NO. COA01-653

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

STATE OF NORTH CAROLINA,
Plaintiff,

v. Richmond County
No. 99 CRS 5273

LANG HAYES, JR.,
Defendant.

Appeal by defendant from judgment entered 10 August 2000 by Judge Robert F. Floyd in Richmond County Superior Court. Heard in the Court of Appeals 27 March 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Henry T. Drake for defendant appellant.

McCULLOUGH, Judge.

Defendant Lang Hayes, Jr., was tried before a jury at the 8, 9, and 10 August 2000 Criminal Session of the Richmond County Superior Court. Defendant had been arrested and charged with driving while impaired (DWI) in violation of N.C. Gen. Stat. § 20-138.1 (2001).

Evidence for the State tended to show that at approximately 12:00 a.m., 4 July 1999, defendant was pulled over by Trooper R. K. London from the North Carolina Highway Patrol. Trooper London

observed a 1986 Chevrolet Blazer, determined later to be driven by defendant, pass by his cruiser. The Blazer was riding on the "fog line," or the white line closest to the shoulder of the road. The Blazer kicked up rocks that actually struck the trooper's cruiser. Trooper London estimated that the Blazer, driven by defendant, was traveling at approximately 70 m.p.h.

Trooper London pulled out and followed defendant because defendant was weaving in his lane. When defendant turned off onto a side road, Trooper London pulled him over. Defendant was cooperative with Trooper London during the stop. In response as to why he was driving so poorly, defendant stated that he was in a hurry to get home.

When defendant exited his vehicle, Trooper London noticed a strong odor of alcohol and that defendant was unsteady on his feet. Trooper London also noticed that defendant's speech was slurred, and his eyes were red, bloodshot, and glassy. Defendant was very talkative with the trooper. He admitted that he had one drink a few hours before. Apparently it was at this point that the trooper formed the opinion that defendant had consumed a sufficient quantity of an impairing substance to the extent that there was an appreciative impairment of both his bodily and mental faculties. Trooper London then placed defendant under arrest for DWI.

Defendant was advised of his Intoxilyzer rights at 12:37 a.m. The same trooper that arrested defendant administered the Intoxilyzer test at 12:56 a.m., which yielded a result of 0.08. The trooper also ran certain other field sobriety tests which

defendant was unable to perform.

Defendant put on evidence by way of his girlfriend, brother, cousin, and himself. They all testified that they had been to a 4th of July cookout at which defendant had one drink. None of those who testified believed defendant was intoxicated.

Defendant's first trial ended in a mistrial. On retrial, he was found guilty by the jury and sentenced by Judge Robert F. Floyd to a suspended active term of 60 days, 12 months of unsupervised probation, 48 hours of community service, fines and costs.

Defendant presents the following arguments on appeal: The trial court erred in (1) allowing the officer to give an expert opinion without being qualified as an expert and allowing prejudicial testimony not related to the issues; (2) allowing the testimony of the Intoxilyzer results contrary to the requirements of the statute; (3) refusing to allow questions or evidence about the Intoxilyzer, Intoxilyzer logs and maintenance records; (4) failing to instruct the jury on the Intoxilyzer result of 0.08 or more and failing to dismiss the case.

I.

Defendant's first assignment of error is that the trial court erred by allowing Trooper London to give an expert opinion without being qualified as an expert, and also that the trial court allowed the trooper to give irrelevant and prejudicial testimony.

As to Trooper London's giving an expert opinion, the trial court allowed the trooper to testify concerning the effect that the removal of a partial plate from defendant's mouth had on the

results of the test.

> Q: You testified about the 15 minute required waiting period on the regulations; is that correct?
>
> A: Yes, sir.
>
> Q: Could you tell the judge and the jury about how that's affected in this case in terms of the partial plate?
>
> A: With the intoxilizer 5000, the partial plate has no bearing whatsoever on the person blowing into the instrument. He can keep it in his mouth or he can take it out. He wished to take it out, so he took it out. The intoxilyzer 5000 has an element about it that if any raw alcohol or any mouth alcohol is in the person's mouth at the time a person blows in to [sic] it - for example, if you blow - if you drink some liquor and you've still got that alcohol in your mouth when you immediately blow in there, it will not analyze that breath sample at that time, the intoxilyzer 5000 because you have -
>
> [Defendant's lawyer]: Objection, move to strike.
>
> BY THE COURT: Overruled, denied.

