NO. COA14-246
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 11 CRS 40240
11 CRS 730874

ALEXANDER JAMES HOWARD

Appeal by defendant from judgments entered 31 July 2013 by Judge Gary M. Gavenus in Forsyth County Superior Court. Heard in the Court of Appeals 27 August 2014.

Roy Cooper, Attorney General, by Kathryne E. Hathcock, Assistant Attorney General, for the State.

Anna S. Lucas for defendant-appellant.

DAVIS, Judge.

Alexander James Howard ("Defendant") appeals from his convictions for driving while impaired and reckless driving to endanger. On appeal, Defendant argues that the trial court erred in (1) admitting hospital records documenting his treatment and indicating Defendant's blood alcohol concentration on the night of the offenses; and (2) allowing expert testimony

regarding Defendant's blood alcohol level as measured in grams per 100 milliliters of blood. After careful review, we find no error.

Factual Background

The State's evidence at trial tended to establish the following facts: On 23 December 2011, at approximately 7:30 p.m., Defendant was traveling northbound on U.S. Highway 52 in Winston-Salem, North Carolina. Defendant was in the left-hand lane and passing through a construction zone when he came upon a Toyota 4Runner driven by William Knopf ("Knopf"). Defendant tried to pass Knopf's vehicle by moving into the right-hand lane. Defendant then attempted to reenter the left lane in front of Knopf despite the fact that there was another vehicle directly in front of Knopf. Defendant's vehicle "clipped" the right passenger-side bumper of Knopf's vehicle as Defendant changed lanes and then collided with concrete construction barriers before coming to a stop.

Knopf called 911 and observed Defendant "roll out" of his vehicle and throw several beer bottles onto a construction area on the right-hand side of the highway. Shortly thereafter, Corporal R.A. Necessary ("Corporal Necessary") of the Winston-Salem Police Department arrived on the scene. Corporal

Necessary spoke with Defendant as EMS personnel were placing Defendant onto a gurney and preparing to transport him to the hospital. Corporal Necessary noticed that Defendant's speech was slurred, he had glassy eyes, and there was a "strong" odor of alcohol on his breath. Corporal Necessary then proceeded to perform the horizontal gaze nystagmus ("HGN") test and an Alcosensor portable breath test on Defendant. Other field sobriety tests were not performed because Defendant was receiving medical treatment for his injuries. Defendant's eyes lacked smooth pursuit during the HGN test, and the Alcosensor test of the two samples of Defendant's breath yielded positive results for alcohol.

Defendant was then transported to the emergency room of Baptist Medical Center. At the hospital, Corporal Necessary advised Defendant of his implied consent rights under N.C. Gen. Stat. § 20-16.2 and requested that Defendant submit to a blood test. A registered nurse drew two vials of Defendant's blood and gave both vials to Corporal Necessary.[1] Corporal Necessary later charged Defendant with driving while impaired and reckless driving to endanger.

[1] At the time of trial, these two samples had not yet been tested by the State Bureau of Investigation.

A jury trial was held in Forsyth County Superior Court beginning on 29 July 2013. At trial, the State introduced Defendant's hospital records from the night of the accident. These records included the results of a blood panel ordered by Dr. Cedric Lefebvre ("Dr. Lefebvre"), which indicated that Defendant had a blood alcohol level of 122 milligrams per deciliter. Paul Glover ("Mr. Glover"), a research scientist and the branch head of the Forensic Tests for Alcohol division of the North Carolina Department of Health and Human Services, was tendered by the State and accepted by the trial court as an expert witness in the fields of blood alcohol physiology and pharmacology. Mr. Glover testified that Defendant's blood alcohol level of 122 milligrams per deciliter, as reported in his hospital records, converted to a blood alcohol level of .10 when using the grams per 100 milliliters measurement required by the North Carolina General Statutes.

On 31 July 2013, the jury returned verdicts finding Defendant guilty of both driving while impaired and reckless driving to endanger. The trial court entered judgment on the jury's verdicts, sentencing Defendant to 12 months active imprisonment based on the aggravating factor that Defendant had been convicted of impaired driving previously within the past

seven years. The trial court also sentenced Defendant to 45 days imprisonment for reckless driving to endanger, suspended the sentence, and placed Defendant on 12 months supervised probation following his release from incarceration. Defendant gave timely notice of appeal to this Court.

Analysis

I. Admission of Hospital Records

Defendant first argues on appeal that the trial court erred in allowing Defendant's hospital records from Baptist Medical Center to be admitted into evidence. Defendant contends that the admission of these records violated his rights under the Confrontation Clause of the Sixth Amendment because the statement reporting his blood alcohol content constituted testimonial evidence. We disagree.

The United States Supreme Court has held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination" before the evidence can be admitted. *Crawford v. Washington*, 541 U.S. 36, 68, 158 L.E.2d 177, 203 (2004). While declining to explicitly define the term "testimonial," the Supreme Court stated that testimonial evidence included *ex parte* statements made at a preliminary

hearing, statements taken by police officers in the course of interrogations, and other such statements that declarants would expect to be used prosecutorially, *id.* at 51-52, 158 L.E.2d at 193, and explained that most hearsay exceptions — including the business records exception — address "statements that by their nature [are] not testimonial" and, therefore, do not violate the Confrontation Clause, *id.* at 56, 158 L.Ed.2d at 195-96.

