IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-93

Filed: 5 September 2017

Nash County, Nos. 14 CRS 54642, 15 CRS 1112

STATE OF NORTH CAROLINA, Plaintiff,

v.

OWEN BERNICE SMITH, III, Defendant.

Appeal by defendant from judgments entered 27 April 2016 by Judge Cy A. Grant in Nash County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashleigh P. Dunston, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

ZACHARY, Judge.

Owen Bernice Smith, III (defendant) appeals from the judgments entered upon his convictions of aggravated felony death by vehicle and second-degree murder. On appeal defendant argues, and the State agrees, that the trial court erred by sentencing defendant for both offenses. Defendant also argues that he received

ineffective assistance of counsel in that his trial counsel did not object to the introduction of certain testimony. We conclude that the judgment entered against defendant for aggravated felony death by vehicle should be vacated, and that defendant has failed to establish that he received ineffective assistance of counsel.

Factual and Procedural Background

On 25 October 2014, defendant and Kenneth Justin Hill were in defendant's truck on a rural road in Nash County when the driver of the truck lost control of the vehicle, which left the road and collided with a tree. Mr. Hill died instantly as a result of a broken neck. On 9 February 2015, defendant was indicted on charges of aggravated felony death by vehicle, second-degree murder, and driving while impaired.[1]

The charges against defendant were tried before the trial court and a jury beginning on 25 April 2016. The State's evidence tended to show, in pertinent part, the following: Roy Pearson testified that on 25 October 2014, he was hunting at a location about a half mile from the collision when he heard the sound of squealing car tires followed by a crash. Approximately ten or fifteen minutes later, Mr. Pearson was driving in the area and saw a small pickup truck stopped in the road. He found the defendant lying on the ground about 20 or 30 feet from the truck. Defendant's face

[1] The transcript indicates that defendant was also charged with driving while his driver's license was suspended or revoked, but the charging documents are not included in the record. Prior to submitting the case to the jury, the trial court allowed defendant's motion to dismiss this charge.

was bloody and he appeared dazed; however, he was conscious. Mr. Pearson propped defendant against a tree trunk. As he went back to his truck to call for help, Mr. Pearson found Mr. Hill, who was lying in a roadside ditch and did not have a pulse. About five minutes later, a deputy sheriff arrived.

Nash County Deputy Sheriff David Marks testified that on 25 October 2014, he was dispatched to the scene of a motor vehicle accident on Valley Road in Nash County. When he arrived, defendant was leaning against a tree. Defendant appeared to be in pain and his speech was slurred. However, he was able to answer Deputy Marks's questions, and told the officer that one other person had been in the truck. Deputy Marks located Mr. Hill in the ditch by the roadway, "on the opposite side of the vehicle." Mr. Hill did not appear to have a pulse. He remained with defendant until other rescue and law enforcement personnel arrived. On cross-examination, Deputy Marks testified that at one point defendant said there were three people in the truck, which was not accurate.

Megan Camacho[2] testified that on 25 October 2014, she was dispatched[3] to the scene of the single-vehicle accident. When Ms. Camacho arrived, she noted that the front end and windshield of the truck were severely damaged, and that defendant

[2] Ms. Camacho testified that she had married and changed her legal last name to Spivey. In this opinion we refer to her as Ms. Camacho because that is how she was addressed at trial and it is the name by which her testimony is identified in the transcript.

[3] The content of the parties' examination of Ms. Camacho suggests that she was an ambulance driver or EMT. However, the witness was not asked about her employment, and did not offer testimony on the subject.

and Mr. Hill were about 30 feet from the truck. Ms. Camacho checked on defendant, who was aware that he had been involved in a wreck and was able to speak to those around him. Defendant's front teeth were missing and he appeared to have experienced trauma to the front of his body. Defendant had an odor of alcohol. Ms. Camacho's vehicle had a flat tire, so defendant was transferred to a different ambulance. During the transfer, Ms. Camacho heard someone from the other Emergency Medical Services ("EMS") unit ask defendant if he had been driving and heard defendant reply, "It's my f____ng truck, yeah." Defendant also admitted that he had consumed alcohol prior to the accident, and said, "I've messed up." Defendant appeared to be conscious and coherent.

