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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-119

No. COA20-144

Filed 6 April 2021

Guilford County, Nos. 17 CRS 68742–49, 27147

STATE OF NORTH CAROLINA

v.

ANTHONY DAVIS

Appeal by defendant from judgments entered 24 May 2019 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 13 January 2021.

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

Joseph P. Lattimore for defendant.

DIETZ, Judge.

¶ 1 Defendant Anthony Davis appeals his convictions for impaired driving, four counts of serious injury by vehicle, and two counts of hit and run with injury. Davis asserts that, when he drove while intoxicated causing numerous accidents and injuries, he did so to flee from a man threatening to kill him. Thus, Davis argues, the trial court should have instructed the jury on the defense of necessity. Davis also

makes a series of evidentiary challenges and argues that there was insufficient evidence that two victims sustained serious injuries.

¶ 2 As explained below, Davis did not present sufficient evidence to justify an instruction on the necessity defense. His evidentiary challenges to the officer's testimony likewise fail to amount to reversible error. Finally, the State presented substantial evidence of serious injury to the victims. We therefore find no error in the trial court's judgments.

Facts and Procedural History

¶ 3 Around 4:00 p.m. on 10 February 2017, Officer C.J. Bryant responded to a report of hit and run involving a silver SUV. When Officer Bryant arrived at the scene of the accident, he spoke to a woman whose car had been hit by the silver SUV. The officer observed that the trunk of the woman's car was "pushed into almost past the second row of seats, indicating that the suspect vehicle was traveling at a high rate of speed."

¶ 4 Shortly after that first collision, another witness was driving nearby and saw a silver SUV "up on the pole" with the SUV's tail end "almost touching the ground." The SUV then backed up suddenly, hitting the right front passenger door of the witness's vehicle before speeding off. The impact caused the car to strike another nearby car.

¶ 5 After these collisions, another witness was run off the road by a speeding silver

SUV. That witness watched the SUV speed toward a park, hop the curb, drive through the park, cross a basketball court where children were playing, and then crash into a tree next to a creek. The witness also saw the driver throw a liquor bottle out of the car and into the creek after the crash. When the witness approached the driver, she smelled a very strong odor of alcohol on the driver's breath. Another witness, who saw the initial collision, called 911 and then followed the fleeing SUV. That witness saw the driver throw beer cans out the window.

¶ 6 Law enforcement officers arrived at the final crash scene and found Defendant Anthony Davis sitting in the driver's seat of the SUV with the door open. Witnesses identified Davis as the driver. Officer A.D. Reed approached Davis. Davis's breath smelled strongly of alcohol. His speech was slurred, his eyes were red and glassy, and his responses were inconsistent. He exhibited rapid mood swings between cooperative and combative. Davis admitted to consuming alcohol and hydrocodone.

¶ 7 Officer Reed wanted to test Davis for impairment but, because Davis's leg appeared broken and Davis refused a breath test, the only portion of the standard field sobriety testing that Reed could administer was the horizontal gaze nystagmus test. During that test, Davis exhibited all six signs of impairment.

¶ 8 Emergency personnel transported Davis to the hospital to treat his injuries. At the hospital, Officer Reed placed Davis under arrest for driving while impaired and advised him of his implied consent rights. Davis requested a witness, but then refused

to provide a blood sample.

¶ 9 The State charged Davis with four counts of felony serious injury by vehicle, four counts of felony hit and run with injury, and misdemeanor driving while impaired. The case went to trial. On Davis's motion, the trial court dismissed two of the four counts of felony hit and run.

¶ 10 At trial, Davis's friend Beth Blackwood testified that on the afternoon of the accidents, Davis came to her home. Blackwood asked Davis to look at her car, which had been hit by random gunfire, to see if the bullets had hit any important parts. Davis then asked Blackwood if he could wait in her car for his ride. Blackwood agreed and went inside her apartment. Shortly after, Blackwood heard "a lot of noise, you know, a loud argument" and looked outside. She saw Davis and another man "having words." The man pulled up his shirt and appeared to brandish a weapon in his pocket, saying to Davis, "You want to die today?" Blackwood saw what she thought might be "a piece of a handgun" but could not "say for sure."

