, 638 S.E.2d at 27-28 (citation and quotation marks omitted). "[A]bsent a request by a party, the trial court is not required to make a formal finding as to a witness'

qualification to testify as an expert witness. Such a finding has been held to be implicit in the court's admission of the testimony in question." *Id.*, 638 S.E.2d at 28 (citation and quotation marks omitted). Even if a party properly preserves its challenge to expert testimony, testimony may be admitted if a witness's emergency medical training and experience equip him with "scientific, technical, or other specialized knowledge" that would "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 702). The questions and answers must be "related specifically to their area of expertise and qualifications." *Id.*

In the present case, Trooper Lancaster testified that, based on his training and experience, Defendant was impaired and ruled out any medical episodes, including seizures. According to Trooper Lancaster, Defendant had "[n]o signs of any type of seizure activity[.]" When Defendant was subsequently called to the stand, he testified that he had suffered a seizure on the day in question and responded the following when asked how long his seizure had lasted: "They're just small seizures. I just lose control of my legs and arms. I can still see and tell what's going on, but I can't talk."

On rebuttal, when Trooper Lancaster was questioned regarding Defendant's characterization of the seizure he had purportedly suffered, the following exchange occurred, which Defendant contends constituted impermissible expert testimony:

> [The State:] As a paramedic – a certified paramedic, what sort of signs or symptoms do you look for when somebody has had a seizure?
>
> [Trooper Lancaster:] Most people that have seizures, they – like you said, they have different types of seizures, jerking of the body. Post-pupil stage where they're confused. Some seizures last longer than others like he described. He stated he had the seizure that only allowed him to – his legs and below to jerk. Most of the time, my experience that that is called what they call a focal-type seizure which it only involves jerking of part of the body. It does not involve anything with your mental status, confusion, or anything like that.

Trooper Lancaster did not witness Defendant's conduct prior to his arrival, and he encountered Defendant already lying on the ground next to his moped. However, Trooper Lancaster's testimony that Defendant was impaired and had not suffered a seizure, was rationally based on his perception of Defendant immediately following Defendant's incident in the Dollar General parking lot. Trooper Lancaster testified that Defendant had a "strong odor of alcohol coming from his person," "red glassy eyes," and that he had "slurred speech" and a "thick tongue" when he responded to questions. Based on Trooper Lancaster's training and experience as a trooper and paramedic, he determined that Defendant had not suffered a seizure. Trooper Lancaster was better qualified at that time to judge Defendant's condition than the jury "by reason of [his] opportunities for observation[.]" *Friend*, 164 N.C. App. at 437, 596 S.E.2d at 281 (citation and quotation marks omitted).

Furthermore, Trooper Lancaster's testimony would assist in the understanding of the fact in issue, whether or not Defendant had operated the moped under the influence of alcohol or suffered a seizure. Trooper Lancaster testified that he had been working as a trooper for fifteen years, he was a certified paramedic who had worked as a paramedic nine to ten years before going to patrol, and he was still a certified paramedic on the day in question. Trooper Lancaster further testified that not only did he maintain his paramedic certifications and training, but he was also an instructor in the EMS field who helped certify upcoming paramedics from the EMT level to the paramedic level. It was with this training and background that Trooper Lancaster was able to opine on the signs and symptoms of a seizure. Moreover, Trooper Lancaster's testimony reads as a summation of what Defendant first testified were his symptoms, and Trooper Lancaster's familiarity with different types of seizures.

Because Trooper Lancaster's testimony was rationally based on his perception, and if believed by the jury, would assist in a factual determination that Defendant had driven the moped under an impaired substance and had not suffered a seizure, the trial court did not abuse its discretion in allowing Trooper Lancaster to testify on his knowledge of seizures. Trooper Lancaster's observations of Defendant go "to the weight, not the admissibility, of the testimony." *Norman*, 213 N.C. App. at 119, 711 S.E.2d at 854 (citation and quotation marks omitted).