Charles Nelson testified that he was employed by Nash County EMS and that on 25 October 2014, he was dispatched to the accident scene. Upon arrival, the emergency technicians moved defendant into their ambulance and applied bandages to some of his injuries. Defendant had bruises and abrasions on his left side and chest, a large laceration over his left eye, missing front teeth, and bruises on his left shin. Mr. Nelson described defendant as being "alert and oriented" and able to answer questions such as the current date and the date of his birthday. Defendant told Mr. Nelson that he had been driving the truck, that he had consumed 12 to 18 beers before the accident, and that he had probably not been wearing a seatbelt. Mr. Nelson could smell alcohol. After Mr. Nelson's coworker asked defendant several times if he had

been driving, defendant became impatient and said, "G___D__n, it was my truck. I was driving. How many more times are you going to ask me?" Mr. Nelson testified that in his opinion defendant had been the driver of the truck:

> MR. NELSON: Okay. In my professional opinion and from injuries I've seen in the past in motor vehicle accidents, when a driver slams into the side of the vehicle, all of his -- most -- 99% of the time, all of their injuries will be on the left side. The bruising across here and the bruising across the lower abdomen is consistent with the driver's side seatbelt. So, with him having the injuries to the left side is where we come to the conclusion that he may have been the driver. We did ask him if he was driving. He advised yes.
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> MS. HONEYCUTT: And so, after you asked him did your findings and his answer lead you to that conclusion?
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> MR. NELSON: Yes, ma'am. And he was asked several times if he was driving. And at one point he used an explicit [sic]. He said, "GD, it was my truck. I was driving. How many more times are you going to ask me?"

Mr. Nelson transported defendant to Wake Medical Center in Raleigh. When they arrived at the hospital, a doctor or nurse asked defendant whether he had been the driver or the passenger, and defendant answered that he had been driving. Jacob Manning, who was also employed by Nash County EMS, offered testimony that corroborated that of Mr. Nelson. Mr. Manning testified that although defendant asked repetitive questions of the EMTs, he "responded appropriately to pretty much all the questions that were asked" and that "specifically he said that it's my truck. I was driving."

Trooper Jeremy DeVaughn of the North Carolina State Highway Patrol testified that when he was dispatched to the location of the accident he spoke briefly with defendant, who smelled strongly of alcohol. When Trooper DeVaughn asked defendant if he had been driving, defendant said that he "was F___ng driving his truck." Trooper DeVaughn testified that he had received advanced training on collision investigation and collision reconstruction. He studied the area of the wreck and prepared a collision report summarizing his findings. Based on his observations, Trooper DeVaughn testified regarding the path of the truck and the relationship between its path and the injuries received by defendant and Mr. Hill. After noting features of the crash scene, Trooper DeVaughn followed the ambulance to Wake Medical Center, where he observed defendant's injuries. He testified that defendant had a "clear indentation" from the steering wheel on his chest and facial injuries that were consistent with the damage to the left side of the truck and the windshield.

> TROOPER DeVAUGHN: . . . I did ask one of the nurses there to remove his shirt and see if we could see any kind of seatbelt marks or anything like that. We didn't find any seatbelt mark, but we could see the -- the clear indentation of the -- the steering wheel in his upper thoracic cavity. . . . [W]henever I got there to the scene, I could see that [the] steering wheel was bent, so I knew whoever the driver was had taken that -- that -- some type of force to his -- to his chest or to his abdominal cavity and that also assisted in helping identify that [defendant] maybe was the driver.
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> MS. HONEYCUTT: So, on the scene, you saw that the steering wheel of the truck was bent?

> TROOPER DeVAUGHN: Yes, ma'am.
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> MS. HONEYCUTT: And you said when you were at Wake Med, you saw an indentation on his chest?
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> TROOPER DeVAUGHN: Yes, ma'am. A dense coloring from where he actually had had the impact. It works the same with a seatbelt. Anytime anybody gets into a seatbelt when they are wearing it, they usually have a stripe all the way across their chest where the seatbelt caught and usually there's several abrasions to the chest as well. Which obviously in this case, it was not there. It wasn't present. He didn't have his seatbelt on, but it was present where he had taken the impact to that -- the same impact that caused all the injuries to his face and to the left side of his body, he also took that to his chest in those -- the steering column.
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> MS. HONEYCUTT: Now, you -- you used the word a thoracic cavity. What is that[?] . . .
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> TROOPER DeVAUGHN: It's the -- the upper chest portion, pretty much from the bottom of your sternum all the way to your stomach.

