An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-294

Filed: 6 December 2016

Nash County, No. 13 CRS 54109

STATE OF NORTH CAROLINA

v.

CHRISTOPHER ANGELO WHITEHEAD

Appeal by defendant from judgment entered 18 November 2015 by Judge Marvin K. Blount, III in Nash County Superior Court. Heard in the Court of Appeals 3 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Oliver G. Wheeler, IV, for the State.

Unti & Smith, PLLC, by Sharon L. Smith, for defendant.

DIETZ, Judge.

Defendant Christopher Angelo Whitehead appeals his conviction for habitual impaired driving. The State concedes that the indictment is defective under this Court's recent decision in *State v. Brice*, __ N.C. App. __, __, 786 S.E.2d 812, 814 (2016) and that, under *Brice*, this Court must vacate Whitehead's conviction and remand for entry of judgment and sentencing on the lesser included offense of impaired driving.

Whitehead also argues that the trial court erred in denying his motion to dismiss and committed plain error in admitting expert testimony from a law enforcement officer without qualifying the officer as an expert. As explained below, the State presented sufficient evidence to survive a motion to dismiss and the trial court's admission of the officer's testimony does not amount to plain error. Accordingly, we reject these arguments, vacate Whitehead's conviction for habitual impaired driving, and remand for entry of judgment and sentencing on the lesser included offense of impaired driving.

Facts and Procedural History

Officer Michael Davidson stopped Whitehead for driving 81 mph in a 55 mph zone around 5:00 p.m. on Highway 58 near Nashville, North Carolina. Whitehead told Officer Davidson he was driving from Winston-Salem to a hospital in Rocky Mount. Whitehead did not face Officer Davidson during most of their interaction and spoke on his cellphone. Officer Davidson noticed a moderate odor of alcohol and Whitehead admitted to drinking "one tall beer" before leaving Winston-Salem. Whitehead's eyes were glassy and red, which Whitehead attributed to a medical condition.

Officer Davidson conducted a horizontal gaze nystagmus field sobriety test which indicated that Whitehead was impaired. Officer Davidson arrested Whitehead

and, at the jail, an intoxilyzer test reported Whitehead's blood alcohol concentration as 0.08.

At trial, Officer Davidson testified that "[t]he average rate of [alcohol] elimination for a non-drinker is .0165 an hour" and that one tall beer would not have been enough alcohol to stay in Whitehead's system for two hours after leaving Winston-Salem and give him a 0.08 blood alcohol concentration.

A jury later convicted Whitehead of habitual impaired driving. Whitehead timely appealed.

Analysis

Whitehead raises three arguments on appeal. First, he argues that the trial court did not have subject matter jurisdiction over his habitual impaired driving charge because the indictment was fatally defective. Second, he argues that the trial court erred in denying his motion to dismiss because the State failed to present substantial evidence of impairment. Third, he argues that the trial court committed plain error by allowing the arresting officer to testify about horizontal gaze nystagmus and alcohol elimination rates without qualifying the officer as an expert. We address each of Whitehead's arguments in turn.

I. Habitual Impaired Driving Indictment

Whitehead first argues the trial court lacked jurisdiction to enter judgment for habitual impaired driving because the indictment was fatally defective. Specifically,

Whitehead argues that the State failed to comply with N.C. Gen Stat. § 15A–928, which requires that the alleged prior convictions supporting a habitual impaired driving offense must be contained in a separately headed count or in a separate indictment. *See State v. Brice*, __ N.C. App. __, __, 786 S.E.2d 812, 814 (2016).

The State concedes this error on appeal in light of our decision in *Brice*. The State's brief indicates that it has sought discretionary review of *Brice* in our Supreme Court and asserts a series of arguments to preserve them for possible review in the Supreme Court. We are bound by *Brice* but acknowledge the State's arguments, which the State asserts solely to preserve for review in the Supreme Court. Accordingly, under *Brice*, we vacate Whitehead's felony conviction for habitual impaired driving and remand for entry of judgment and sentencing on the lesser included offense of impaired driving. *See id.* at __, 786 S.E.2d at 815. We note, however, that the State's arguments challenging this Court's reasoning in *Brice*—including its argument that this Court cannot remand for judgment on the lesser included offense because the trial court never acquired jurisdiction over this criminal case—are preserved for further review in our Supreme Court.