¶ 11 After a bystander said, "Please don't do that here because there's children playing outside," the man dropped his shirt. Davis then asked him, "Well, man, why you trying to hurt me? Why can't we work together?" Blackwood did not call the police after seeing this incident. She instead went upstairs to get dressed because things "seemed pretty calm at that moment." Blackwood did not hear any gunshots and when she returned downstairs 15 to 20 minutes later, the two men were gone.

¶ 12 A witness testified that, after Davis crashed his SUV after driving through the park, he said "Someone is shooting at me. Somebody's trying to kill me." The witness did not see anyone chasing Davis at any point. A witness to the initial two collisions also testified that she did not see anyone chasing Davis's SUV. Investigating officers later found a report of a disturbance in the area of Blackwood's apartment, with the report stating that one subject left in a vehicle and the other remained on a porch, but there was no mention of any weapons or gunshots.

¶ 13 Over Davis's objection, the trial court accepted Officer Reed "as an expert in the field of administration of the horizontal gaze nystagmus test." Officer Reed testified about the results of the HGN test he conducted on Davis.

¶ 14 Later, at the charge conference, Davis requested a jury instruction on the defense of necessity, on the theory that he drove away from Blackwood's home to escape the armed man who threatened to kill him. The trial court denied the request.

¶ 15 The jury returned guilty verdicts, and the trial court sentenced Davis to consecutive terms of 15 to 27 months in prison for each of the four counts of serious injury by vehicle. The trial court consolidated the two hit and run convictions and imposed a term of 8 to 19 months, suspended for 36 months of supervised probation, to run after the active prison sentences. The trial court arrested judgment on the impaired driving charge.

¶ 16 Davis gave oral notice of appeal on the same day the judgments were entered,

but it appears from the record that his counsel left the courtroom after sentencing and then reentered later to give the notice of appeal. It is unclear from the record how much time elapsed before counsel returned and gave oral notice of appeal. Davis petitioned for a writ of certiorari because the record does not show that his notice of appeal was made "at trial." N.C. R. App. P. 4(a)(1). Because Davis's intent to appeal his criminal judgments is clear, in our discretion, we allow the petition. N.C. R. App. P. 21.

Analysis

I. Denial of request for instruction on necessity defense

¶ 17 Davis first argues that the trial court erred by denying his request for instruction on the defense of necessity. Davis contends that the trial court should have instructed the jury on necessity because the evidence at trial showed that he "drove the vehicle to get away from a man who threatened him with a gun in an area well-known for gun violence."

¶ 18 We review this legal challenge *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). When a criminal defendant requests a jury instruction, the trial court should give that instruction if the evidence, viewed in the light most favorable to the defendant, supports it. *State v. Edwards*, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015).

¶ 19 Necessity is a legal defense in criminal cases that excuses otherwise criminal

conduct if the defendant (1) took reasonable action, (2) to protect life, limb, or health of a person, and (3) there were no other acceptable choices available. *State v. Miller*, 258 N.C. App. 325, 328, 812 S.E.2d 692, 695 (2018). Importantly, this Court repeatedly has held that defendants, in the context of driving away from dangerous situations, cannot rely on the necessity instruction without evidence that they were being pursued at the time of the alleged criminal acts. For example, in *State v. Cooke*, we rejected the necessity defense because "nothing in the record suggests that defendant would have exposed himself to harm of any kind if he had stopped driving the car long before the officer saw him." 94 N.C. App. 386, 387, 380 S.E.2d 382, 383 (1989). Similarly, in *State v. Whitmore*, this Court rejected the necessity defense because "there was no evidence that it was necessary for defendant to continue to flee" after he fled the dangerous situation but had "ample opportunity to realize he was not being pursued in the one or two miles he traveled before colliding with the victim's car." 264 N.C. App. 136, 823 S.E.2d 167, 168, 2019 WL 661558, at *5 (2019) (unpublished).

¶ 20 Here, too, there is nothing in the record to support the necessity defense. Davis presented evidence that the man with a gun threatened him but, at the time, that man was on foot. There was no evidence that he had any means of pursuing Davis once Davis drove away in the car. Indeed, the only evidence of that man's actions after Davis fled indicate that he remained near the porch where the altercation

occurred.