While at the hospital, Trooper DeVaughn informed defendant that he was charged with an impaired driving offense and obtained defendant's consent for a blood test to determine his blood alcohol level. Later forensic testing revealed that at that time, which was several hours after the accident, defendant had a blood alcohol level of .12.

After observing the blood draw from defendant, Trooper DeVaughn completed a questionnaire used by the Highway Patrol to document investigations into impaired driving offenses. Trooper DeVaughn informed defendant of his *Miranda* rights and

defendant agreed to waive his right to remain silent and to speak with the trooper. Trooper DeVaughn testified that when defendant "was answering the questions, he kind of seemed kind of jovial. Kind of like it was [a] joke, but he didn't really understand the entire gravity of the situation." The answers defendant provided to Trooper DeVaughn during this interview were significantly less coherent than, and in some cases contradictory to, the statements that defendant had made at the scene of the crash, as evidenced by the following excerpt:

> TROOPER DeVAUGHN: The first question that I asked him is . . . Were you the operator of the vehicle? He stated, no. My next question is, were there any mechanical problems with the vehicle? He stated, no. I asked him where was he going. He said home. I asked him where he was coming from. He said home. I asked him what street or highway were you on? He said, no.
> I asked what city are you in now. He said, Wilson. I asked him without looking at a watch, what time is it now? He said -- he said, 10:30 p.m. I asked him what was the date. He said, the 29th. I asked him what was the day of the week -- what day of the week. He said, 25th -- 10/25/2014. . . . And then the actual time was 9:30 p.m. The actual date 10/25.
> The actual day was Saturday. I asked him when did he last eat. He didn't answer. I asked him what did he eat. He didn't answer. I asked what time did you begin drinking? He said lunch. I asked him when was his last drink. He said lunch. I said what did you drink? He said, I don't know. I asked him how many? He said, I don't know. . . .[I asked him on] a scale of 0 to 10, 0 being completely sober and 10 being completely drunk, where do you fit? He stated that he was at a 5. I asked in his opinion should he have operating a motor vehicle. He said, no.
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> . . .

> I asked have you . . . been injured lately, he said, no. I asked were you involved in a crash today. He said, no. I asked did he get a bump on his head. He said, no. I asked have you had any alcoholic beverages since the crash. He did not answer. I asked have you seen a doctor or dentist lately. He stated, no. . . .

Trooper DeVaughn reviewed defendant's criminal record and determined that as of 25 October 2014, defendant's driver's license had been suspended indefinitely as a result of multiple convictions for impaired driving.

Trooper Brandon Davidson of the North Carolina Highway Patrol testified that he had been dispatched to the scene of the accident on 25 October 2014. Trooper Davidson observed that defendant's injuries were to his left side, while Mr. Hill had injuries to the right side of his face, which led him to conclude that defendant had been the driver of the truck.

Trooper David Finch of the North Carolina Highway Patrol testified that when he was dispatched to the scene of the crash, he directed a paramedic to ask defendant whether he had been the driver of the truck, heard defendant say twice that he had been driving, and also noted that defendant smelled strongly of alcohol. Trooper Finch accompanied Trooper DeVaughn to Wake Medical Center, where he found defendant to be "fully conscious and alert." He observed defendant's injuries, which were on the left side of his face and body, and believed these injuries to be "consistent with impacting the steering wheel with his face as far as knocking his teeth out and

-- and the left side of his face as he come out the left side of the truck." Trooper Finch noted that defendant had a large mark on his chest that appeared to be from the steering wheel.

Dr. Karen Vick, the Medical Examiner for Nash County, testified that Mr. Hill died as a result of a broken neck and head injuries suffered in the accident. Mr. Hill did not have external injuries to his chest. His blood alcohol level was .21. Kathy Jones, the Nash County Clerk of Superior Court, identified documents establishing that defendant had been convicted of impaired driving in 2010 and 2012. Douglas Perry testified that sometime in 2014, prior to 25 October 2014, he had sold defendant the truck that was damaged in the crash. Defendant paid cash for the truck and assured Mr. Perry that he would transfer the title and registration. After the wreck, Mr. Perry learned from the North Carolina DMV that the truck was still registered in his name.

