IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-887

No. COA22-417

Filed 20 December 2022

Watauga County, No. 18 CRS 50115

STATE OF NORTH CAROLINA

v.

PAUL BRANTLEY LEWIS, Defendant.

Appeal by defendant from judgment entered 15 September 2021 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 18 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison Janine Newton, for the State.

Shawn R. Evans for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Paul Brantley Lewis ("Defendant") appeals from judgment entered upon a jury verdict convicting him of impaired driving, pursuant to N.C. Gen. Stat. § 20-138.1. On appeal, Defendant argues the trial court committed reversible error in allowing the arresting officer to testify as to the category of the impairing substance, as well as to the specific substance the officer opined had caused Defendant's impairment.

Contemporaneously with his appellant brief, Defendant filed with this Court a motion for appropriate relief in which he contends the State made "false and misleading" statements in its closing argument related to Defendant's suppressed drug test results. After careful review, we find no prejudicial error, and we deny the motion for appropriate relief.

I. Factual & Procedural Background

¶ 2 On 20 January 2018, Defendant was arrested and charged with impaired driving, in violation of N.C. Gen. Stat. § 20-138.1. On 27 August 2020, Defendant waived his right to counsel and entered a guilty plea in Watauga County District Court. Defendant appealed his conviction to Watauga County Superior Court. On 13 September 2021, the superior court conducted a pre-trial hearing to rule on Defendant's motion to suppress blood test results analyzed by the North Carolina State Crime Lab for the presence of impairing substances. The court granted Defendant's motion to suppress the blood test results.

¶ 3 On 14 September 2021, a jury trial commenced before the Honorable Gary M. Gavenus, judge presiding. The evidence presented at trial tends to show the following: On 20 January 2018, Officer Evan Laws ("Officer Laws") of the Boone Police Department responded to a service call in the parking lot of Bojangles located at the intersection of Blowing Rock Road and Winklers Creek Road in Boone, North Carolina. When Officer Laws arrived at the location, he observed the driver of a U-

Haul box truck honking his horn and shouting out of the truck. The box truck began to pull out onto Winklers Creek Road, and Officer Laws followed it due to the driver's behavior and driving. At trial, Officer Laws identified the driver of the box truck as Defendant.

¶ 4 According to Officer Laws, Defendant turned onto Boone Creek Drive and parked in an apartment complex. Defendant then exited his vehicle from the driver's side door with his hands in his pockets and approached Officer Laws' vehicle. Officer Laws exited his patrol vehicle and requested that Defendant stop and show his hands. Defendant informed Officer Laws that his dog was missing and asked if he had seen it.

¶ 5 Officer Laws noticed Defendant "had very red, bloodshot eyes." Defendant spoke rapidly, was "very fidgety," and could not stand still. Defendant denied having consumed any alcoholic beverage but admitted to Officer Laws that he likely smoked marijuana the previous day. Defendant agreed to perform a series of field sobriety tests.

¶ 6 Officer Laws first administered on Defendant, in accordance with his training and experience, the horizontal gaze nystagmus ("HGN") test, which is used to determine whether an individual has consumed alcohol, or another impairing substance, based on the individual's involuntary eye movements. At trial, Officer Laws was tendered without objection, "as an expert in the administration and

interpretation of [HGN] testing."

¶ 7 Officer Laws explained the HGN test is performed by holding a stimulus a certain distance from an individual's eyes and looking for three different clues in each eye, for a total of six clues, including: (1) lack of smooth pursuit; (2) distinct and sustained nystagmus at maximum deviation; and (3) onset nystagmus prior to forty-five degrees. According to Officer Laws, Defendant exhibited six out of six clues on the HGN test.

¶ 8 Next, Officer Laws administered on Defendant the walk-and-turn test. While Officer Laws was demonstrating the test, Defendant could not keep his balance and started the test before instructed to do so—two clues considered in the instructional phase. Out of eight clues considered in the walk-and-turn test, Defendant exhibited six clues, indicating to Officer Laws that Defendant was impaired.

¶ 9 Finally, Officer Laws instructed Defendant to perform the one-leg stand test. Defendant was not able to stand still, he raised his arms at a ninety-degree angle, hopped on one foot, and placed his other foot down twice. Defendant exhibited four out of four clues on the one-leg stand test.