¶ 21 Davis also contends he was pursued by a black SUV. That black SUV was the one driven by a witness to the initial crashes, who then pursued Davis in his SUV as Davis drove away from the scene. Importantly, there is no evidence that Davis saw that black SUV or knew it was pursuing him. And, equally important, that witness only pursued Davis *after* Davis caused multiple collisions and fled the scene. By that point, the evidence indicates that Davis already had the opportunity to stop driving without fearing for his safety. Indeed, like the defendant in *Whitmore*, Davis had ample opportunity to observe that he was not being pursued, stop driving while intoxicated, and contact authorities to ensure his safety, long before the first of his many collisions while driving. Because the evidence failed to show that Davis reasonably believed it was necessary to drive as far as he did to protect his life, and because the evidence failed to show that he had no reasonable alternatives to continuing to drive while intoxicated, the trial court properly denied Davis's request for a necessity instruction.

II. Admission of expert testimony regarding HGN test

¶ 22 Davis next argues that the trial court erred by admitting Officer Reed's testimony regarding the horizontal gaze nystagmus test because the court failed to fully consider the factors for admission of expert testimony under Rule 702.

¶ 23 A trial court's ruling to admit expert testimony under Rule 702 "will not be

reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). Ordinarily, when presented with proposed expert testimony, the trial court must find that testimony meets a three-pronged reliability test under Rule 702(a) of the Rules of Evidence: "(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. R. Evid. 702(a)(1)–(3). But, importantly, under a separate subsection of Rule 702, a law enforcement officer is deemed competent to testify to the results of an HGN test administered in accordance with the officer's training:

> Notwithstanding any other provision of law, a witness may give expert testimony solely on the issue of impairment . . . relating to the following: (1) The 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.

N.C. R. Evid. 702(a1).

¶ 24 Under that portion of Rule 702, "a trial court need not inquire about the reliability of HGN evidence before admitting an officer or other qualified expert to testify about the results of a particular HGN test." *State v. Younts*, 254 N.C. App. 581, 593, 803 S.E.2d 641, 649 (2017). Where the officer "testified to his successful completion of HGN training with the North Carolina State Highway Patrol, and the State tendered him as an expert in 'the administration and interpretation of

horizontal gaze and nystagmus testing,'" this Court has held that under Rule 702(a1)(1), "the trial court did not err in qualifying [the officer] as an expert based on his training and professional experience administering the test, or in admitting his testimony regarding HGN testing." *State v. Wiles*, __ N.C. App. __, __, 841 S.E.2d 321, 330 (2020).

¶ 25 Here, in foundational questioning, the State asked Officer Reed about the nature of the HGN test, his training and experience with the test, and his administration of the test on Davis. Officer Reed testified that he completed his "initial DWI detection and standardized field sobriety testing" training "in the early 2000s," which included training in horizontal gaze nystagmus testing. In order to pass the course, Officer Reed had to demonstrate proficiency in the administration of the HGN test pursuant to a "ten-step administrative process for the administration of a horizontal gaze nystagmus test . . . set out by NHTSA." After he completed the HGN training, Officer Reed received a "Certificate of Completion for DWI Detection and Standardized Field Sobriety Testing." Officer Reed also testified that he administered the HGN test to Davis in accordance with his training. Following this testimony, the State tendered Reed as an expert "in the administration of the HGN test" and Davis objected, requesting *voir dire*.

¶ 26 Davis then questioned Reed further about his background and experience with the HGN test, his familiarity with studies questioning the reliability of the HGN test,

and whether other medical conditions can cause nystagmus. Davis also questioned Reed about whether it makes a difference what position the test subject is in—whether they are facing the officer straight on or if their head is turned—and the circumstances under which Reed conducted the test on Davis. The trial court cut off Davis's *voir dire* questioning, stating "You're getting a little far afield . . . he's established that he is qualified in the administration of the HGN test. You'll have an opportunity for all this cross-examination further on. . . . He's accepted as an expert in the field of administration of the horizontal gaze nystagmus test."

¶ 27 Under *Wiles*, the trial court's decision to admit this expert testimony was well within the trial court's sound discretion. Officer Reed established that he was trained in HGN testing and administered an HGN test to Davis in accordance with that training. Under Rule 702(a1), the foundational testimony offered by the State was sufficient to permit the trial court to admit Officer Reed's expert testimony. As the trial court properly observed, questions about whether that HGN test might be flawed because Davis had to turn his head, or because Davis may have some disorder of the eyes, appropriately are directed at the weight of that expert testimony during cross-examination. *See State v. Gray*, 259 N.C. App. 351, 355, 815 S.E.2d 736, 739–40 (2018).