Defendant's evidence at trial tended to show, in relevant part, the following: Annette Pendergrass testified that she was an emergency room nurse at Wake Medical Center, and that on 25 October 2014, she provided preliminary treatment to stabilize defendant after he was brought to the hospital. Defendant was conscious and awake, but asked repetitive questions. Nurse Pendergrass could not determine whether defendant's inability to answer certain questions was the result of intoxication or of his injuries. Kennon Murray testified that he lived near the scene

of the accident, and had walked to the site of the crash after he heard sirens. He was not able to see defendant, whom he believed was already in an ambulance.

Hugh Massey testified that he had known defendant for seven or eight years. On 25 October 2014, defendant was at Mr. Massey's house and they were planning to hunt together. At some point, Mr. Hill arrived in a truck belonging to Brian Hill, and picked up defendant to go visit another person. When they returned to Mr. Massey's house, defendant did not appear to Mr. Massey to be intoxicated. Defendant and Mr. Hill sat in defendant's red truck for about twenty minutes before leaving. When they drove away at around 5:45 p.m., Mr. Hill was driving defendant's truck. To rebut Mr. Massey's testimony, the State recalled Trooper DeVaughn, who testified that the distance between Mr. Massey's house and the accident site was 5.4 miles and was approximately a seven-minute drive.

On 27 April 2016, the jury returned verdicts finding defendant guilty of driving while impaired, second-degree murder, and aggravated felony death by vehicle. The trial court arrested judgment on the impaired driving conviction, and sentenced defendant to 73 to 100 months' imprisonment for aggravated felony death by vehicle, to be served concurrently with a sentence of 180 to 228 months' imprisonment for second-degree murder. Defendant gave oral notice of appeal in open court.

Sentencing Issue

Defendant argues first that the trial court erred by sentencing him for both felony death by vehicle and second-degree murder, based upon the same conduct. The State agrees with defendant's argument on this issue, and we conclude that this argument has merit.

N.C. Gen. Stat. § 20-141.4(a5) (2015) defines the offense of aggravated felony death by vehicle as follows:

> A person commits the offense of aggravated felony death by vehicle if:
> (1) The person unintentionally causes the death of another person,
> (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2,
> (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the death, and
> (4) The person has a previous conviction involving impaired driving, as defined in G.S. 20-4.01(24a), within seven years of the date of the offense.

N.C. Gen. Stat. § 20-141.4(b)(1a) states that "[u]nless the conduct is covered under some other provision of law providing greater punishment . . . Aggravated felony death by vehicle is a Class D felony." N.C. Gen. Stat. § 14-17(b)(1) (2015) provides that second-degree murder based upon impaired driving is a Class B2 felony. Our Supreme Court discussed the interplay of these statutes in *State v. Davis*, 364 N.C. 297, 698 S.E.2d 65 (2010):

> Thus, according to the plain language of the statute, the classifications and corresponding ranges of punishment authorized in [§ 20-141.4] subsection (b) apply only when the conduct is not punished by a higher class offense. In

> turn, when a trial court imposes punishment for a greater offense covering the same conduct, it is not authorized to impose punishment for the offenses enumerated in subsection (b).

Davis, 364 N.C. at 303, 698 S.E.2d at 68. The Court held that "the General Assembly intended an alternative: that punishment is *either* imposed for the more heavily punishable offense *or* for the section 20-141.4 offense, but not both." *Id.* at 304, 698 S.E.2d at 69. The opinion in *Davis* held that, because felony death by vehicle and second-degree murder based upon impaired driving punish the same conduct, the trial court was not authorized to sentence the defendant for both offenses:

> In this case, defendant points out that second-degree murder is a Class B2 felony[.]. . . Section 20-141.4(b) specifies that [aggravated] felony death by vehicle is a Class [D] felony . . . "[u]nless the conduct is covered under some other provision of law providing greater punishment." The judgments for second-degree murder and felony death by vehicle punish the same conduct[.] . . . Because second-degree murder . . . provide[s] greater punishment for the same conduct, section 20-141.4(b) does not authorize the trial court to impose [a] sentence[] for felony death by vehicle. . . . Thus, the trial court in this case was not authorized to sentence defendant for felony death by vehicle[.]

