IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1293

Filed: 17 September 2019

Sampson County, No. 16CRS051753

STATE OF NORTH CAROLINA

v.

GEORGE AMMONS, JR., Defendant.

Appeal by Defendant from judgments entered 24 April 2018 by Judge Albert D. Kirby in Sampson County Superior Court. Heard in the Court of Appeals 21 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alan D. McInnes, for the State.

Anne Bleyman for the Defendant.

BROOK, Judge.

George Ammons, Jr., ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of habitual impaired driving and impaired driving while his license was revoked for impaired driving. We hold that Defendant received a trial free from error.

I. Background

In the early morning hours of 19 March 2016 Defendant was driving home from a local restaurant when Trooper John Franklin Smith ("Officer Smith") noticed him driving with a front, right headlight out. Officer Smith then began to follow Defendant's vehicle. As their vehicles entered a 55 mile-per-hour zone, Defendant did not adjust his speed accordingly, and instead continued traveling at approximately 40 miles per hour, 15 miles per hour below the speed limit. Officer Smith then observed Defendant make "a very slow, wide, right turn on the road," at which point Officer Smith activated his blue lights and conducted a traffic stop of Defendant's vehicle.

Officer Smith asked Defendant for his driver's license and vehicle registration. As Defendant began retrieving these documents, Officer Smith noticed an odor he recognized as alcohol emanating from the Defendant. Officer Smith testified that Defendant's "eyes were red and glassy, [and] movements were lethargic, very slow." Officer Smith then requested that Defendant place the vehicle in park and exit the vehicle. Officer Smith testified that he noticed the odor of burnt marijuana emanating from Defendant's vehicle as Defendant exited.

Once outside the vehicle, Defendant declined Officer Smith's request that he provide a preliminary sample for testing using an Alco-Sensor device. Officer Smith then conducted a Horizontal Gaze Nystagmus ("HGN") test of Defendant to determine whether Defendant was intoxicated. Officer Smith testified that

Defendant exhibited six out of six possible cues indicating intoxication during that testing, leading him to conclude that Defendant had consumed sufficient alcohol that evening to be impaired, and was operating a motor vehicle under the influence of alcohol in excess of the legal limit. Officer Smith placed Defendant under arrest and transported him to the Sampson County Detention Center. At the jail, Defendant again refused to submit to chemical analysis of his breath.

On 23 October 2017, a Sampson County grand jury indicted Defendant on a charge of habitual impaired driving. Defendant had also been cited on 25 March 2016 for operating a vehicle while his license was revoked for impaired driving based on the events of 19 March 2016.

On 23 April 2018 the matter came on for trial in Sampson County Superior Court before the Honorable Albert D. Kirby, Jr. Judge Kirby presided over a one-day trial. The jury returned verdicts of guilty on both charges. Judge Kirby determined that Defendant had a prior record level of two and sentenced him to 19 to 32 months in prison for habitual impaired driving and 120 days for operating while license revoked for impaired driving, ordering that the sentences run consecutively. Defendant entered notice of appeal in open court.

II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

A. Officer Smith's Testimony About Defendant's Impairment

Defendant first argues that the trial court erred in allowing Officer Smith to testify about Defendant's impairment because Officer Smith's testimony about Defendant's impairment was improper expert opinion testimony. Specifically, Defendant contends that admission of Officer Smith's testimony about his impairment was an abuse of discretion because the foundation laid for Officer Smith's expertise in HGN testing was inadequate under Rule 702 of the North Carolina Rules of Evidence. We disagree.

1. Standard of Review

> A trial court's ruling regarding the admissibility of expert testimony will not be reversed on appeal absent a showing of abuse of discretion. . . . A trial court may only be reversed for abuse of discretion upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.

State v. Barker, ___ N.C. App. ___, ___, 809 S.E.2d 171, 174 (2017) (internal marks and citation omitted).

2. Testimony About HGN Testing Under Rule 702

Rule 702 of the North Carolina Rules of Evidence provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.

> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702 (2017). Subsection (a1) of Rule 702 of the North Carolina Rules of Evidence further provides that "[n]otwithstanding any other provision of law, a witness may give expert testimony solely on the issue of impairment . . . relating to . . . [t]he results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered in accordance with the person's training by a person who has successfully completed training in HGN." *Id.* § 8C-1, Rule 702(a1)(1).

The Supreme Court has held that the 2006 amendment to Rule 702 of the North Carolina Rules of Evidence, which added subsection (a1), "allow[s] testimony from an individual who has successfully completed training in HGN and meets the criteria set forth in Rule 702(a)[.]" *State v. Godwin*, 369 N.C. 604, 609, 800 S.E.2d 47, 50 (2017). The Supreme Court in *Godwin* explained further:

> overruling [a] defendant's objection, the trial court [may] implicitly [find] that [an officer] [is] qualified to testify as an expert, and as such, in accordance with the guidance in Rule 702(a1), [the officer] [can] "give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level."