Even if, *arguendo*, Trooper Lancaster's testimony constituted impermissible lay witness testimony, the trial court's implicit tender of him as an expert witness allowed him to testify regarding seizures because Trooper Lancaster was qualified, based on his training, experience, and knowledge, to render his opinion that Defendant had been intoxicated and had not suffered a seizure. *Faulkner*, 180 N.C. App. at 512, 638 S.E.2d at 27-28 (citation and quotation marks omitted).

Accordingly, the trial court did not err.

II. Jury Deliberations

Defendant next contends that the trial court erred in expressing an opinion as to a material factual issue in response to a jury question. We disagree.

"After the jury retires for deliberation, the judge *may* give appropriate additional instructions to . . . [r]espond to an inquiry of the jury made in open court." N.C. Gen. Stat. § 15A-1234(a)(1) (2017) (emphasis added). If the trial court does respond, "[w]hether the trial court instructs using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988) (citations and quotation marks omitted).

"The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2017). "In instructing the jury, the judge shall not express an opinion as

to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2017). However, Section 15A-1232's commentary states:

> This section restates the substance of G.S. 1-180, which is repealed concurrently with the amendment of this section. The Commission found to be unnecessary the proviso in G.S. 1-180 requiring the judge to "give equal stress to the State and defendant in a criminal action" because this is a duty imposed on the judge by general requirements of fairness to the parties; it is not necessary that it be explicitly stated.

N.C. Gen. Stat. § 15A-1232 (Official Commission Commentary).

" 'Unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.' " *State v. Herrin*, 213 N.C. App. 68, 73, 711 S.E.2d 802, 806 (2011) (citations and brackets omitted). Defendant bears the burden of showing prejudice. *Id.* "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *Id.* (citation and quotation marks omitted).

Here, during jury deliberations, the jury submitted to the trial court the following question: "Does vehicle have to be on for either [DWI or DUI]?"

Outside the presence of the jury, the trial court reasoned with the parties as follows:

> Well, what we're talking about is two – there's two pieces of evidence. One in your favor, the vehicle was off. That's one in your favor. And one in the State's favor that the engine was warm. That's a balancing. I think to give an

> instruction and just say, yeah, just consider it was off without giving something to balance that out would be unfair.

Then, over Defendant's objection, the trial court answered the jury's question as follows:

> While there is no requirement, per se, that the vehicle be on at the time it is observed by a law enforcement officer, whether it was on or off is a circumstance to be considered along with all other facts and circumstances such as whether the engine was or was not still warm in determining whether the Defendant had been driving the vehicle at any time while the Defendant was impaired.

The trial court's answer declared and explained adequately the law arising on the evidence. At trial Defendant testified that his moped had been off upon Trooper Lancaster's arrival. Trooper Lancaster testified that the moped felt warm to the touch. Thus, the trial court was giving "equal stress to the State and defendant[,]" which is "a duty imposed on the judge by general requirements of fairness to the parties[.]" N.C. Gen. Stat. § 15A-1232. The trial court did not abuse its discretion because its answer "both addressed the jury's concerns and constituted a correct statement of law." *State v. Gerberding*, 237 N.C. App. 502, 506, 767 S.E.2d 334, 337 (2014).

In addition, when responding to jury questions, a trial court may repeat facts based upon the testimony at trial. *State v. Conley*, 220 N.C. App. 50, 59, 724 S.E.2d 163, 170 (2012) (determining that the trial judge was "not offering his opinion on the evidence; he was merely repeating a fact that [a witness] had already testified to in

responding to the jury's question."). Here, in response to the jury's question, the trial court merely repeated testimony elicited from both Defendant and Trooper Lancaster.

Thus, the trial court did not err.

Conclusion

The trial court did not abuse its discretion when it allowed Trooper Lancaster to testify on his knowledge of seizures, and did not err when it responded to the jury question. Accordingly, we find no error.

NO ERROR.

Judge HAMPSON concurs.

Judge ZACHARY concurs in result only.

Report per Rule 30(e).