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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1309

Filed: 19 September 2017

Mecklenburg County, No. 14 CRS 238553

STATE OF NORTH CAROLINA

v.

DAMOND LAMONT GREENE

Appeal by defendant from judgment entered 19 May 2016 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 April 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.*

*Parish & Cooke, by James R. Parish, for defendant-appellant.*

CALABRIA, Judge.

Damond Lamont Greene (“defendant”) appeals from the trial court’s judgment entered upon a jury verdict finding him guilty of driving while impaired pursuant to N.C. Gen. Stat. § 20-138.1 (2015). After careful review, we conclude that defendant received a fair trial, free from prejudicial error.

**I. Background**

At approximately 2:30 a.m. on 29 September 2014, North Carolina State Highway Patrolman Charles Montgomery (“Trooper Montgomery”) was on duty, traveling south on Interstate 77 in Charlotte, North Carolina. In his patrol vehicle’s rearview mirror, he viewed a silver sport utility vehicle (“SUV”) approaching in the left lane. After Trooper Montgomery confirmed that the driver was traveling 80 mph in an area where the posted speed limit was 55 mph, he followed the SUV, activated his blue lights and siren, and the SUV pulled over to the side of the road. For nighttime safety purposes, Trooper Montgomery approached the SUV from the vehicle’s passenger side. When he requested the driver’s identification, defendant produced it. Trooper Montgomery asked defendant why he was speeding, and defendant responded that he did not believe that he had been.

Trooper Montgomery smelled a moderate odor of alcohol emanating from the SUV and observed what appeared to be red wine spilled on the front passenger-side floorboard. He also noticed that defendant’s eyes were red and glassy. Trooper Montgomery asked defendant whether he had consumed any alcohol, and defendant replied that he had two glasses of wine earlier in the evening while watching a football game at a friend’s house. Trooper Montgomery asked defendant to move away from the SUV so that he could determine the source of the alcohol odor that he detected.

Defendant exited his SUV. When Trooper Montgomery still detected a moderate odor of alcohol on defendant's breath, he asked defendant to perform a series of field sobriety tests, and defendant agreed. Trooper Montgomery first requested that defendant perform the ABC test by reciting the alphabet from "C" through "Q." Defendant performed the test mostly as instructed, except that he began "D-C-D-E-F- . . ." before correctly reciting the rest of the letters.

Trooper Montgomery next asked defendant to perform the Romberg balance test, which requires the subject to put his feet together; place his arms by his side; tilt his head back; silently estimate 30 seconds; and say "30" once he believes that time has elapsed. With this "divided-attention test," Trooper Montgomery was assessing defendant's ability to estimate time and looking to see whether he swayed back and forth, side to side, or from heel to toe. Defendant performed the test correctly; he did not sway, and he correctly estimated 30 seconds.

To assess defendant's dexterity, Trooper Montgomery next requested defendant perform the finger-to-nose test. Trooper Montgomery first instructed defendant to stand with his feet together; hold his arms straight out from his sides; ball his fists and point his index fingers; tilt his head back slightly; and close his eyes. Next, Trooper Montgomery directed defendant to touch the center of his nose with his left index finger and then bring it back out to the side, repeating the exercise six times with alternating arms. Defendant touched his nose each time as instructed,

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but Trooper Montgomery repeatedly had to remind defendant to bring his arm back out to the side.

The final field sobriety test that Trooper Montgomery asked defendant to perform was the horizontal gaze nystagmus (“HGN”) test. With this standardized test, Trooper Montgomery was looking to see whether defendant’s eyes exhibited “involuntary jerking” in response to a stimulus held 12 to 15 inches away. Trooper Montgomery instructed defendant to stand with his feet together, place his arms by his side, and keep his head level. Holding his finger 12 to 15 inches from defendant’s nose, Trooper Montgomery first tested defendant’s eyes for resting nystagmus and equal pupil size. During the remaining phases of the HGN test, Trooper Montgomery moved his finger to various positions and instructed defendant to follow it with his eyes.

