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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-60

Filed 04 April 2023

McDowell County, No. 19 CRS 52070

STATE OF NORTH CAROLINA

v.

AUSTIN TYLOR EDWARDS, Defendant.

Appeal by defendant from judgment entered 11 August 2021 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 11 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for the Defendant.

DILLON, Judge.

Austin Tylor Edwards (“Defendant”) appeals from a judgment entered upon a jury’s verdict convicting him of involuntary manslaughter after he crashed a car he was driving into a tree, resulting in the death of a passenger. We conclude that Defendant received a fair trial, free of reversible error.

I. Background

Evidence at trial tended to show the following: On the evening of December 2019, Defendant drove along a highway in Marion with two passengers, one of whom was in the front passenger seat.

During trial, a woman testified that a few minutes before the wreck occurred, she was driving her vehicle on the same road. She testified that the weather was misting and “raining a bit” and that Defendant’s vehicle approached her from behind, before passing her and “spe[eding] up pretty quickly.” About a mile down the road, she noticed Defendant wrecked his car; and she called 911.

The investigating law enforcement officer testified that he arrived at the scene shortly after the 911 call. Defendant told him that he was driving his truck when he went around a curve, lost control, and hit a bank. The officer saw Defendant’s car in the road with heavy damage and the front-seat passenger in a ditch being treated by emergency responders. He determined Defendant lost control of his vehicle, and the passenger’s side struck a tree, causing the front passenger, who was unrestrained, to be ejected from the car and suffer fatal injuries.

Because the accident resulted in a fatality, the officer compiled a Fatal Collision Packet (the “Report”) which included details regarding the wreck. In his Report, the officer estimated Defendant had been traveling 70 mph in a 45 mph zone.

Defendant was convicted by a jury of reckless driving and involuntary manslaughter. He timely appeals.

II. Analysis

Defendant's primary argument on appeal is that the officer's non-expert opinion that Defendant was traveling 70 mph should not have been admitted into evidence.

The State concedes the officer was not properly qualified as an expert to offer his opinion but argues Defendant failed to properly object to the admission of the opinion. The State also argues that assuming any error occurred, it did not amount to reversible error.

The officer was never asked at trial for his opinion of Defendant's speed at the time Defendant lost control of his vehicle. Rather, he was asked about the estimate of speed he noted when he completed the Report.

Specifically, during the State's direct examination of the officer, the State sought to offer the Report which included the officer's accident report, witness statements, Defendant's driving record, and other information. Defendant's counsel objected, indicating that he wanted to be heard: "I think [there are] some opinions in here that would not be admissible into evidence." Defendant's counsel never stated which part of the Report he was referring to. In any event, the judge excused the jury and heard Defendant's counsel on the objection. Regarding the portion of the Report which comprised the officer's accident report, counsel took issue with the fact that the

report contained codes which the jury would not understand and that it was “the officer’s estimation of reconstruction of what happened not actually what took place.” The trial court indicated that it would “allow [the accident report portion of the Report] upon receiving foundational information” regarding its preparation.

The jury was brought back in, and the trial court indicated that it was going to allow the report in its entirety “at this point”, implying that it would entertain Defendant counsel’s objections as the State laid the foundation through the testimony of the officer about the report. While laying the foundation, the following exchange took place:

[The State]: And based on the factors in this case, did you indicate and estimate a speed in your report?

[Defendant]: Yes, sir.

[The State]: And what estimated speed did –

[Counsel for Defendant]: I object, Your Honor.

THE COURT: Overruled. Go ahead.

[Defendant]: I listed on the wreck report an estimated speed of 70 miles an hour.

[The State]: What’s the speed limit in that area?

[Defendant]: 45.

Later, during the State’s redirect, the State again moved to admit the Report in its entirety. Defendant’s counsel objected. The trial court allowed most of the Report, including all of the accident report.

From the context, it appears the trial court seemed primarily concerned about whether the State could lay a foundation for the admission of the Report as a business record. The trial court found the Report was an admissible business record. The issue before us is whether it was clear that Defendant was challenging the officer's estimation of speed based on the State's failure to qualify him as an expert. We note that Defendant never *expressly* made a challenge based on a lack of foundation that the officer was an expert.

Our Supreme Court has held that a general objection will not suffice to preserve an objection to a witness's qualifications to give an expert opinion:

An objection to a witness's qualifications as an expert in a given field or upon a particular subject is waived if it is not made in apt time upon this special ground, and a mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent review.