¶ 10 Based on the three tests, Officer Laws formed an opinion that Defendant "was impaired on a sufficient amount of impairing substance" and placed Defendant under arrest. Upon a search incident to arrest, Defendant advised he had a hypodermic needle in his pocket. Officer Laws found an uncapped needle in Defendant's pocket

and disposed of it.

¶ 11 Prior to Defendant's transport to the police station, Officer Laws contacted Sergeant Casey Miller ("Sergeant Miller"), a certified Drug Recognition Expert ("DRE") of the Watauga County Sheriff's Office, to perform a DRE evaluation on Defendant. After completing a standardized twelve-step evaluation, Sergeant Miller formed an opinion that Defendant "had consumed a sufficient amount of some impairing substance to appreciably impair his mental and physical faculties to operate a vehicle safely." In Sergeant Miller's expert opinion, Defendant was under the influence of central nervous system depressants, central nervous system stimulants, and cannabis. Sergeant Miller also noticed what appeared to be recent track marks at the bend of Defendant's left elbow.

¶ 12 Defendant testified and admitted to taking a "Roxi 15," or Oxycodone, pain pill the previous day. On 15 September 2021, the jury returned its verdict, finding Defendant guilty of driving while impaired. Defendant gave notice of appeal in open court.

¶ 13 Contemporaneous with his appellant brief, Defendant filed with this Court on 23 July 2022 a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1418. In his motion, Defendant argues "the State presented arguments in closing that it knew or should have known were false in violation of [Defendant's] due process rights . . . ."

II. Jurisdiction

¶ 14 This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2021) and N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issues

¶ 15 As discussed below, both the issue set out in Defendant's motion for appropriate relief and the issue in Defendant's appellant brief are properly before this Court. These two issues, respectively, are whether: (1) the trial court abused its discretion by not intervening at closing when the State summarized the evidence related to Defendant's impairment and referred to Defendant's suppressed drug test results; and (2) the trial court violated N.C. Gen. Stat. § 8C-1, Rule 702(a1), by allowing expert testimony from the arresting officer, which indicated Defendant was impaired by a central nervous system depressant, and specifically, by methamphetamine.

IV. Motion for Appropriate Relief & the State's Closing Argument

¶ 16 As an initial matter, we consider Defendant's motion for appropriate relief, in which Defendant maintains "the State argued to the jury that [D]efendant was impaired by marijuana and other substances . . . and ma[d]e suggestions which were flatly refuted by the suppressed blood test[.]"

¶ 17 In its brief, the State responds to Defendant's motion and asserts this Court should dismiss the motion on the basis Defendant could have raised this issue in his

brief on direct appeal. Additionally, the State contends Defendant's argument is without merit because the prosecutor's "statements were based on evidence in the record and reasonable inferences from the evidence . . . ." For the reasons discussed below, we find Defendant's argument unconvincing and deny his motion for appropriate relief.

¶ 18 A defendant may seek a motion for appropriate relief where "[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." N.C. Gen. Stat. § 15A-1415(b)(3) (2021). That motion must be filed in the appellate division when the case is pending in that division. N.C. Gen. Stat. § 1418(a) (2021). A motion for appropriate relief is subject to dismissal when, "[u]pon a previous appeal[,] the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419(a)(3) (2021). In such a case, the appellate court must deny the motion unless the defendant can show either (1) "[g]ood cause for excusing the grounds for denial," or (2) [t]hat failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C. Gen. Stat. § 15A-1419(b)(1)–(2) (2021); *see also State v. Murrell*, 362 N.C. 375, 402, 665 S.E.2d 61, 79 (2008) ("Motions for appropriate relief may not be used to add to an appeal[,] new arguments which could have been raised in the brief originally filed.").

¶ 19 Here, Defendant filed the motion for appropriate relief pursuant to N.C. Gen.

Stat. § 15A-1418 based on an alleged due process violation. *See* N.C. Gen. Stat. § 15A-1415(b)(3). On appeal, Defendant does not explain why the issue presented in his motion was not included in his principal brief; however, we conclude the motion is properly before this Court because Defendant's direct appeal—filed contemporaneously with the motion—does not constitute "a previous appeal," which would subject his motion to dismissal. *See* N.C. Gen. Stat. § 15A-1419(a)(3). Furthermore, we are able to decide the motion based on the record before us and "in conjunction with the appeal." *See* N.C. Gen. Stat. § 15A-1418(b). Thus, we consider the merits of Defendant's motion.