Defendant submitted to a portable breath test (“PBT”), and the reading was positive for the presence of alcohol. Based on the odor of alcohol on defendant’s breath, his performance on the field sobriety tests, and the PBT results, Trooper Montgomery opined that defendant was appreciably impaired, placed him under arrest, and transported him to the Pineville Police Department. After advising defendant of his rights, Trooper Montgomery administered a breathalyzer test. Defendant’s blood alcohol concentration (“BAC”) measured at .09 grams of alcohol per 210 liters of breath.

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Trooper Montgomery issued citations charging defendant with driving while impaired and driving 80 miles per hour in a 55 mile per hour zone. After a trial, on 30 September 2015, defendant was found guilty of both charges in Mecklenburg County District Court. He appealed the judgments to Mecklenburg County Criminal Superior Court, and a jury trial commenced on 17 May 2016.

Defendant filed a pretrial motion to suppress “any and all physical evidence seized from [defendant] by the police, including the results of the chemical analysis of his breath and blood[.]” According to defendant, Trooper Montgomery lacked probable cause to arrest him, and therefore, the resulting evidence was “the tainted fruit of the initial illegality.” Defendant and the State asked the trial court to “hear the probable cause motion prior to trial”; however, the court determined that the issue was more efficiently handled during the course of trial and denied the request. Based on the court’s ruling, defendant filed a motion *in limine* to exclude any PBT evidence from the jury’s hearing. The State agreed, and the trial court granted defendant’s motion.

At trial, the State tendered Trooper Montgomery as an expert in HGN, and defendant objected on Rule 702 and foundational grounds. Defendant requested *voir dire* outside of the jury’s presence, but the trial court allowed the jury to remain while Trooper Montgomery testified about his training, qualifications, and knowledge of HGN. Following *voir dire*, the court excused the jury and held a Rule 702 conference.

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After considering the parties' arguments, the trial court denied the State's motion to tender Trooper Montgomery as an expert in HGN, because his testimony regarding the methodology was not sufficiently reliable under Rule 702(a)(2). However, despite prohibiting Trooper Montgomery from testifying to the HGN test results, the court denied defendant's motion to strike the portions of his *voir dire* testimony conducted in the jury's presence. Defendant then requested the trial court to give an instruction to the jury to not consider that the HGN test was performed. The court denied the motion.

The parties discussed the State's intention to play a video of the traffic stop for the jury, and defendant requested that the court mute the audio during the portion depicting the administration of the HGN test. The court also denied this motion. Defendant did not object when the State subsequently played the video for the jury.

During direct examination by the State, Trooper Montgomery testified that he formed the opinion that defendant had consumed a sufficient quantity of alcohol to appreciably impair his faculties. When asked what factors he considered in arriving at his opinion, Trooper Montgomery responded, "The odor. The field sobriety tests that I had performed on the shoulder of the road. And, and the PBT." Defendant objected and moved to strike the reference to the PBT, but the trial court overruled his objection.

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The trial court subsequently excused the jury and held a probable cause hearing. Following arguments by defendant, the court found that Trooper Montgomery had probable cause to arrest defendant and denied his motion to suppress. The court stated that in the event of a conviction, he would make findings of fact for the record.

At the close of the State's evidence and the close of all of the evidence, defendant moved to dismiss both charges due to the insufficiency of the evidence. The trial court denied defendant's motions as to both charges. Defendant subsequently moved for a mistrial pursuant to N.C. Gen. Stat. § 15A-1061, contending that he was caused "substantial and irreparable prejudice" by the trial court's failure to strike Trooper Montgomery's (1) *voir dire* testimony concerning the HGN test; and (2) reference to his use of the PBT in determining the existence of probable cause. The trial court denied defendant's motion.

On 19 May 2016, the jury returned verdicts finding defendant guilty of both of the charged offenses.<sup>1</sup> On the driving while impaired charge, the trial court found, as a mitigating factor, that defendant's BAC did not exceed .09 at any relevant time after driving. The trial court sentenced defendant to 60 days in the custody of the

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<sup>1</sup> After dismissing the jury, the trial court made oral findings of fact on probable cause for the record. The court instructed the parties to prepare a proposed order for the trial court to enter "in the next two weeks." The record is silent as to whether the parties submitted a proposed order to the trial court, but no written order was ever entered by the court.

