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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1015

Filed 05 September 2023

Buncombe County, No. 19 CRS 86220

STATE OF NORTH CAROLINA

v.

LARRY CHARLES WILLIAMS

Appeal by defendant from judgment entered 2 February 2022 by Judge Robert C. Ervin in Buncombe County Superior Court. Heard in the Court of Appeals 8 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Irons & Irons, PA, by Ben G. Irons, II, for defendant-appellant.

ARROWOOD, Judge.

Larry Charles Williams (“defendant”) appeals from the judgment entered upon his conviction of driving while impaired. On appeal, defendant argues the trial court erred by allowing a drug recognition expert to testify about indicators of impairment, despite the expert not being present at the scene and her inability to offer an ultimate opinion on impairment. For the following reasons, we hold the trial court did not err.

I. Background

On 15 June 2019 at 3:18 p.m., Officer Ian Ammons (“Officer Ammons”) with the Black Mountain Police Department was dispatched to a call about a red Ford Ranger “all over the road” “traveling eastbound on US Highway 70[.]” Officer Ammons located the vehicle and followed behind it for thirty seconds to a minute. After he observed the vehicle fail to use its turn signal and go “into the complete opposite lane of traffic” over a double yellow line, Officer Ammons initiated a traffic stop. Officer Joseph Moore (“Officer Moore”), also with the Black Mountain Police Department, was right behind Officer Ammons and witnessed the vehicle’s traffic violations. Officer Ammons stopped the vehicle.

Officer Ammons made contact with the driver, later identified as defendant, and asked him to step out of the vehicle. Upon exiting the vehicle, defendant “had to lean up against the vehicle for stability[.]” Officer Ammons noticed defendant was “[c]onfus[ed][.]” had “[v]ery delayed responses[.]” “and his attention was not on” the officers. Officer Moore also observed that defendant was “very lethargic[.]” “disoriented, confused,” and “had real soft slurred speech.” Furthermore, an empty beer can was visible under the driver’s seat of the vehicle, leading officers to suspect defendant was impaired. At that point, Officer Moore began to conduct a driving while impaired investigation.

Although Officer Moore attempted to administer the horizontal gaze nystagmus test on defendant, defendant “wouldn’t pay attention to the stimulus” and

Officer Moore discontinued the test after several attempts and defendant claiming, “the test was too hard.” During the walk and turn test, defendant almost fell over, was nearly hit by a car, and displayed eight out of eight clues of impairment. Defendant was also unable to complete the one-leg stand test, as after the instructions were provided “he began doing the walk and turn test again[.]” Thereafter, defendant participated in a portable breath test. When the test was negative for alcohol, officers thought defendant may have a cognitive impairment instead of being intoxicated.

Officers searched defendant’s vehicle and “found a plastic knotted bag with 15 white pills” identified “as [a mixture of] acetaminophen and oxycodone hydrochloride” in the center console. The pills were not in any container and were not labelled. Defendant, when asked about the pills, stated they were his prescribed Percocet.

At this point, Officer Moore had formed the opinion, based on “[t]he totality of the circumstances[.]” that defendant “had consumed a sufficient amount of [an] impairing substance[.]” specifically the pills located in his truck, to “impair his mental and physical faculties.” Defendant was arrested and taken to the Black Mountain Fire Department for a blood draw. After the blood draw, defendant was taken before the magistrate where “[h]e started to doze off and . . . almost fell out of [his] stool several times[.]” The magistrate issued an arrest warrant for defendant for driving while impaired and an open container violation.

The matter initially came on for trial on 19 August 2021 in Buncombe County

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District Court, Judge Julie M. Kepple presiding. After defendant was found not guilty of the open container violation but was found guilty of driving while impaired, he appealed to the superior court for a *de novo* trial on the DWI charge.

The matter then came on for trial on 1 February 2022 in Buncombe County Superior Court, Judge Ervin presiding. This time, defendant was charged with driving while impaired and possession of a controlled substance, stemming from the pills located in his vehicle. At the trial, Kylie Alford (“Ms. Alford”), a forensic scientist with the State Crime Lab, testified “as an expert in the analysis of blood for forensic toxicology.” Ms. Alford testified that an analysis of defendant’s blood “confirmed the presence of oxycodone[,]” but the test did not determine the amount of the substance present or how long it had been in defendant’s system. However, Ms. Alford did testify the half-life of oxycodone for the average person was three to six hours.

Lieutenant Ann Fowler (“Lieutenant Fowler”), with the Asheville Police Department, testified as an expert in drug recognition. Defense counsel did not object to Lieutenant Fowler being tendered as an expert, but did “object to her offering any opinion about” defendant. Lieutenant Fowler testified she was not present for defendant’s field sobriety tests, but she had consulted after-the-fact on many cases by evaluating the evidence and determining “what evidence is present” based on her expertise. However, Lieutenant Fowler was clear she could not testify to an opinion of impairment.

For this case, Lieutenant Fowler reviewed the toxicology report, the body

camera footage, the incident report, and the driving while impaired report (“DWIR”). Based on her expertise, review of the case materials, and officers’ testimony, Lieutenant Fowler testified as to the possible indicators of impairment present, including defendant being unsteady on his feet, having constricted pupils, nodding off in front of the magistrate, his “slow, raspy speech[.]” and being “drowsy” with “depressed reflexes[.]”

