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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-199

Filed: 3 October 2017

Buncombe County, No. 14 CRS 80428

STATE OF NORTH CAROLINA

v.

CHRIS LEE ROBERTSON

Appeal by Defendant from judgment entered 20 July 2016 by Judge Marvin P. Pope, Jr. in Superior Court, Buncombe County. Heard in the Court of Appeals 21 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Karen A. Blum, for the State.

Charlotte Gail Blake for Defendant.

McGEE, Chief Judge.

Chris Lee Robertson (“Defendant”) appeals his convictions for driving while impaired and driving while license revoked. Defendant argues the trial court erred by (1) admitting the arresting officer as an expert in horizontal gaze nystagmus and (2) allowing the arresting officer to testify regarding Defendant’s blood alcohol content. We find no error.

I. Background

Lieutenant Michael Dykes (“Lt. Dykes”) of the Woodfin Police Department was on patrol within the Woodfin town limits around 2:00 a.m. on 16 February 2014. While stopped at a stop sign, Lt. Dykes noticed that an approaching vehicle had one headlight out. Once the vehicle drove past him, Lt. Dykes turned around and began to follow it. Lt. Dykes observed the vehicle “running off the right-hand side of the road into the grass.” When the vehicle veered back onto the road, Lt. Dykes saw “the [vehicle’s] left tires cross the yellow double line two times.” Lt. Dykes ran the vehicle’s license tag number on his in-car computer and found that the vehicle’s registration had expired, the vehicle had an inspection violation, and the vehicle’s registered owner, later found to be Defendant, had a suspended driver’s license.

Lt. Dykes followed the vehicle for a half mile before activating his blue patrol lights. Defendant, who was driving the vehicle, pulled over. Lt. Dykes exited his patrol car and approached the vehicle, speaking first with a female sitting in the vehicle’s passenger seat. While speaking with Defendant, Lt. Dykes “noticed a moderate odor of alcohol coming from inside the vehicle[.]” Lt. Dykes “advised [Defendant] of the reason for the stop, [specifically] the expired tag and [driving] left of center and running [the vehicle] off the road to the right, and asked to see [Defendant’s] driver’s license.” Defendant gave Lt. Dykes a North Carolina identification card rather than a driver’s license.

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After verifying the information on Defendant's identification card, Lt. Dykes asked Defendant to step out of the vehicle. Lt. Dykes noticed Defendant was "unsteady on his feet, not walking with a normal gait[,] and Defendant's eyes appeared "glassy[.]" He also detected "a moderate odor, not very strong, but not a weak odor of [alcohol] coming from [Defendant's] breath." Defendant told Lt. Dykes he had consumed one beer that evening. Lt. Dykes asked Defendant to submit to a preliminary breath test. After Defendant made several attempts to provide a sample, the testing instrument registered positive for the presence of alcohol in Defendant's breath.

Lt. Dykes asked Defendant to perform three standardized field sobriety tests: horizontal gaze nystagmus test ("HGN" or "HGN test"), walk and turn, and one leg stand. Lt. Dykes performed the HGN test first. Lt. Dykes testified that HGN was designed to detect the presence of alcohol in the brain by looking for certain clues in a subject's eyes as the eyes follow a stimulus such as a finger or pen. Lt. Dykes observed three out of three possible clues of HGN in both of Defendant's eyes, including a lack of smooth pursuit when tracking the stimulus, involuntary jerking of the eyes at maximum deviation, and the onset of nystagmus prior to forty-five degrees.

During the walk and turn, Defendant had difficulty keeping his balance. He stepped off the line and put his feet side-by-side rather than heel-to-toe as Lt. Dykes

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instructed; missed several steps; and performed an improper turn. Lt. Dykes observed four out of eight possible clues of intoxication. During the one leg stand, Defendant stood on his right foot, swayed while balancing, used his arms for balance, and put his foot down. Lt. Dykes observed three out of four possible clues of intoxication. He testified that Defendant's performance on the three standardized field sobriety tests "indicate[d] a blood alcohol content of .08 or greater." Defendant objected to this statement, but the trial court overruled the objection. When Lt. Dykes stated "[a]gain, [Defendant's performance on the field sobriety tests] indicated the presence of alcohol with a blood alcohol content of .08 or greater[,] Defendant did not renew his objection.

Lt. Dykes asked Defendant to submit to a second preliminary breath test and Defendant's breath again tested positive for the presence of alcohol. Based on his observations of Defendant's driving and appearance, Defendant's performance on the field sobriety tests, and the odor of alcohol on Defendant's breath, Lt. Dykes formed the opinion that Defendant "had consumed a sufficient quantity of . . . alcohol[] as to appreciably impair his mental and/or physical faculties or both." Lt. Dykes arrested Defendant for driving while impaired.