Defendant contends that this is expert testimony by a witness who had not been tendered as such, arguing that when specialized knowledge is presented to a jury, the person must first be qualified as an expert. *State v. Helms*, 127 N.C. App. 375, 379, 490 S.E.2d 565, 568 (1997), *rev'd*, 348 N.C. 578, 504 S.E.2d 293 (1998). If the layperson or the officer is not qualified as an expert, then the laywitness is not competent to testify as to theory and function of the machine. *Id.* *See State v. Bowman*, 84 N.C. App. 238, 352 S.E.2d 437 (1987).

The State contends that the testimony was not opinion

testimony, but rather a factual statement which did not require the trooper to be qualified as an expert. *See State v. Fletcher*, 322 N.C. 415, 422, 368 S.E.2d 633, 637 (1988) (stating, "If a witness, whether or not an expert, has knowledge of facts which would be helpful to a jury in reaching a decision, he may testify to such relevant facts."). Trooper London has administered hundreds of Intoxilyzer tests and undergoes periodic certification. As such, he testified as to factual information gleaned from his training and experience.

Further, in a case involving school bus braking systems, this Court allowed a mechanic to testify stating:

> Generally, opinion evidence of a non-expert witness is not admissible because it invades the province of the jury. The basic question in determining the admissibility of opinion testimony, however, is whether the witness is better qualified, through his training, skills, and knowledge, than the jury to form an opinion as to the particular issue. [The witness] had testified that he had received high school and on-the-job training as a mechanic and had been employed in such capacity at the school bus garage for over six years. He was examined regarding his knowledge of and familiarity with the brake systems of school buses in general and with the particular bus involved. He therefore was better qualified to form an opinion on the subject than was the jury, despite the fact that he was never formally qualified as an expert. Additionally, defendant made only a general objection to the question calling for the witness's opinion, and has thus waived his objection.

State v. Wright, 52 N.C. App. 166, 175-76, 278 S.E.2d 579, 587 (citation omitted), *disc. review denied*, 303 N.C. 319 (1981). Obviously, after testifying that he had performed over 1,000

Intoxilyzer tests, the trooper was better qualified than the jury and could inform them. In addition, the objection by defendant was generalized, and thus he has waived that objection. *See Strickland v. Jackson*, 23 N.C. App. 603, 209 S.E.2d 859 (1974).

As to Trooper London giving irrelevant and prejudicial testimony, he testified that he had been a patrolman for 20 years and had made approximately 2,000 arrests for DWI and had run approximately 1,000 Intoxilyzer 5000 tests since 1992. Defendant contends that whether the officer had arrested someone else or others, or even defendant himself, is irrelevant to the issues in the case.

Trooper London's length of experience and number of arrests are clearly relevant to his ability in identifying who is impaired and who is not. N.C. Gen. Stat. § 8C-1, Rule 402 (2001).

II.

Defendant's second assignment of error is that the trial court erred by allowing the results of the Intoxilyzer test into evidence without the proper foundation being laid by the State.

> Before the results of [an Intoxilyzer] test can be considered valid the State must show: (i) that the person administering the test possesses a valid permit issued by the Department of Human Resources for this purpose and (ii) that the test was performed according to the methods approved by the Commission for Health Services.

State v. Barber, 93 N.C. App. 42, 46, 376 S.E.2d 497, 499, *disc. review denied*, 328 N.C. 334, 381 S.E.2d 775 (1989); N.C. Gen. Stat. § 20-139.1(b) (2001). Compliance with the two requirements of N.C.

Gen. Stat. § 20-139.1(b) may be shown in any proper and acceptable manner. *State v. Powell*, 10 N.C. App. 726, 179 S.E.2d 785, *aff'd*, 279 N.C. 608, 184 S.E.2d 243 (1971).

In *State v. Powell*, 279 N.C. 608, 184 S.E.2d 243 (1971), this Court said, "[The Officer] had a valid permit issued by the Board to conduct such analysis and testified that he made the analysis in this case according to methods approved by that Board. We hold this sufficient to meet the requirements of G.S. 20-139.1(b)." *Id.* at 611, 184 S.E.2d at 245. In the case *sub judice*, Trooper London's valid permit as a certified chemical analyst was received into evidence. This is not in dispute.

Defendant claims that there was no showing that the test was administered in accordance with the "'methods approved by the Commission for Health Services.'" *State v. Gray*, 28 N.C. App. 506, 507, 221 S.E.2d 765, 765 (1976) (citation omitted); *Powell*, 279 N.C. 608, 609, 184 S.E.2d 243, 244.

Trooper London testified about the methods he used in the following exchange:

> Q: Trooper London, when we asked had this particular intoxilyzer 5000 unit, in this case that you used, *in accordance with the methods approved by the commission for health services*, did you make a determination as to whether the preventive maintenance was performed within the appropriate time frame on the intoxilyzer?
>
> A: Yes, sir, I did.