Although Lieutenant Fowler testified several times she could not testify as to whether defendant was impaired, only as to indicators of impairment, defense counsel objected. After Lieutenant Fowler again stated she could not testify as to whether defendant was impaired, defense counsel then objected “based on relevance,” arguing that the State was attempting to utilize Lieutenant Fowler’s testimony as a “backdoor way of trying to get [her] opinion [of impairment] in front of the jury[.]” Defense counsel further argued that if Lieutenant Fowler is only testifying to things already testified to by officers “then [Lieutenant Fowler’s] not really doing anything the jury can’t do themselves” and her testimony was therefore “not relevant[.]” The trial court overruled defense counsel’s objection and allowed Lieutenant Fowler to testify as to “indicators of impairment” as long as she did not testify as to her “ultimate opinion” as to whether defendant was impaired.

At the close of the State’s evidence and at the close of all evidence, defendant made a motion to dismiss the charges based on insufficiency of the evidence. The court allowed the motion to dismiss as to the possession charge, since the State did

not present sufficient evidence the pills were oxycodone, but denied the motion as to the driving while impaired charge. Defendant did not offer any evidence.

On 2 February 2022, defendant was found guilty of driving while impaired. Defendant was sentenced at a Level IV to 120 days confinement, suspended for 18 months supervised probation. Defendant filed a notice of appeal on 14 February 2022.

II. Discussion

On appeal, defendant's sole argument is that the trial court erred in allowing Lieutenant Fowler to testify "that she detected indicators of [defendant]'s impairment and that [the] oxycodone was [a] psychoactive in his body based on" officers' testimony, the body camera footage, and the reports, since she was not present during the stop and unable to offer an ultimate opinion on impairment.

A. Standard of Review

"[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony[;]" therefore, a "decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984); *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005) (citation omitted). Abuse of discretion requires a showing that the trial court's "ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Barts*, 316 N.C. 666, 679, 343 S.E.2d 828, 837 (1986) (citations omitted). By contrast, plain error

review requires the defendant to demonstrate a “fundamental error occurred at trial” which “had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

B. Expert Testimony

On appeal, defendant argues the trial court erred by allowing Lieutenant Fowler to testify “that she detected indicators of [defendant]’s impairment and that [the] oxycodone was [a] psychoactive in his body.” We disagree.

“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[.]” N.C. Gen. Stat. § 8C-1, Rule 702(a) (2022). It is the trial court’s role to decide “[p]reliminary questions concerning” the qualifications of experts to testify or the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2022). “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing.” N.C. Gen. Stat. § 8C-1, Rule 703 (2022).

As an initial matter, we note that Lieutenant Fowler did not testify “that oxycodone was [a] psychoactive in [defendant]’s body[.]” Lieutenant Fowler testified about “psychoactive” drugs three times. First, Lieutenant Fowler testified that oxycodone “is the only drug that constricts the pupils[,] [s]o when the pupils are

constricted then the drugs is psychoactive in *the* body.” Next, Lieutenant Fowler testified that oxycodone “slows the voice down” and “makes it so you can’t project your voice” so if you display these symptoms, “it’s [a] psychoactive in *the* body.” Lastly, Lieutenant Fowler testified that slow raspy speech, constricted pupils, and nodding off in front of the magistrate are “all indicators of impairment when the drug is psychoactive in *the* body.”

Here, Lieutenant Fowler discussed the possible indications of impairment from oxycodone, but made it very clear to the jury that she could not testify defendant was impaired. She never testified that oxycodone was in defendant’s system or acting as a psychoactive in *his* body. Additionally, Lieutenant Fowler’s testimony was relevant and admissible because “she compare[d] the signs and symptoms of impairment” from the officers’ testimony, reports, and body cam footage “to corroborate drug categories identified in the Blood Report.” *State v. Neal*, 267 N.C. App. 442, 458, 833 S.E.2d 367, 378 (2019). Her testimony was even more relevant considering the absence of alcohol and officers concern that defendant’s symptoms may be related to a cognitive issue. Accordingly, this argument is without merit.

Furthermore, it was not an error for Lieutenant Fowler to testify as an expert. At trial, defense counsel acknowledged he did not object to Lieutenant Fowler testifying as an expert in drug recognition. Still, defendant contends it is this Court’s duty to determine whether Lieutenant Fowler qualifies as an expert under Rule 702. As defendant did not preserve this objection, we analyze the admission of Lieutenant

Fowler's expert testimony under plain review.

Here, defendant cannot show the expert testimony had a “probable impact on the jury’s finding that the defendant was guilty.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted). As defendant acknowledges, all of the possible indications of impairment Lieutenant Fowler testified to were previously admitted through body camera footage shown to the jury, reports, or officer testimony. Her testimony simply explained potential signs of impairment from oxycodone and what potential indications of impairment she observed in this case. Accordingly, we cannot say that her testimony had a probable impact on the jury’s verdict.

III. Conclusion

For the foregoing reasons, we hold the trial court did not err.

NO ERROR.

Chief Judge STROUD and Judge GRIFFIN concur.

Report per Rule 30(e).