II. Motion to Dismiss

Whitehead next argues that the trial court erred by denying his motion to dismiss. Because this argument applies even to the lesser included offense of

impaired driving, we address it despite our holding that Whitehead's conviction for habitual impaired driving must be vacated.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65–66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

"A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street or any public vehicular area within this State: (1) While under the influence of an impairing substance; or (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more . . . ." N.C. Gen. Stat. § 20–138.1. "Thus, there are two ways to prove the single offense of impaired driving: (1) showing appreciable

impairment; or (2) showing an alcohol concentration of 0.08 or more." *State v. Narron*, 193 N.C. App. 76, 79, 666 S.E.2d 860, 863 (2008).

The State presented substantial evidence to satisfy both of these disjunctive prongs. First, by law, "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration." N.C. Gen. Stat. § 20–138.1. Here, the State presented evidence of Whitehead's intoxilyzer test that showed his blood alcohol concentration to be 0.08. This is sufficient to survive a motion to dismiss with respect to prong two, "an alcohol concentration of 0.08 or more."

The State also presented substantial evidence supporting the officer's testimony that Whitehead was appreciably impaired. A law enforcement officer's opinion "has consistently been held sufficient evidence of impairment provided that it is not solely based on the odor of alcohol." *State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002). Here, Officer Davidson testified that Whitehead had red, glassy eyes; that he admitted consuming alcohol; that he smelled of alcohol; that he was traveling more than 25 miles per hour over the posted speed limit; and that he told the officer he was "lost." This evidence was sufficient to survive a motion to dismiss with respect to prong one, appreciable impairment. Accordingly, the trial court properly denied Whitehead's motion to dismiss.

III. Expert Testimony

Finally, Whitehead argues that the trial court committed plain error by allowing Officer Davidson to testify regarding the horizontal gaze nystagmus test and alcohol elimination rates without qualifying the officer as an expert. For the reasons discussed below, we find no plain error.

"[I]f an officer is going to testify on the issue of impairment relating to the results of an HGN test, the officer must be qualified as an expert witness under Rule 702(a) and establish proper foundation." *State v. Torrence*, __ N.C. App. __, __, 786 S.E.2d 40, 42 (2016). Additionally, "North Carolina courts have consistently regarded blood alcohol retrograde extrapolation as the domain of expert witnesses." *State v. Cook*, 362 N.C. 285, 292, 661 S.E.2d 874, 878 (2008).

Whitehead did not object to the admission of Officer Davidson's testimony and concedes we must review this argument for plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (brackets omitted).

Whitehead fails to show that but for the admission of the challenged testimony, the jury probably would have reached a different result. As explained above, the State presented substantial evidence of appreciable impairment even without the challenged testimony, and presented evidence that Whitehead registered a blood alcohol concentration of 0.08 once he arrived at the jail after his arrest. In light of this evidence, Whitehead failed to meet his burden to show that, but for the officer's testimony concerning the horizontal gaze nystagmus test and alcohol elimination rates, the jury probably would have reached a different result. Accordingly, we find no plain error in the trial court's admission of the challenged testimony.

Conclusion

For the reasons discussed above, we find no error in the trial court's denial of Whitehead's motion to dismiss and no plain error in the trial court's admission of Officer Davidson's lay testimony. We vacate Whitehead's conviction for habitual impaired driving and remand for entry of judgment and sentencing on the lesser included offense of impaired driving under *State v. Brice*, __ N.C. App. __, __, 786 S.E.2d 812, 815 (2016).

NO ERROR IN PART; NO PLAIN ERROR IN PART; VACATED IN PART AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).