State v. Hunt, 305 N.C. 238, 243, 287 S.E.2d 818, 821 (1982). Four years later, relying on and quoting the above sentence in *Hunt*, the Court held that where a "defendant merely made a general objection to the testimony[,] any objection to the witness testifying as an expert was waived[.]" *State v. Riddick*, 315 N.C. 749, 758, 340 S.E.2d 55, 60 (1986). *See also State v. Aguallo*, 322 N.C. 818, 821-22, 370 S.E.2d 676, 677-78 (1988) (holding that a defendant waived his right to challenge on appeal expert opinions offered at trial because he "did not object on the grounds that the testifying witnesses were not qualified as experts.") Our Court has relied on these opinions to

conclude that a defendant's general objection to expert testimony is not properly preserved. *See, e.g., State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508-09 (1985) (holding that "[i]n the absence of a special request to qualify a witness as an expert, a general objection to specific opinion testimony will not suffice to preserve the question of the expert's qualifications, even on ultimate issues.")

However, Defendant argues that even if the objection was not properly preserved, the error constituted plain error. To show plain error, Defendant must first show that the trial court erred by allowing the officer's opinion as contained in the Report. It could be argued that the trial court had no duty to intervene *ex mero motu* to strike the opinion. Assuming the trial court erred, we conclude that any such error did not rise to the level of plain error based on the other evidence before the jury. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (plain error occurs if "absent the error the jury would have probably reached a different verdict.")

Specifically, other evidence at trial tended to show that the area the woman driver described to the officer as the area Defendant passed her was a no-passing zone; Defendant's car had passed her and "quickly sped up"; the roadway was wet at the time of the accident; at least two tires on Defendant's car were slick with virtually no tread, and were unsafe for the road; at least one of Defendant's tires appeared to have tread below the legal limit; Defendant's car was heavily damaged as a result of the accident; and the force of the impact was so great that the victim was expelled from the vehicle. Based on this other evidence, we cannot say that, absent the

evidence of speed, the verdict probably would have been different.

We dismiss without prejudice to Defendant's argument that he received ineffective assistance of counsel. Defendant may seek review through a motion for appropriate relief.

III. Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial, free from reversible error.

NO ERROR.

Judge TYSON concurs.

Judge HAMPSON concurs with separate opinion.

Report per Rule 30(e).

HAMPSON, Judge, concurring.

While I would conclude Defendant’s argument concerning the testimony of Trooper Settlemyer regarding Defendant’s estimated speed as reflected in the Trooper’s Report was preserved for appellate review, I would also conclude the trial court’s error in introducing that evidence was not prejudicial.

Defendant objected to admission of the report on the basis it was the Trooper’s “estimation of what happened.” Defendant subsequently objected to questioning regarding the Trooper’s estimation of Defendant’s speed at the time of the accident as contained in the Report. When the State attempted to introduce the report, Defendant again objected. In context, it is clear Defendant was objecting to the contents of the Report because Trooper Settlemyer was a lay witness and not, for example, an accident reconstruction expert, and was not qualified to offer opinions—including the estimate of speed—regarding the accident not rationally based on his own perception of the accident. Even if this is not clear from the context, the basis of the objection to the speed testimony is apparent. Indeed, the inadmissibility of the evidence of estimated speed is plainly apparent as illustrated by the State readily conceding error.

Nevertheless, the trial court’s jury instruction on involuntary manslaughter included the instruction that the jury could find Defendant violated the law of the

State by reckless driving if it found Defendant was “driving a vehicle upon a highway or public vehicular area, and passing in a no passing zone and traveling at an excessive rate of speed under wet road conditions with deficient tire tread, and that in so doing he acted carelessly and heedlessly in willful or wanton disregard of the rights and safety of others.” Consistent with these jury instructions, the remainder of the State’s unchallenged evidence reflects: Defendant was driving on deficient tire tread; the roadway was wet; and Defendant passed a witness in between curves on the road in a no passing section. That witness testified she was driving at 40 miles per hour. The speed limit in that area was 45 miles per hour. After passing the witness, Defendant continued to accelerate and sped off. Defendant subsequently lost control of his vehicle and hit a bank resulting in the fatal accident. After Defendant’s vehicle passed the witness and sped off, the witness did not see Defendant’s vehicle again until approximately a mile down the road when she came upon the scene of the accident. As such, the evidence is not such that exclusion of the evidence of the Trooper’s estimate of speed creates a reasonable possibility of the jury returning a different verdict. Indeed, Defendant does not challenge his separate conviction upon the jury verdict finding him guilty of reckless driving arising from substantially the same jury instructions.