Misdemeanant Confinement Program, but suspended the sentence and imposed a 14-month period of unsupervised probation. Defendant appeals.

## **II. Analysis**

### **A. Post-Appeal Motions**

On 23 February 2017, the State filed a motion to dismiss defendant's appeal due to defendant's failure to include the district court's judgment within the appellate record, in violation of N.C.R. App. P. 9(a)(3). However, we subsequently granted defendant's motion to amend the record to include the district court judgment. Therefore, we deny the State's motion to dismiss and proceed to the merits of defendant's appeal.

### **B. Probable Cause**

On appeal, defendant first contends that the trial court erred by denying his motion to suppress the breathalyzer evidence, because there was no probable cause to arrest him for driving while impaired. However, at oral arguments in Cumberland County on 26 April 2017, defendant's appellate counsel conceded the existence of probable cause. Accordingly, we need not address this argument.

### **C. HGN Evidence**

Defendant next argues that the trial court committed several errors related to the admission of HGN evidence. Specifically, defendant asserts that the trial court denied him a fair trial by: (1) failing to strike Trooper Montgomery's *voir dire*



testimony after the court denied the State's motion to tender him as an expert witness; (2) denying defendant's request for a jury instruction to not consider that the HGN test was performed; and (3) failing to mute the portion of the video depicting Trooper Montgomery's administration of the HGN test. We disagree, because we conclude that the Supreme Court's recent opinion in *State v. Godwin*, \_\_ N.C. \_\_, 800 S.E.2d 47 (2017) forecloses all of defendant's arguments that pertain to the trial court's admission of HGN evidence.

Pursuant to amended N.C. Gen. Stat. § 8C-1, Rule 702(a),

- (a) 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, 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.

“The three numbered requirements for admission of expert testimony were added to Rule 702(a) by amendment in 2011 to incorporate the standard from the line of United States Supreme Court cases beginning with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*” *Godwin*, \_\_ N.C. at \_\_, 800 S.E.2d at 50.

Also relevant to the instant case, N.C. Gen. Stat. § 8C-1, Rule 702(a1) provides, in pertinent part:

- (a1) 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.

In *Godwin*, our Supreme Court considered whether Rule 702(a1) “requires a law enforcement officer to be recognized explicitly as an expert witness pursuant to Rule 702(a) before he may testify to the results” of an HGN test. *Godwin*, \_\_\_ N.C. at \_\_\_, 800 S.E.2d at 48. In holding that “such explicit recognition is not required[,]” *id.*, the Court deemed it “evident that the General Assembly . . . made clear provision to allow testimony from an individual ‘who has successfully completed training in HGN’ and meets the criteria set forth in Rule 702(a) . . . .” *Id.* at \_\_\_, 800 S.E.2d at 50 (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a1)(1)).

“In assessing how a witness may be qualified as an expert,” the Supreme Court reiterated that an appellate court may determine that the trial court implicitly recognized a witness as an expert, *even where the court denied a party’s motion to tender the witness as an expert at trial.* *Id.* at \_\_\_, 800 S.E.2d at 50-51. Revisiting its

holding in *Apex Tire & Rubber Co. v. Merritt Tire Co.*, 270 N.C. 50, 153 S.E.2d 737 (1967), the Court explained 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. [The Supreme Court] 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, [the Court] inferred from its actions that the trial court made an implicit finding that the witness was an expert.

*Godwin*, \_\_ N.C. at \_\_, 800 S.E.2d at 50-51 (internal citations omitted).

In the instant case, Trooper Montgomery testified that he had served as a law enforcement officer for seven years. His HGN training was provided by the Governor's Highway Traffic Safety for the State of North Carolina in accordance with standards set by the National Highway Traffic Safety Administration ("NHTSA"). Trooper Montgomery testified that he attended a 30-hour Advanced Roadside Impairment Detection course, and each year, he attends a four-hour in-service training on standardized field sobriety tests at the Highway Patrol Academy. In order to qualify to administer the HGN test in the field, Trooper Montgomery was

first required to pass a written and practical exam in front of certified instructors. He testified that he passed both exams.