Id. at 612, 800 S.E.2d at 52 (quoting N.C. Gen. Stat. § 8C-1, Rule 702 (a1)(1) (2015)). The *Godwin* Court also observed that through enactment of subsection (a1) of Rule 702, "our General Assembly clearly signaled that the results of the HGN test are

sufficiently reliable to be admitted into the courts of this State." *Id.* at 613, S.E.2d at 53. *See also State v. Barker*, ___ N.C. App. ___, ___, 809 S.E.2d 171, 176 (2017) (Dietz, J., concurring) ("*Godwin* held that the legislature has deemed HGN testing to be reliable as a matter of law, and therefore trial courts need not assess that reliability factor before admitting expert testimony on the issue.").

3. Officer Smith's Testimony About HGN Testing of Defendant

Over objection, Officer Smith testified that his opinion based on the HGN testing he conducted of Defendant was that Defendant was appreciably impaired in the early morning hours of 19 March 2016 during the traffic stop resulting in Defendant's arrest. Officer Smith explained that he was certified in field sobriety tests through the North Carolina Highway Patrol and had received an annual up-to-date refresher in this field of forensic testing as of 19 March 2016, going on to provide additional details regarding the specifics of the training he had received. Officer Smith also testified that he had arrested well over 200 impaired drivers during his three-and-a-half years with the Highway Patrol at the time of Defendant's trial, and "countless" other drivers "that were under the legal limit," and that based on his training and experience, HGN testing was a reliable indicator that a person was impaired by alcohol. Officer Smith went on to describe the procedure followed by officers in the field when conducting HGN testing, and the results of his HGN testing

of Defendant, which led him to conclude that Defendant was appreciably impaired by alcohol at the time of the 19 March 2016 stop.

We hold that, "[i]n overruling [D]efendant's objection, the trial court implicitly found that Officer [Smith] was qualified to testify as an expert, and as such, in accordance with the guidance in Rule 702(a1), Officer [Smith] could 'give expert testimony [] on the issue of impairment[.]" *Godwin*, 369 N.C. at 612, 800 S.E.2d at 52 (quoting N.C. Gen. Stat. § 8C-1, Rule 702 (a1)(1) (2015)). Accordingly, we reject Defendant's contention that admission of Officer Smith's testimony about his impairment was an abuse of discretion because it was not error under *Godwin*, much less an abuse of discretion.

B. Sufficiency of Evidence of Habitual Impaired Driving

Defendant next argues that the trial court erred in denying his motion to dismiss the charge of habitual impaired driving because there was insufficient evidence to submit this charge to the jury. Specifically, Defendant contends that the evidence of his guilt of habitual impaired driving was inadequate in the absence of Officer Smith's testimony about his impairment based on HGN testing, which Defendant contends was unreliable. Having held that it was not error, much less an abuse of discretion, to allow the introduction of this testimony, we cannot agree that there was insufficient evidence to submit the question of Defendant's guilt of habitual impaired driving to the jury.

1. Standard of Review

> When considering a motion to dismiss for insufficiency of the evidence, we consider whether, in the light most favorable to the State and with all reasonable inferences drawn in the State's favor, there is enough evidence of each essential element of the crime charged to persuade a rational juror that the defendant was the perpetrator.

State v. Childress, 367 N.C. 693, 694-95, 766 S.E.2d 328, 330 (2014) (citation omitted).

2. Elements of Habitual Impaired Driving

The crime of habitual impaired driving is defined in N.C. Gen. Stat. § 20-138.5(a), which provides that "[a] person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of this offense." N.C. Gen. Stat. § 20-138.5(a) (2017). N.C. Gen. Stat. § 20-138.1(a)(1) in turn in relevant part provides that "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area . . . [w]hile under the influence of an impairing substance[.]" *Id.* § 20-138.1(a)(1). The elements of habitual driving while impaired thus are (1) that "the defendant drove while impaired," and (2) that the defendant "had three prior DWI convictions within 10 years of the date of the offense." *State v. White*, 202 N.C. App. 524, 529, 689 S.E.2d 595, 598 (2010).

3. Evidence of Defendant's Guilt

Taken together, the evidence adduced at trial, including Officer Smith's testimony about Defendant's impairment at the time of the stop, was sufficient to persuade a rational juror that Defendant was guilty of habitual driving while impaired. Defendant voluntarily admitted his convictions for three driving while impaired offenses in the previous ten years, relieving the State of its burden of proof with respect to this element of the crime. Defendant also admitted that he had been drinking prior to being stopped by Officer Smith. Although he claimed he had only had one beer and disputed whether he admitted to Officer Smith that he had been smoking marijuana that evening as well, Officer Smith's testimony that Defendant was impaired, along with the balance of his testimony about his observations of Defendant at the time of the stop, was sufficient to submit the question of whether Defendant was appreciably impaired while driving in the early morning hours of 19 March 2016 to the jury. Viewing the evidence in the light most favorable to the State, and drawing all reasonable inferences from the evidence in the State's favor, as we are required to do, we hold that the trial court did not err in denying Defendant's motion to dismiss the charge of habitual driving while impaired before submitting the issue to the jury. *See Childress*, 367 N.C. at 694-95, 766 S.E.2d at 330.

III. Conclusion

Under *Godwin*, it was not error, much less an abuse of discretion, to allow the introduction of Officer Smith's testimony about Defendant's impairment. This

testimony, taken together with the other evidence, was sufficient to submit the question of Defendant's guilt to the jury. We therefore hold that Defendant received a trial free from error.

NO ERROR.

Judges INMAN and HAMPSON concur.

Report per Rule 30(e).