Defendant was taken to a chemical analysis room at the Buncombe County Detention Facility ("BCDF"). Lt. Dykes advised Defendant of the statutory rights of a person who is asked to submit to a chemical analysis to determine the presence of

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an impairing substance. Defendant signed a form indicating he was informed of his rights. He requested to call a witness and was allowed a waiting period of thirty minutes. When Defendant's witness did not arrive within that time, Defendant submitted to a chemical breath analysis by blowing into an intoxilyzer instrument. Defendant gave two breath samples, the first of which indicated a blood alcohol content of .09. The second breath sample, collected four minutes after the first, indicated a blood alcohol content of .08. At trial, both test tickets were published to the jury without objection from Defendant. Defendant admitted that his license was suspended.

Lt. Dykes testified about his training and experience, including his qualifications as a chemical analyst and his certification in standardized field sobriety testing. When the State asked Lt. Dykes to "address specifically the [HGN] portion of the test" he administered to Defendant, defense counsel "object[ed] . . . to any testimony regarding HGN and the issue of impairment. [Lt.] Dykes was not presented as an expert in HGN under [evidentiary] Rule 702 as well as [there is case law that] requires an expert only to give such testimony." The objection was overruled and Lt. Dykes was permitted to testify about the mechanics of HGN testing. When the State moved "to enter [Lt.] Dykes as an expert in standardized field sobriety testing and HGN[,]" Defendant asked to be heard outside the presence of the jury. Defendant told the trial court that the defense had been unable to "adequately

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prepare” because the State “did not prior to trial disclose that [it intended to call] any expert witnesses” and did not provide curriculum vitae for any State witnesses. The State responded that there was “no requirement for [advance notice of] expert witnesses to be provided in a misdemeanor [prosecution][,]” and argued Lt. Dykes was qualified to testify as an expert because he had received training in HGN. Defendant’s objection was overruled and Lt. Dykes was permitted to testify, in the presence of the jury, about his knowledge and experience with respect to HGN testing. After Lt. Dykes was questioned by both the State and the defense regarding his background in HGN testing, Defendant “re-move[d] to the [c]ourt that [Lt.] Dykes not be admitted, allowed to have any expert testimony admitted[.]” The trial court stated: “Objection’s overruled. [The c]ourt will find [Lt.] Dykes to be an expert in the field of [HGN] tests.” The jury found Defendant guilty on both charges. Defendant appeals.

II. Testimony of Lt. Dykes

Defendant contends the trial court erred by admitting Lt. Dykes as an expert in HGN testing because Lt. Dykes was not qualified to provide such testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 702(a). Defendant further submits that, even if Lt. Dykes was properly permitted to testify as an expert, the trial court erred

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by allowing Lt. Dykes to testify that Defendant's performance on the field sobriety tests "showed [Defendant's] blood alcohol content to be .08 or greater."¹

A. *Standard of Review*

The trial court's decisions related to the admission of expert testimony are reviewed for an abuse of discretion. *See State v. Dew*, 225 N.C. App. 750, 760, 738 S.E.2d 215, 222 (2013) ("As a result of the fact that the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony, we review the trial court's decision to allow [a witness] to testify as an expert using an abuse of discretion standard of review." (citations and internal quotation marks omitted)). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *State v. Moore*, 152 N.C. App. 156, 161, 566 S.E.2d 713, 716 (2002) (citation and quotation marks omitted); *see also State v. Walston*, ___ N.C. ___, ___, 798 S.E.2d 741, 745 (2017) ("[A] trial court's decision to admit or exclude expert testimony will not be reversed on appeal unless there is no evidence to support it." (citation and internal quotation marks omitted)). Furthermore, even if abuse of discretion is found, a defendant must demonstrate prejudice resulting from the trial court's error. *See*

¹ Defendant's characterization of this testimony is subtly misleading. Lt. Dykes did not testify that Defendant's performance on the field sobriety tests conclusively "showed" Defendant had a blood alcohol content of .08 or greater. Lt. Dykes stated that, based on his training in field sobriety testing, Defendant's performance "indicated" the presence of alcohol and a blood alcohol content of .08 or greater.

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State v. Babich, ___ N.C. App. ___, ___, 797 S.E.2d 359, 364 (2017); *see also* N.C. Gen. Stat. § 15A-1443(a) (2017) (“A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.”).

