IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-81

Filed: 19 September 2017

Duplin County, Nos. 13CRS000882-83, 13CRS051175-79

STATE OF NORTH CAROLINA

v.

ANTIONE CEDRIC McKENITH, Defendant.

Appeal by Defendant from judgment entered 8 June 2016 by Judge W. Douglas Parsons in Duplin County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Mark L. Hayes for the Defendant.

DILLON, Judge.

Antione Cedric McKenith ("Defendant") appeals from a judgment convicting him of a number of crimes resulting from a traffic accident which left one person dead and several persons injured. Specifically, Defendant challenges the trial court's admission of testimony from the State's expert witness. We find no prejudicial error.

I. Background

Defendant was involved in a car accident when his van swerved into oncoming traffic and collided head-on with another car. One of the occupants in the other car died at the scene and several others were injured. Defendant was indicted for a number of charges as a result of his involvement in the accident.

Based on the evidence offered at trial, which included evidence that Defendant was intoxicated at the time of the accident, a jury found Defendant guilty on a number of charges. Following sentencing, Defendant gave notice of appeal in open court.

II. Analysis

Defendant challenges his conviction based on the trial court's error in allowing a witness for the State to provide expert testimony regarding Defendant's blood alcohol content ("BAC") at the time of the accident. Specifically, at trial, the evidence showed that about three and a half hours after the accident, Defendant consented to a blood test, which indicated a BAC of .06. Given this information, the State's expert testified that Defendant's BAC at the time of the accident – three and a half hours before the blood test was administered – would have been .12. The State's expert based his opinion on a "retrograde extrapolation" calculation, a calculation which makes assumptions regarding the rate which a person's BAC increases and decreases over time. Defendant objected to the testimony. We conclude that, assuming the trial court erred in allowing the State's expert to testify, the error was not prejudicial.

Defendant contends that the testimony of the State's expert failed the *Daubert* "fit" test.[1] Defendant points to testimony of the expert which suggests that the expert admits not having enough information to predict accurately Defendant's BAC at the time of the accident through the application of the retrograde extrapolation analysis in this case. *See State v. Babich*, ___ N.C. App. ___, ___, 797 S.E.2d 359, 364 (holding that when "the expert concedes that [his or her] opinion is based entirely on a speculative assumption about the defendant . . . that testimony does not satisfy the *Daubert* 'fit' test").

However, assuming the trial court erred in allowing the State's expert to testify, we conclude that Defendant has failed to meet his burden that the admission of the evidence was prejudicial in this case. *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009) ("[E]videntiary error does not necessitate a new trial unless the erroneous admission was prejudicial."); *State v. Cotton*, 329 N.C. 764, 767, 407 S.E.2d 514, 517 (1991) (holding that he burden of proof of prejudicial error is on the defendant). Any error is prejudicial only if Defendant shows that "there is a

[1] This test is named for *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The General Assembly revised Rule 702 of the North Carolina Rules of Evidence in 2011, and, in so doing, adopted the federal standards for the admission of expert testimony. *State v. Hunt,* ___ N.C. App. ___, ___, 792 S.E.2d 552, 558 (2016). The federal standard requires that: "(1) The testimony must be based upon sufficient facts or data. (2) The testimony must be the product of reliable principles and methods. (3) The witness must have applied the principles and methods reliably to the facts of the case." *State v. McGrady*, 368 N.C. 880, 890, 787 S.E.2d 1, 9 (2016). It is not enough that the principles and methods may be applied in the abstract; they must also be reliably applicable to the facts of the particular case. *See Daubert,* 509 U.S. 579, ___. This notion, known as the *Daubert* "Fit" Test, *Id.* at 591, is where Defendant's argument focuses.

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." N.C. Gen. Stat. § 15A-1443(a) (2015) (emphasis added). "The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987).

In reaching our conclusion, we are guided by our holding in *State v. Taylor*, 165 N.C. App. 750, 600 S.E.2d 483 (2004). In that case, we held that the erroneous admission of the testimony of a State's expert witness regarding a retrograde extrapolation analysis is not prejudicial where there is other strong evidence of the defendant's impairment. *Id.* at 489-90, 600 S.E.2d at 758. Indeed, N.C. Gen. Stat. § 20-138.1 states that an individual may be convicted of impaired driving on *either* of two independent grounds: (1) driving while under the influence of an impairing substance; or (2) having a BAC of [0.08] or more at any relevant time after (i) consuming alcohol and (ii) driving a vehicle. *See State v. Coker*, 312 N.C. 432, 439-40, 323 S.E.2d 343, 349-50 (1984). In *Taylor*, our Court explained as follows:

> Although the primary value of [the expert's] testimony was to establish that defendant's blood alcohol content was above the statutory limit at the time of the collision, the State was not required to establish that level to prove that defendant was driving while impaired[.] In fact, the State may prove [that the defendant was impaired] where the [BAC] is entirely unknown or less than [the legal limit]. [For instance, the] opinion of a law enforcement officer . . .

> has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol.

Taylor, 165 N.C. App. at 757-58, 600 S.E.2d at 489 (internal citations and marks omitted).

In the present case, even excluding testimony of the State's expert, the evidence was overwhelming that Defendant was impaired by alcohol at the time of the accident. Specifically, the evidence tended to show as follows: Defendant was driving on the wrong side of the road when he collided with the other car. Defendant had a strong odor of alcohol coming from his breath. Defendant's speech was slurred. Defendant was disoriented. Defendant's eyes were bloodshot. Defendant acted in a belligerent manner with the paramedics and with law enforcement. Defendant had alcohol in his blood three and a half hours after the accident, with no evidence that he consumed alcohol after the accident. As in *Taylor*, we hold that "even if the admission of [the State expert's testimony] was error, the error was not prejudicial." *Id.* at 758, 600 S.E.2d at 489.

We note Defendant's contention that it would be inequitable to allow the State to succeed on appeal by arguing that "the jury's decision-making process is unknown" because, at trial, Defense counsel requested a special verdict sheet. The State opposed the special verdict, and the trial court denied Defense counsel's request. However, Defendant provides no precedent in support of this contention. Further, at

no time must the State allege which theory of guilt it wishes to proceed upon to prove the single offense of impaired driving. *State v. Palmer*, 293 N.C. 633, 638-40, 239 S.E.2d 406, 409-11 (1977).

III. Conclusion

Assuming that the trial court erred in allowing the State's expert to testify regarding Defendant's BAC, we conclude that such error was not prejudicial.

NO ERROR.

Judge ZACHARY concurs.

Judge BERGER concurs by separate opinion.

Report per Rule 30(e).

BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion that if we assume the trial court erred, said error was not prejudicial. However, I would find that the trial court did not err in admitting the expert's testimony regarding retrograde extrapolation.