The trial court allowed Trooper Montgomery to explain how he administers the HGN test pursuant to his training and experience. Without revealing defendant's test results, Trooper Montgomery described the procedures he uses and indicators of impairment that he looks for during each phase of the test. During *voir dire*, however, Trooper Montgomery struggled to answer questions about the scientific principles underlying the HGN test, and defendant objected to his tender as an expert. The trial court excused the jury and held a Rule 702 hearing.

After considering arguments from both parties, the trial court, in his discretion, declined to recognize Trooper Montgomery as an expert in HGN because his testimony concerning the test's methodology did not satisfy Rule 702(a)(2):

THE COURT: 702 doesn't require . . . that the training be by anything other than law-enforcement related or NHTSA. I don't – there's nothing that requires anything like that. . . .

That's not the concern that I've got. You know, you don't have to have any advanced degree, or scientific degree, or pharmacology degree in order to qualify as an expert on HGN. And I'm not concerned about whether or not the gentleman's able to disprove in application every possible explanation for . . . nystagmus . . . based on, you know, observations.

That doesn't preclude a witness from giving an opinion about what he saw and what the relationship is, possibly, between that and a substance or a material such

as alcohol. But the gentleman just doesn't have any grounding regarding the methodology. With all due respect, he just doesn't.

It doesn't take a lot. Frankly I've held before, it doesn't take a lot for, you know a witness to have some basic knowledge and information about studies. Or this is, you know, this is the material. This is what it does to the body. That doesn't take a lot of learning in order to cross the threshold. It just doesn't.

...

It can be very minimal. I have not required much. I haven't. But I – and I'm fine with the application here. I mean, the gentleman – I don't have any problem with the way he did the test. I don't have any issues with that. But . . . the problem I have is under 702(a)(2).

It's really about whether or not he's just regurgitating. Which, which the gentleman is. I mean, that's not to be mean. I mean, you know, it's just – he's just reciting that, This is what I learned, and this is what I did. And that's fine.

And frankly, one of these days I'm praying that the Court of Appeals or the Supreme Court will address the, the reliability of it as a matter of law, because I do think the subject is something that they could say this is – or the General Assembly could do it. But we go through this laborious process each time.

Here I'm just not satisfied. . . . Based on all the testimony, with all due respect, I don't think the gentleman has even a basic knowledge about the methodology and the relationship between alcohol and the impact on the, the physical eyeballs, and the muscles, and this is what alcohol does.

Don't have any issues about the 38 different types of

nystagmus. All . . . the testimony would still come in. That would go to . . . weight in terms of how you evaluate it. But it's just that methodology, you know. It's having some knowledge about a few studies. Or knowledge about just something related to anatomy. Anything. And I just don't have it here at all.

Our Supreme Court's opinion in *Godwin* granted the trial court's wish. Although the general reliability of HGN evidence was not squarely at issue in *Godwin*, the Supreme Court indicated that "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." *Id.* at \_\_\_, 800 S.E.2d at 53. Based on that statement, this Court recently held that "a trial court does not err when it admits expert testimony regarding the results of a Horizontal Gaze Nystagmus . . . test without first determining that HGN testing is a product of reliable principles and methods as required by subsection (a)(2)." *State v. Younts*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2017 N.C. App. LEXIS 563, \*1 (filed July 18, 2017).

In light of *Godwin* and *Younts*, we conclude that the record contains sufficient evidence upon which the court could have found that Trooper Montgomery was permitted to testify about the results he observed when he administered the HGN test to defendant. *See Godwin*, \_\_\_ N.C. at \_\_\_, 800 S.E.2d at 51. Trooper Montgomery was qualified to testify concerning the HGN test by his experience and training. N.C. Gen. Stat. § 8C-1, Rule 702(a). His testimony established that he administers the HGN test pursuant to his training and certifications, which were provided in

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accordance with NHTSA standards. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a)(1). Trooper Montgomery was not permitted to testify to the results that he observed in defendant's case, due to the trial court's determination that his testimony was insufficient under Rule 702(a)(2). Nevertheless, in his ruling, the court specifically stated that he was "fine with the application here" and did not "have any problem with the way" that Trooper Montgomery performed the test. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a)(3).