An unpreserved challenge to the admission of expert testimony is subject to plain error review. *See State v. Hunt*, ___ N.C. App. ___, ___, 792 S.E.2d 552, 559 (2016). Plain error exists if the trial court’s error “had a probable impact on the jury’s finding that the defendant was guilty.” *See State v. Turbyfill*, ___ N.C. App. ___, ___, 776 S.E.2d 249, 258 (2015); *see also State v. Crabtree*, ___ N.C. App. ___, ___, 790 S.E.2d 709, 715 (2016) (“Under our plain error review, we must consider whether the erroneous admission of expert testimony . . . was a fundamental error.” (citation and quotation marks omitted)). However, “a defendant asserting plain error must, in his brief, ‘specifically and distinctly’ contend that any error committed by the trial court amounted to plain error.” *State v. Bartley*, 156 N.C. App. 490, 497, 577 S.E.2d 319, 323 (2003) (citations omitted); *see also* N.C.R. App. P. 10(a)(4) (2017).

B. *Analysis*

1. Expert Witness Qualification

Defendant contends that Lt. Dykes did not satisfy “the exacting and rigorous standards now required by [evidentiary] Rule 702(a)[,]” which provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to

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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, if all of the following apply:

- (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.

See N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017). Defendant argues the testimony of Lt. Dykes “[did] not fulfill the requirements that the testimony be based on sufficient facts or data or that his HGN testimony [be] the product of reliable principles and methods. In addition, Lt. Dykes himself could not show that he had applied the principles and methods reliably to [Defendant’s] case.” In support of this argument, Defendant asserts that Lt. Dykes “could not meet the requirements to qualify as an expert *given his lack of understanding of the principles behind HGN testing.*” (emphasis added). Defendant underscores various statements by Lt. Dykes indicating that, although he was taught that HGN was a scientifically reliable method of detecting the presence of alcohol in the brain, he was not trained in “the scientific reason behind” why alcohol in the brain would cause the eye to involuntarily jerk.

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“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C.R. App. P. 10(a)(1). In the present case, Defendant did not object to Lt. Dykes’s HGN testimony *on the specific basis* that Lt. Dykes was unqualified to testify as an expert in the field of HGN testing, nor did he make a special request to have Lt. Dykes qualified as an expert in HGN. *See State v. Edwards*, 49 N.C. App. 547, 557, 272 S.E.2d 384, 391 (1980) (“Objection to a witness’[s] qualifications as an expert is waived if not made . . . on this special ground, even though general objection is taken.” (citation and quotation marks omitted)).

When the State first asked Lt. Dykes to “address specifically the [HGN] portion of the [field sobriety] test[s][.],” counsel for Defendant stated: “Your Honor, I would object at this point to any testimony regarding HGN and the issue of impairment. [Lt.] Dykes *was not presented* as an expert in HGN under Rule 702[.]” (emphasis added). Defendant’s observation that Lt. Dykes “was not presented as an expert in HGN” did not amount to a contention that Lt. Dykes *was not qualified* to give expert testimony on HGN testing under Rule 702(a), which is the argument Defendant makes on appeal.

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When the State moved to have Lt. Dykes qualified as an expert in HGN testing, Defendant asked to be heard outside the presence of the jury. After the jury was dismissed, defense counsel told the trial court:

Your Honor, the [S]tate presented the defense with a witness list, and again, according to the statute, under that witness list of lay witnesses [the State] did not tender any of those witnesses as being experts. The [S]tate did not prior to trial disclose that there was [sic] going to be any expert witnesses, didn't tender any curriculum vitae of expert witnesses that it anticipated calling, and again, I was trying to use the question about that to ensure that there wasn't going to be a situation where somebody was tendered as an expert and we have this come up and the [c]ourt . . . asked if there was [sic] any expert witnesses the [S]tate anticipated calling and the answer was no. And, Your Honor, *we cannot adequately prepare* in terms of having that curriculum vitae at this point because I haven't received that in regards to any [S]tate witnesses. And so the issue [is] in terms of due process where we have statutes that are designed to allow the defense to get information about an expert that the [S]tate anticipates calling and *we don't have time to prepare*.

(emphases added). These statements provide context for Defendant's earlier objection to "any testimony regarding HGN" on the ground that Lt. Dykes "was not presented as an expert in HGN." Defense counsel's own explanation indicates that the basis for Defendant's objection was the lack of advance notice that the State intended to offer *any* expert testimony on HGN by *any* witness.