(Emphasis added.) This is sufficient to meet the requirements of N.C. Gen. Stat. § 20-139.1(b); *see Powell*, 279 N.C. at 611, 184

S.E.2d at 245.

III.

Defendant's next assignment of error is that the trial court erred by failing to allow defendant to question or enter evidence about the Intoxilyzer. Defendant wanted to cross-examine, as it were, the results of the Intoxilyzer by using the logs, maintenance records, and results to show that there had been erroneous readings on other occasions.

N.C. Gen. Stat. § 20-139.1(b4), titled "Introducing Routine Records Kept as Part of Breath-Testing Program," states:

> In civil and criminal proceedings, any party may introduce, without further authentication, simulator logs and logs for other devices used to verify a breath-testing instrument, certificates and other records concerning the check of ampoules and of simulator stock solution and the stock solution used in any other equilibration device, preventive maintenance records, and other records that are routinely kept concerning the maintenance and operation of breath-testing instruments. In a criminal case, however, this subsection does not authorize the State to introduce records to prove the results of a chemical analysis of the defendant or of any validation test of the instrument that is conducted during that chemical analysis.

N.C. Gen. Stat. § 20-139.1(b4).

Defendant offered Intoxilyzer records, allegedly on the particular machine that tested defendant. The theory was that the machine was faulty or not working properly, and that the 0.08 reading it gave for defendant was untrustworthy.

One of defendant's test log's showed that a simulator solution test result was 0.06 on 26 June 1999, and 0.02 on 10 July 1999.

The simulator solution is a combination of alcohol and distilled water mixed so as to produce an alcohol concentration of 0.08. 15A N.C.A.C. 19B.0101(8). If the Intoxilyzer registers either a 0.08 or 0.07, the instrument will be considered as properly calibrated. 15 N.C.A.C. 19B.0101(9). If it registers any other result, a test cannot be run. The calibration check with the simulator solution for defendant's test showed an alcohol concentration of 0.07.

The State objected to the introduction of defendant's exhibits on relevancy grounds. The reading from 26 June 1999 was not relevant to defendant's case because it was from a log for a different instrument (Serial No. 66-003949) than the one used to test defendant (Serial No. 66-003267) on 4 July 1999. The reading from 10 July 1999 was from the correct machine. The State contends, nevertheless, that it is not relevant because all tests up to the 10th of July show the machine working correctly. In addition, the reading of "0.02" is subject to interpretation. Apparently, that log entry was made by a German trooper named Dietrich whose sevens apparently look like twos. This is bolstered by the fact that if the reading was in fact 0.02, the analyst would have been required to close the instrument. This was not done, so the number was probably an 0.07. Regardless, as the State contends, it is difficult for defendant to show prejudice because this reading, if it is really 0.02, is low and not high. This assignment of error is overruled.

IV.

After a thorough review of the record before us, we conclude

that defendant's remaining assignments of error are without merit and we find

No error.

Judge BIGGS concurs.

Judge WYNN concurs with separate opinion.

Report per Rule 30(e).

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LANG HAYES, JR.,

WYNN, Judge, concurring with separate opinion,

I disagree with the majority's holding concerning whether the removal of a dental partial plate from defendant's mouth would affect the results of a Breathalyzer. "If the witness is not testifying as an expert, his testimony in the form of opinions or references 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 (2001).

The admissibility of expert witness testimony is governed by Rule 702 of the North Carolina Rules of Evidence. 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. *See* N.C. Gen. Stat. § 8C-1, Rule 702 (2001). "'The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has

acquired such skill that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies.'" *State v. Underwood*, 134 N.C. App. 533, 518 S.E.2d 231, 238, *cert. allowed*, 351 N.C. 368, 543 S.E.2d 145 (1999), *writ denied as improvidently granted*, 352 N.C. 669, 535 S.E.2d 33 (2000) (quoting *State v. Mitchell*, 283 N.C. 462, 467, 196 S.E.2d 736, 739 (1973)). This was opinion evidence as the record fails to show that the officer had any specialized training or experience to qualify him as an expert witness who could independently provide this opinion under N.C. Gen. Stat. § 8C-1, Rule 702.

However, even assuming *arguendo* that the opinion evidence presented to the jury was specialized knowledge and thus the testimony was error, there has been no showing by defendant that a different result would have been reached had the testimony been excluded. *See* N.C. Gen. Stat. § 15A-1443(a) (2001). Moreover, I concur with the result because this defendant failed to sufficiently object to the evidence to preserve this issue for review. *See State v. Strickland,* 23 N.C. App. 603, 209 S.E.2d (1974).