IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-658

Filed: 3 October 2017

Buncombe County, No. 15CRS0887822

STATE OF NORTH CAROLINA

v.

EDWARD LEWIS HOLLOMAN, Defendant.

Appeal by defendant from judgment entered on or about 11 February 2016 by Judge W. Todd Pomeroy in Superior Court, Buncombe County. Heard in the Court of Appeals 9 January 2017.

Attorney General Josh Stein, by Assistant Attorney General Ashleigh P. Dunston, for the State.

Hollers & Atkinson, by Russell J. Hollers, III, for defendant-appellant.

STROUD, Judge.

Defendant appeals the trial court's judgment convicting him of habitual impaired driving, speeding, and driving while license revoked. We find no plain error.

I. Background

The State's evidence showed that around 3:00 a.m. on 26 July 2015, highway patrolman Kevin Glenn witnessed defendant's car speeding. Trooper Glenn pulled defendant over and noticed a strong odor of alcohol and saw that defendant had red, glassy eyes. Defendant told Trooper Glenn he consumed two beers. Trooper Glenn asked defendant to get out of the car for field sobriety tests including the horizontal gaze nystagmus ("HGN") test. Defendant's results indicated impairment.

Ultimately defendant was arrested and later refused to provide a breath sample. Defendant was indicted for habitual impaired driving, speeding, and driving without a license. During defendant's trial, Trooper Glenn testified about why he believed defendant showed impairment based upon his observations and field sobriety tests, including the HGN test. Defendant was convicted of all of the charges against him. Defendant appeals.

II. HGN Test

Defendant's only argument on appeal is "the trial court erred in allowing a lay witness to testify that, based on the results of an HGN test, . . . [he] was greatly impaired by alcohol and had a specific alcohol concentration in his blood." (Original in all caps.) Since defendant did not object to Trooper Glenn's testimony, he argues that we should review for plain error.

> [T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

Rule 702 provides:

> A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
> (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

N.C. Gen. Stat. § 8C-1, Rule 702(a1)(1) (2015).

During the pendency of this appeal our Supreme Court determined that a law enforcement officer need not explicitly be tendered under Rule 702 to testify about HGN testing:

> In assessing how a witness may be qualified as an expert, we have held that when the record contains sufficient evidence upon which the trial court could have based an explicit finding that the witness was an expert, an appellate court may conclude that the trial court found the witness to be an expert. In *Apex Tire* the trial court explicitly denied counsel's motion to declare a witness was an expert. The trial court then permitted the witness to testify in detail, as well as offer an opinion in the case. We concluded that, notwithstanding the trial court's denial of

the motion to recognize explicitly the witness as an expert, the record contained evidence on which the trial court could have based a finding that the witness was an expert. Accordingly, we inferred from its actions that the trial court made an implicit finding that the witness was an expert.

Since our decision in *Apex Tire*, we have reiterated the concept of implicit recognition of expert witnesses in several opinions. We have held:

> In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness.

Similarly, we have held that a trial judge implicitly recognized a witness as an expert by overruling defense counsel's objection to the witness's qualifications. In addition, we have determined that when a defendant interposed only general objections to trial testimony and never requested a finding by the trial court as to the witnesses' qualifications as experts, the recognition that the witnesses were qualified to testify as experts was implicit in the trial court's ruling admitting the opinion testimony. More recently, we ruled that a trial court's overruling of defense counsel's objection to the opinion testimony constituted an implicit finding that the witness was an expert.

Although we decided the aforementioned cases prior to the amendment to Rule 702, the 2011 amendment did not categorically overrule all North Carolina judicial precedents interpreting that rule. Moreover, our precedents continue to dictate that a trial court's ruling on the admissibility of expert testimony will not be reversed on appeal absent a showing of abuse of discretion. Here we can detect no such abuse of discretion by the trial court.

During both the pretrial hearing and the trial in this case, Officer Kennerly was qualified as an expert by

knowledge, skill, experience, training, or education. Officer Kennerly testified that he had completed training on how to administer the HGN test and other standardized field sobriety tests that he administered to defendant. During direct examination, Officer Kennerly explained that he attended a thirty-four hour course in standardized field sobriety testing and DWI detection in 2006. Officer Kennerly's certificate of completion for this course was admitted into evidence. He also testified that he attended an eight hour refresher course in 2009. Both courses were approved by the National Highway Traffic Safety Administration (NHTSA). Prior to the date he administered the HGN test to defendant, Officer Kennerly had conducted approximately three hundred impaired driving offense investigations.