Id. at 305, 698 S.E.2d at 70. Finally, our Supreme Court in *Davis* ordered that:

> According to the plain language of section 20-141.4(b), the trial court was not authorized to impose punishment for felony death by vehicle and felony serious injury by vehicle because second-degree murder and ADWISI impose greater punishment for the same conduct. Therefore, the felony death by vehicle and felony serious injury by vehicle judgments are vacated[.]

Id. at 305-06, 698 S.E.2d at 70. Defendant argues, and the State agrees, that pursuant to the holding of *Davis*, the trial court was not authorized to sentence him for both second-degree murder and aggravated felony death by vehicle. We find *Davis* to be functionally indistinguishable from the present case. Accordingly, the judgment for aggravated felony death by vehicle is vacated and the case is remanded for resentencing.

Ineffective Assistance of Counsel

Defendant's second argument is that he received ineffective assistance of counsel from his trial attorney, on the grounds that his trial counsel failed to object to the introduction of testimony from several witnesses that observation of defendant's injuries contributed to the witness's opinion that defendant was driving the truck at the time of the accident. After careful consideration, we conclude that defendant has failed to establish that his counsel was ineffective.

"On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*."[4] *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citing *State v. Martin*, 64 N.C. App. 180, 181, 306 S.E.2d 851, 852 (1983)). A defendant's claim of ineffective assistance of counsel is reviewed by applying the standards established by the United States Supreme Court in

[4] On appeal, the State argues that we should review this argument under the plain error standard, which we apply to certain alleged errors by the trial court that were not preserved by objection. In this case, defendant is not arguing that the trial court made an error.

Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citing *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693)).

"Performance is 'deficient' when counsel's representation falls beneath an objective standard of reasonableness, *id*., or when counsel's errors are so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment[.]" *State v. Taylor*, 362 N.C. 514, 547, 669 S.E.2d 239, 266 (2008) (citing *Allen*) (internal quotation marks omitted) "To demonstrate prejudice when raising an ineffective assistance of counsel claim, defendant must show that based on the totality of the evidence there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *State v. Phillips*, 365 N.C. 103, 144-45, 711 S.E.2d 122, 151 (2011) (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698). Our Supreme Court has set out the standard for determination of whether a claim of ineffective assistance of counsel may be addressed on direct appeal:

> "[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Therefore, on direct appeal we

> must determine if these ineffective assistance of counsel claims have been prematurely brought. If so, we must "dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding."

State v. Al-Bayyinah, 359 N.C. 741, 752, 616 S.E.2d 500, 509 (2005) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (other citations omitted)).

In this case, defendant argues that his trial counsel was ineffective by failing to object to the introduction of testimony from Trooper DeVaughn, Trooper Finch, Trooper Davidson, and Mr. Nelson that defendant's injuries indicated that he was the driver of the truck. The premise of defendant's argument is that the challenged testimony was inadmissible as a matter of law. This is an issue that we can determine on the basis of the appellate record, without the need for an evidentiary hearing. We can also evaluate whether, absent the introduction of this testimony, there is a reasonable probability that defendant would not have been convicted.

N.C. Gen. Stat. § 8C-1, Rule 701 (2015) provides that if a "witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." In this case, defendant has argued generally that it was error to admit lay opinion testimony that the nature of defendant's injuries indicated that he

was the driver. Defendant contends that only a witness who was qualified as an expert in accident reconstruction could properly give such testimony.

Our review of the transcript indicates that some of the testimony to which defendant objects was arguably admissible as based on the experience and perceptions of the witness. First, specific portions of the witnesses' testimony appear to be admissible as the result of the witness's own observations. For example, Mr. Nelson testified that, in his experience as an EMT, in 99% of cases, the driver of a vehicle will have injuries to the left side of his face or body. In addition, Trooper DeVaughn's testimony that he observed that defendant had a conspicuous mark on his chest in the shape of a steering wheel was admissible.