At the conclusion of voir dire, conducted in the presence of the jury, Defendant "re-move[d] to the [c]ourt that [Lt.] Dykes not be admitted, allowed to have any expert

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testimony admitted[.]” In renewing the objection, Defendant again did not specifically challenge the qualifications of Lt. Dykes as an expert in HGN testing. *See State v. Howell*, 335 N.C. 457, 471, 439 S.E.2d 116, 124 (1994) (finding “[d]efendant’s objection ‘for the record’ was not a statement of [the] specific grounds [argued on appeal], especially in light of [defendant’s] previous objection [to the same evidence] based on [a different argument].”). Defendant did not argue at trial, as he does on appeal, that Lt. Dykes’s testimony failed the three-part reliability test set forth in Rule 702(a) due to a “lack of understanding [by Lt. Dykes] of the [scientific] principles behind HGN testing.” *See In re K.D.*, 178 N.C. App. 322, 326, 631 S.E.2d 150, 153 (2006) (“A party may not assert at trial one basis for objection to the admission of evidence, but then rely upon a different basis on appeal.” (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988))). As a result, Defendant did not preserve this argument for appellate review.

Although “[p]lain error review is appropriate when a defendant fails to preserve [an] issue for appeal by properly objecting to the admission of evidence at trial[.]” *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002), Defendant makes no argument on appeal that the admission of Lt. Dykes’s HGN testimony amounted to plain error.² *See State v. Lawrence*, 365 N.C. 506, 516, 723

² We note that, concerning the trial court’s decision to allow Lt. Dykes to testify as an expert in HGN in general, Defendant’s brief also offers no substantive argument with respect to prejudicial error.

S.E.2d 326, 333 (2012) (quoting N.C.R. App. P. 10(a)(4)). Accordingly, Defendant waived the right to appellate review of this issue.

2. Defendant's Blood Alcohol Concentration

Defendant argues that, even if Lt. Dykes was properly permitted to testify as an expert in HGN testing, Lt. Dykes's statement that Defendant's performance on the three field sobriety tests "indicate[d] a blood alcohol content of .08 or greater" violated the plain language of Rule 702(a1)(1), which provides that

[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 . . . [t]he results of a [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) (2017) (emphasis added). The State submits that Defendant waived the right to appeal this issue because, after the trial court overruled Defendant's objection, Lt. Dykes repeated the statement that Defendant's performance on the field sobriety tests "indicated the presence of alcohol with a blood alcohol content of .08 or greater[,]” and Defendant did not renew his objection. *See, e.g., State v. Reed*, 153 N.C. App. 462, 466, 570 S.E.2d 116, 119 (2002) (“[O]ur Supreme Court has long held that when evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.” (citation and internal quotation marks omitted)).

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However, even assuming *arguendo* that Defendant properly preserved the objection, and that the testimony was admitted in violation of Rule 702(a1)(1), we find no reasonable possibility that, had the statements been excluded, the jury would have found Defendant not guilty of driving while impaired. As Defendant concedes, the jury heard testimony about the results of Defendant's chemical breath analysis, conducted at BCDF following his arrest. Lt. Dykes testified that Defendant submitted to two breath tests, showing a blood alcohol content of .09 and .08, respectively. Defendant did not object to this testimony. The two test tickets, showing the results of Defendant's chemical breath analysis, were then published to the jury without objection. Thus, irrespective of Lt. Dykes's opinion testimony about Defendant's blood alcohol content, the jury had before it objective evidence that Defendant had a blood alcohol concentration of .08. *See State v. Smith*, 312 N.C. 361, 373, 323 S.E.2d 316, 323 (1984) (observing that "scientific and technological advancements . . . [in chemical] analysis have removed the necessity for a subjective determination of impairment[.]"); *see also State v. Narron*, 193 N.C. App. 76, 81-82, 666 S.E.2d 860, 864 (2008) (noting that N.C. Gen. Stat. § 20-138.1(a)(2) codifies "the longstanding common law rule" in providing that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration."). To obtain a conviction for driving while impaired, "the State need only show that [the] defendant had an alcohol concentration of .08 or more while driving a vehicle on a

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State highway.” *State v. Arrington*, 215 N.C. App. 161, 165, 714 S.E.2d 777, 780 (2011) (citing N.C.G.S. § 20-138.1[(a)(2)]). Accordingly, the State’s evidence was sufficient, even without Lt. Dykes’s comments about Defendant’s blood alcohol content, to support the jury’s verdict.

III. Conclusion

For the reasons discussed above, we find no error in Defendant’s trial.

NO ERROR.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).