The trial court also established that Officer Kennerly's testimony met the three-pronged test of reliability pursuant to the amended rule. The trial court conducted its own voir dire of Officer Kennerly, which elicited testimony that the HGN test he administered to defendant on the day in question was given in accordance with the standards set by the NHTSA, and that those standards were derived from the results of a specific scientific study. Additionally, the trial court's voir dire confirmed that the principles and methods utilized in the HGN test were found to be reliable indicators of impairment, and that Officer Kennerly applied those principles and methods to defendant in this case.

Defendant objected to Officer Kennerly's testimony on the grounds that he was neither formally tendered as an expert witness by the State nor recognized as such by the trial court. Yet we note that defendant did not object to any of Officer Kennerly's actual qualifications, even clarifying his general objection by stating, I'm not saying Officer Kennerly could not be qualified, but I think the State's going to have to go through that. Defendant eventually narrowed his objection by acknowledging that if the State were to limit the officer's testimony to his observations and the indications of impairment, then defendant had less problem with it. The trial court then

overruled defendant's objection; however, as the colloquy between the trial court and the defense attorney indicates, Officer Kennerly only was permitted to offer testimony regarding his observations of defendant's impairment as he administered the HGN test and was not permitted to comment on the HGN test's reliability. These distinctions are critical.

. . . .

In overruling defendant's objection, the trial court implicitly found that Officer Kennerly was qualified to testify as an expert, and as such, in accordance with the guidance in Rule 702(a1), Officer Kennerly could give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level.

Although the Court of Appeals relied on our prior decision in *Helms* to reach its conclusion that the expert testimony was erroneously admitted, several important facts render *Helms* distinguishable from the present case. At issue in *Helms* was the reliability of the HGN test, not the observed impairment of the individual being subjected to the HGN test. Furthermore, although the officer in *Helms* testified that he had taken a forty hour training course in the use of the HGN test, the State presented no evidence regarding—and the court conducted no inquiry into—the reliability of the HGN test. We also noted in *Helms* that nothing in the record of the case indicated that the trial court took judicial notice of the reliability of the HGN test. Accordingly, we concluded that because no sufficient scientifically reliable evidence existed as precedent to show the correlation between intoxication and nystagmus, it was improper to permit a lay person to testify as to the meaning of HGN test results. Additionally, the trial court permitted the law enforcement officer to testify as a lay person regarding the meaning of HGN test results, and there was no evidence in the record to support a finding that the trial court had implicitly found the officer to be an expert. This scenario plainly contrasts with the present case in which the trial court made a finding of reliability of the HGN test and an implicit finding that Officer Kennerly was qualified as an expert. Furthermore,

> with the 2006 amendment to 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. Based on these distinguishing factors, our decision in *Helms* is not dispositive of the present case.

See State v. Godwin, ___ N.C. ___, ___, 800 S.E.2d 47, 50-53 (2017) (citations, quotation marks, and brackets omitted).

After a thorough review of the trial transcript, we conclude this case is actually more similar to *Helms* than *Godwin*. *See id*. ___, 800 S.E.2d at 52-53. Trooper Glenn testified that he had received training in field sobriety testing, but did not specifically mention any training in HGN testing. Trooper Glenn did not testify about any prior experience with DWI cases or HGN testing. The closest the testimony comes to addressing his training or experience was his answer to a question about the test's reliability. Trooper Glenn was asked, "And based on your training and experience, is the horizontal gaze nystagmus test a reliable indicator of impairment?" to which he responded,

> Yes, sir, there's been many studies to develop the results of this test; and with a test, the studies show that at least four out of six clues shows a great percentage of impairment; and the Defendant had six out of six clues. A total of all the clues you could have to show impairment over ten or greater.

Although this answer shows Trooper Glenn has some knowledge of the HGN test, it does not establish his qualifications to testify as an expert. Here, "there was no

evidence in the record to support a finding that the trial court had implicitly found the officer to be an expert." *Id.* at ___, 800 S.E.2d at 53. The evidence does not demonstrate that Trooper Glenn was actually qualified as an expert in HGN testing, so it was error for Trooper Glenn to testify about the HGN test administered. *See State v. Helms*, 348 N.C. 578, 579, 504 S.E.2d 293, 293 (1998).

However, unlike in *Helms*, the question before us is not whether prejudicial error occurred, but if the court committed plain error. *See id.* The unchallenged evidence shows that defendant was pulled over for speeding. Trooper Glenn smelled alcohol on defendant and noticed his red and glassy eyes. Defendant admitted to drinking two beers and he showed three out of four clues for impairment on the one-leg stand test. Defendant tested positive for alcohol twice on the portable breath test. Given the other evidence, we cannot conclude that "the error 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. Therefore, this argument is overruled.

III. Conclusion

We therefore find no plain error.

NO PLAIN ERROR.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).