The general import of the testimony discussed by defendant on appeal is this: several witnesses opined that the fact that defendant's injuries were to the left side of his face and body suggested to the witnesses that defendant was the driver. Given that in American automobiles the driver is seated on the left, it is not readily apparent why this observation would require expert qualifications. In this regard, we note the holding of *State v. McCloud*, 310 S.W.3d 851 (Tenn. Crim. App. 2009). In *McCloud*, as in the instant case, two men were in a vehicle that ran off the road. Both defendant and the other man were intoxicated, and at trial the primary issue of disputed fact was the identity of the driver. A law enforcement officer testified to his opinion, based upon the injuries to the men and the damage to the car, that defendant had been

driving. On appeal, the Court held that the trial court had erred by allowing him to testify as a lay witness to this opinion, not because expert qualifications were required, but because it was a matter of common sense:

> As indicated, the trial court ruled prior to trial that Officer Walker would be allowed to offer his opinion as a lay witness that the defendant was driving the vehicle. . . . [T]he admission of lay opinion testimony is limited to those situations wherein the jury could not readily draw its own conclusions on the ultimate issue, without the aid of the witness's opinion testimony. . . . Officer Walker testified that because the defendant suffered the greater injury of the two occupants and because that injury was to the left side of the defendant's body, he had concluded that the defendant was the driver of the vehicle. Because the jury could have easily drawn this conclusion for itself based upon Officer Walker's testimony about the defendant's injuries and the condition of the vehicle, the trial court should not have allowed the officer to offer a lay opinion that the defendant was the driver of the vehicle. Because the conclusion was so readily apparent from the evidence and because there was other, direct evidence that the defendant was driving at the time of the accident, the erroneous admission of the officer's opinion as a lay witness was harmless.

McCloud, 310 S.W.3d at 865 (emphasis added).

Although *McCloud* is not binding precedent in North Carolina, its holding illustrates the possibility that no particular expertise is required for a witness -- or a juror -- to find that the driver of a vehicle is more likely to suffer left-side injuries in an accident. Had defendant objected to the introduction of testimony by Mr. Nelson or by one or more of the law enforcement officers, it is possible that further

exploration of the basis for the witnesses' opinions would have established that it was based upon personal observation and experience. We conclude that defendant has failed to establish that as a matter of law, regardless of the previous experience of a witness, lay testimony that in general the person on the left side of a vehicle is likely to have left-side injuries is always inadmissible.

Other testimony to which defendant has directed our attention would arguably have been subject to exclusion unless the witness was qualified as an expert. For example, Trooper Davidson testified about the physical movements of defendant and Mr. Hill within the truck during the collision, including testimony that in his opinion Mr. Hill's right side injuries were incurred when he rotated towards the driver's side door and struck the windshield with the right side of his head. It is possible that, had defendant's counsel objected to such testimony, the trial court would have found that Trooper Davidson lacked the necessary expertise to offer this opinion.

We conclude that defendant has not shown that *all* of the witness statements opining that defendant's injuries suggested that he was the driver were necessarily inadmissible. We next consider whether, assuming *arguendo* that the challenged testimony had been excluded, there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

Defendant spoke with several law enforcement officers and first responders at the scene of the crash. In response to their questions, defendant consistently admitted to each of these witnesses that he had been driving. As discussed above, Mr. Nelson testified that defendant stated that he had been driving the truck and had consumed 12 to 18 beers before the accident. When Mr. Manning asked defendant several times if he had been driving, defendant became impatient and Mr. Nelson heard defendant say, "G___D__n, it was my truck. I was driving. How many more times are you going to ask me?" Mr. Nelson also testified that upon arrival at the hospital, defendant told medical personnel that he had been driving. When Trooper DeVaughn asked defendant if he had been driving, defendant said that he "was F___ng driving his truck." Ms. Camacho heard defendant make this statement to Trooper DeVaughn and also heard defendant say, "I've messed up." Trooper Finch testified that he directed a paramedic to ask defendant whether he had been the driver of the truck, and heard defendant say twice that he had been driving. Thus, every time defendant was asked, he stated that he had been driving the truck.

These witnesses described defendant as fully able to answer basic questions such as whether he had been driving. Ms. Camacho testified that defendant appeared to be conscious and coherent. Mr. Manning testified that, although defendant asked repetitive questions of the EMTs, he "responded appropriately to pretty much all the questions that were asked" and that "specifically he said that it's my truck. I was

driving." Trooper Finch described defendant as "fully conscious and alert." Mr. Nelson noted that defendant had correctly answered various mental-status questions such as the current date and location and defendant's birthday. In addition, defendant had recognized Mr. Manning from previous interactions and remembered his name.