Here, the State introduced Defendant's hospital records under the business records exception to the hearsay rule. It is well established that (1) records of regularly conducted business activities are admissible as a hearsay exception even when the declarant is available as a witness, N.C.R. Evid. 803(6); and (2) "[b]usiness records are defined to include the records of hospitals," *State v. Miller*, 80 N.C. App. 425, 428, 342 S.E.2d 553, 555, *disc. review denied*, 317 N.C. 711, 347 S.E.2d 448 (1986). Tammy York, the manager and custodian of medical records for Baptist Medical Center, testified that (1) it was the hospital's regular practice to make and keep medical records; (2) Defendant's records were created by hospital staff the night he was treated; (3) doctors and medical personnel rely upon these types of records when treating patients at the

hospital; and (4) the hospital records are stored electronically in the hospital's databases.

As such, these records were properly authenticated and admitted under the business records exception. *See State v. Crawley*, 217 N.C. App. 509, 516, 719 S.E.2d 632, 637 (2011) ("Business records stored electronically are admissible if (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." (citation omitted)), *disc. review denied*, ___ N.C. ___, 722 S.E.2d 607 (2012); *see also* N.C. Gen. Stat. § 8-44.1 (2013) ("Copies or originals of hospital medical records shall not be held inadmissible in any court action or proceeding on the ground that they lack certification, identification, or authentication, and shall be received as evidence if otherwise admissible, in any court or quasi-judicial proceeding, if . . . they are certified, identified, and authenticated by the live testimony of the custodian of such records.").

Although Defendant's hospital records were ultimately used in Defendant's criminal prosecution, we cannot agree with Defendant's assertion that the records were testimonial. An examination of the records shows that the blood test indicating Defendant's blood alcohol level was one of the laboratory tests ordered by Dr. Lefebvre so that the results could be "reviewed and considered in the medical decision making process." The hospital records also indicate that the blood panel was ordered by Dr. Lefebvre *before* samples were drawn pursuant to Corporal Necessary's request for a blood test. Consequently, while the blood sample provided to Corporal Necessary was clearly intended to be used for the purpose of prosecution, the separate blood test conducted by the hospital and the records documenting its results were for medical treatment purposes and, thus, were nontestimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312, n. 2, 174 L.Ed.2d 314, 322, n. 2 (2009) (explaining that "medical reports created for treatment purposes" are not testimonial in nature). As such, we hold that the Confrontation Clause was not violated by the admission of Defendant's hospital records.

II. Expert Testimony

Defendant next argues that the trial court erred in allowing Mr. Glover's testimony that Defendant had a blood alcohol level of .10 grams per 100 milliliters because Mr. Glover's opinion "was based solely upon raw data" and "no evidence was presented that his opinion was the result of reliable methodology." Defendant's argument centers around his contention that Mr. Glover's testimony regarding Defendant's blood alcohol level was not based on sufficient facts or data because he utilized the 122 milligrams per deciliter measurement contained in Defendant's hospital records in his computations and failed to provide sufficient testimony that the hospital's methodology in testing the blood was reliable. We are not persuaded.

Under Rule 702 of the North Carolina Rules of Evidence,

> a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify . . . 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.

N.C.R. Evid. 702(a). When reviewing the trial court's ruling regarding the admissibility of expert testimony, the standard of review is abuse of discretion. *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010). A trial court abuses its discretion when its ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation and quotation marks omitted).

Here, Mr. Glover's testimony provided a conversion formula from the hospital's measurement, which was reported in milligrams per deciliter of plasma, to the measurement required by our General Statutes, which is grams per 100 milliliters of whole blood. He testified that Baptist Medical Center uses an automatic clinical analyzer to determine the concentration of alcohol in plasma, which refers to a blood sample after the red blood cells have been removed. He then described the process by which the enzyme and cofactor break down the ethyl alcohol in the sample to determine the alcohol concentration. He explained that hospitals utilize plasma rather than whole blood in their testing in order to conduct a variety of other tests on the sample and that the hospital blood alcohol test result can be converted using a conversion formula to a value that reflects the grams per 100 milliliters of whole blood. He proceeded to

discuss each step of the conversion formula and testified that Defendant's blood alcohol level, when converted to grams per 100 milliliters of whole blood, was .10.

"An expert may base his opinion on tests performed by others if those tests are the type reasonably relied upon by experts in the field." *State v. Thompson*, 188 N.C. App. 102, 111, 654 S.E.2d 814, 820 (citation, quotation marks, and brackets omitted), *disc. review denied*, 362 N.C. 371, 662 S.E.2d 391 (2008). Mr. Glover explained the instrumentation and methodology used by Baptist Medical Center in testing Defendant's blood sample and testified that he "ha[d] very high confidence in the value" reported in Defendant's hospital records. Under our Rules of Evidence, "[t]he 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.R. Evid. 703 (emphasis added). After explaining how the hospital determined Defendant's alcohol concentration, Mr. Glover proceeded to detail the mathematical formula he used in converting it to grams per 100 milliliters of whole blood. As such, we cannot say that the trial court abused its discretion in concluding that Mr. Glover's testimony was based on sufficient facts or data under Rule 702 of the North

Carolina Rules of Evidence. Moreover, the fact that Mr. Glover's opinion of Defendant's blood alcohol level was premised on a blood test that he did not personally conduct was thoroughly explored by Defendant on cross-examination. *See State v. Lyles*, 172 N.C. App. 323, 327, 615 S.E.2d 890, 894 (explaining that defendant had opportunity to cross-examine expert as to "any credibility issues regarding the basis of [his] expert opinion" on lab tests performed by another analyst), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 625 (2005).

Conclusion

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

NO ERROR.

Judges HUNTER, Robert C., and DILLON concur.

Report per Rule 30(e).