III. Officer's testimony about blood alcohol concentration

¶ 28 Davis also contends that the trial court committed plain error by allowing

Officer Reed to testify as to Davis's specific blood alcohol concentration level based on the results of the HGN test. Davis acknowledges that he did not object to the challenged testimony and thus we review only for plain error. N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* In other words, the defendant must "show that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335.

¶ 29 Davis cannot satisfy this plain error standard. Even assuming that the admission of this testimony was error, there was other overwhelming evidence of Davis's impairment. For example, the State presented evidence from numerous witnesses that Davis drove erratically, caused two serious accidents, drove off the road, drove through a park, and crashed into a tree. Witnesses saw Davis throw a liquor bottle and beer cans out of his vehicle. Officer Reed observed that Davis's breath smelled strongly of alcohol, his speech was slurred, his eyes were red and glassy, his responses were inconsistent, and he exhibited rapid mood swings. Davis admitted to consuming alcohol and prescription pain medication. In light of all of this other evidence of Davis's intoxication, we cannot say that, had Officer Reed's

comments regarding Davis's blood alcohol content been excluded, the jury probably would have reached a different verdict. *See id.* Accordingly, we find no plain error in this evidentiary challenge.

IV. Sufficiency of the evidence of serious injuries

¶ 30 Finally, Davis argues that the trial court erred in denying his motion to dismiss two of the serious injury by vehicle charges because the State failed to present sufficient evidence of serious injury to victims Kimberly Lyles and Stephen Baldwin. We disagree.

¶ 31 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

¶ 32 The essential elements of the offense of felony serious injury by vehicle are that "the defendant (1) unintentionally caused serious injury to another, (2) was engaged in the offense of impaired driving under N.C.G.S. § 20–138.1 or N.C.G.S. § 20–138.2,

and (3) the commission of the offense under subdivision (2) was the proximate cause of the serious injury. N.C. Gen. Stat. § 20–141.4(a3)." *State v. Leonard*, 213 N.C. App. 526, 530, 711 S.E.2d 867, 871 (2011). "Relevant factors in determining whether serious injury has been inflicted include, but are not limited to: (1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work." *State v. Morgan*, 164 N.C. App. 298, 303, 595 S.E.2d 804, 809 (2004).

¶ 33 At trial, Lyles testified that, after the collision with Davis, she was "shaken up real bad," "in shock," and could barely breath due to the deployment of her airbag. She was transported to the hospital and suffered whiplash, an injured left knee, an asthma attack, and soreness that lasted three weeks. Our Supreme Court has held that "a 'whiplash' injury may or may not be a serious injury, depending upon its severity and the painful effect it may have on the injured victim." *State v. Ferguson*, 261 N.C. 558, 560, 135 S.E.2d 626, 628 (1964). Where the evidence shows the victim suffered whiplash, "the evidence bearing on the question of serious injury is sufficient to take the case to the jury, but the jury must determine whether or not the injury was serious in light of the particular facts disclosed by the evidence." *Id.* Thus, under our precedent, there was sufficient evidence of serious injury to Lyles to send the charge to the jury.

¶ 34 Similarly, Baldwin testified that he suffered pinched nerves in his arm from the collision and, as a result, was out of work for a period of time because he works

with his hands. Baldwin underwent six weeks of therapy to treat his injured arm. He testified that he still experiences numbness and tingling in his arm. Considering the relevant factors, the evidence that Baldwin was out of work, required six weeks of treatment, and still suffers from his injuries more than two years after the accident was sufficient evidence of serious injury to Baldwin to send the charge pertaining to him to the jury. *See Morgan*, 164 N.C. App. at 303, 595 S.E.2d at 809. Accordingly, we hold that the trial court did not err in denying Davis's motion to dismiss.

Conclusion

¶ 35 For the reasons explained above, we find no error in part and no plain error in part in the trial court's judgments.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges ZACHARY and COLLINS concur

Report per Rule 30(e).