Defendant has directed our attention to the fact that on cross-examination his counsel elicited agreement from several witnesses that defendant's injuries were "consistent" with a possible skull fracture. However, there was no evidence that defendant was diagnosed with a fractured skull, and Nurse Pendergrass testified that defendant was sent home with instructions to take over-the-counter pain medication as needed. Defendant also notes that at one point defendant erroneously stated that there had been three people in the truck. We have considered this evidence, but conclude that the record establishes that defendant was able to answer questions appropriately and that he uniformly and consistently stated that he had been driving.

We also find it significant that defendant had an injury to his chest described as a "clear indentation" of the steering wheel, which strongly suggests that defendant was thrown forward from behind the steering wheel. In contrast, Mr. Hill did not have any injuries to his chest. Regarding the fact that defendant's injuries were on the left side of his face and body, we hold that Mr. Nelson could properly testify to his personal observation that in 99% of the collisions he had personally observed, the

driver had left-side injuries. In addition, evidence was introduced that defendant owned the truck and that he had a prior history of driving while impaired. We conclude that the State offered substantial evidence to support a finding that at the time of the collision defendant was driving the truck.

We have also considered the two pieces of evidence that do not support a finding that defendant was the driver. First, Mr. Massey testified that when defendant and Mr. Hill left his home, about fifteen minutes before the crash, Mr. Hill was driving. Mr. Massey's powers of observation were impeached by his testimony that defendant was sober, a contention that was directly contradicted by the testimony of numerous witnesses, by defendant's own admission that he had consumed 12 to 18 beers, and by the results of forensic testing showing that defendant had a blood alcohol level of .12. In addition, Mr. Massey was a personal friend of defendant's and thus might have been perceived to have a greater interest in the outcome of the trial than, for example, the paramedics who treated defendant at the scene.

We have also considered Trooper DeVaughn's testimony concerning his interview of defendant at the hospital. In response to Trooper DeVaughn's question, defendant denied being the driver of the truck. We easily conclude that defendant's statement in this regard lacks credibility. First, defendant repeatedly stated that he was the driver when asked at the scene of the crash. It was only after Trooper

DeVaughn informed defendant that he was facing criminal charges that defendant abruptly changed his position and denied being the driver.

In addition, defendant's denial was given in response to a series of questions asked by Trooper DeVaughn. Most of these were simple factual inquiries whose answers would not inculpate defendant. For example, defendant was asked the date and location of the hospital and whether he had seen a doctor or hurt his head. Defendant's answers to virtually all of Trooper DeVaughn's questions were inaccurate or non-responsive. This is in contrast to defendant's coherence at the scene of the crash, where he was able to answer such questions correctly. We do not speculate on whether defendant's failure to correctly answer the simple questions posed by Trooper DeVaughn was the result of intoxication, defendant's injuries, or intentional deception. Regardless of the underlying reason, the fact that defendant gave inaccurate or nonsensical answers to Trooper DeVaughn's other questions greatly reduces the credibility of his denial that he was driving.

To summarize, defendant was conscious and coherent at the scene of the crash, unequivocally told a number of witnesses that he had been driving the truck, and did not tell *any* of these witnesses that Mr. Hill had been driving. Defendant's answers to other questions asked at the scene were generally correct and reasonable. Defendant had an indentation on his chest in the shape of the steering wheel, while Mr. Hill had no such injury. Defendant's injuries were on the left side of his face and

body, which Mr. Nelson had observed to be the case for the driver in 99% of the accidents to which he had responded. The truck belonged to defendant, and defendant had a blood alcohol level of .12. We conclude that the State offered substantial evidence that defendant was the driver of the truck, and that this evidence was not seriously challenged either by Mr. Massey's testimony or by defendant's interview at the hospital. Defendant has failed to show that, absent the testimony that defendant's left-side injuries indicated that he had been driving, the result of the trial would have been different. Therefore, even if the performance of defendant's trial counsel was deficient in that he failed to object to the challenged testimony, defendant has failed to establish the requisite prejudice.

Conclusion

For the reasons discussed above, we conclude that the judgment entered against defendant for aggravated felony death by vehicle must be vacated and the matter remanded for resentencing, and that defendant did not receive ineffective assistance of counsel.

VACATED IN PART, NO ERROR IN PART.

Judges DILLON and BERGER, JR. concur.

Report per Rule 30(e).