Furthermore, because defendant has abandoned his argument challenging probable cause to arrest him for driving while impaired, defendant cannot demonstrate any prejudice resulting from the admission of Trooper Montgomery's HGN testimony in the present case. Any misconceptions the jury might have had concerning the nature of Trooper Montgomery's testimony, if any, would not have been sufficient to overcome the now unchallenged evidence that the breathalyzer test administered to defendant at the police station indicated a BAC of .09. Therefore, even assuming *arguendo* the trial court erred in its handling of Trooper Montgomery's HGN testimony, we hold that the trial court committed no prejudicial error by: (1) failing to strike Trooper Montgomery's testimony regarding HGN after the court denied the State's motion to tender him as an expert witness; (2) denying defendant's request for a jury instruction to not consider that the HGN test was performed; or (3)

failing to mute the portion of the video depicting Trooper Montgomery's administration of the HGN test.

**D. PBT Evidence**

Defendant also argues that the trial court erred by denying his motion to strike Trooper Montgomery's testimony that the PBT was one factor that he used in forming his opinion that defendant was impaired. However, alleged "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). Here, defendant fails to meet this high burden. Even though the PBT evidence was excluded pretrial, the challenged testimony was so brief that it is extremely unlikely to have affected the jury's verdict:

[THE STATE:] And Trooper Montgomery, did you form an opinion satisfactory to yourself as to whether or not the defendant had consumed some amount of an impairing substance so as to appreciably impair his mental and/or his physical faculties?

A. I did.

Q. And what was that opinion?

A. My opinion that the defendant, um, or the subject had consumed a sufficient quantity of some impairing substance so as to appreciably impair his mental and physical faculties.

Q. And did you have an opinion as to what the impairing



substance was?

A. Yes, alcohol.

Q. And what factors did you consider in making that determination?

A. The odor. The field sobriety tests that I had performed on the shoulder of the road. And, and the PBT.

[DEFENSE COUNSEL]: Objection.

THE COURT: Let's move forward, please.

[THE STATE]: Yes, your Honor.

[DEFENSE COUNSEL]: Move to strike.

THE COURT: Let's move forward, please.

[THE STATE]: Yes, your Honor.

Without context or further explanation, we do not believe that this isolated mention of PBT evidence affected the ultimate result at trial. Consequently, any error in its admission was not prejudicial. *Id.*

### **E. Motion for Mistrial**

Lastly, defendant asserts that the trial court erred by denying his motion for a mistrial. We disagree.

“Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge, and a mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and

impartial verdict under the law.” *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982).

N.C. Gen. Stat. § 15A-1061 provides the trial court’s procedures for declaring a mistrial based on prejudice to the defendant and states in pertinent part:

Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant’s motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant’s case.

Here, defendant contends that the denial of his motion for a mistrial was erroneous, because the trial court’s treatment of the HGN and PBT evidence was erroneous. Since we determined that the trial court did not err in admitting that evidence, we necessarily also conclude that the court did not abuse its discretion in denying defendant’s motion for a mistrial on those grounds.

### **III. Conclusion**

Guided by the recent decisions in *Godwin* and *Younts*, we hold that the trial court did not err by: (1) failing to strike Trooper Montgomery’s *voir dire* testimony after the court denied the State’s motion to tender him as an expert in HGN; (2) denying defendant’s request for a jury instruction to not consider that the HGN test was performed; or (3) failing to mute the portion of the video depicting Trooper Montgomery’s administration of the HGN test. Although the PBT evidence was

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excluded pretrial, the challenged testimony was isolated and lacked context, such that any error in its admission was not prejudicial. Because the trial court did not commit prejudicial error by admitting the HGN or PBT evidence, the court also did not abuse its discretion by denying defendant's motion for a mistrial on those bases.

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).