> Where a defendant fails to object to the closing arguments at trial, [the] defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. To establish such an abuse, [the] defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Roache, 358 N.C. 243, 297–98, 595 S.E.2d 381, 415–16 (2004) (citations and quotation marks omitted).

¶ 20 "In determining whether the argument was grossly improper, this Court considers the context in which the remarks were made, as well as their brevity relative to the closing argument as a whole." *State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008) (citations and quotation marks omitted). We also consider

whether there is "overwhelming evidence against a defendant," in deciding whether an improper statement "amount[s] to prejudice and reversible error." *State v. Huey*, 370 N.C. 174, 181, 804 S.E.2d 464, 470 (2017). Notwithstanding the evidence, the circumstances may warrant finding that an improper statement is prejudicial. *Id.* at 181, 804 S.E.2d at 470. Prejudicial error occurs "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2021). The defendant bears the burden of showing prejudice. *Id.*

¶ 21 "Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury." *State v. Parker*, 377 N.C. 466, 2021-NCSC-64, ¶ 17 (citation omitted). Improper remarks may include "statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence . . . ." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). Nonetheless, a state prosecutor "is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986).

¶ 22 Defendant relies on the United States Supreme Court case of *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), in arguing the State's closing

argument was improper. In *Napue*, the Supreme Court held that a due process violation occurs when a state witness offers *false testimony*, which the prosecution knew or should have known was false. 360 U.S. at 272, 79 S. Ct. at 1178–79, 3 L. Ed. 2d at 1222–23 (emphasis added).

¶ 23 In this case, a state's witness did not offer false testimony or other false evidence as was the issue in *Napue*. *See Napue*, 360 U.S. at 270–71, 79 S. Ct. at 1177–78, 3 L. Ed. 2d at 1221–22. Rather, the prosecutor in the case *sub judice* summarized the State's evidence, which was presented at trial in his closing argument:

> And, finally, cannabis. We have [Defendant] exhibiting these eyelid tremors on multiple tests during the Romberg balance test. He's got his eyes closed, leaned back. Sergeant Miller is noticing those eyelid tremors. He noticed eyelid tremors during all the tests where he had to look at his eyes indicating impairment on cannabis. And you also have the defendant's admission. Or excuse me. You had dry mouth and film on the tongue indicating recent marijuana impairment according to Sergeant Miller. You have all these signs and symptoms of appreciable impairment that were witnessed by both of these officers.
>
> Now, the thing is, what [defense counsel] keeps asking you about, he keeps saying, oh, well, you know, you don't have facts. You need a blood test in order to show all this stuff. What would a blood test show that you don't already know? The defendant admitted to consuming impairing substances. He admitted to smoking marijuana the day before. He admitted to taking Roxi. And Sergeant Miller testified that he believed the defendant to be impaired on

> a central nervous system stimulant such as methamphetamine. [D]efendant admitted to being a methamphetamine user, although he denied having taken methamphetamine recently, however, he was found with a hypodermic needle in his pocket and track marks on his arm, and he admitted that . . . is how he took methamphetamine, intravenously.

¶ 24 We conclude the State's remarks regarding evidence of Defendant's impairment and recent drug use, as well as statements relating to Sergeant Miller's opinion as to the category of drugs causing Defendant's impairment, appropriately summarized the evidence of record. *See Williams*, 317 N.C. at 481, 346 S.E.2d at 410. Defendant also challenges the State's reference to suppressed blood test results at closing:

> Now what would a blood test show you that the evidence doesn't already show you? That he had impairing substance in his system? Are we in any different place now that we would be if we had that because then we'd just be arguing, well, how much is an impairing dose? Is this an impairing dose? Is that an impairing dose?

¶ 25 Defendant avers the State's "argument not only implies there was no drug lab collected, it also improperly asserts, had there been a blood test[,] that it would have been positive for marijuana and roxi." Assuming *arguendo* the State's reference to the blood test results was improper, the statements were brief in relation to the State's closing argument as a whole. *See Taylor*, 362 N.C. at 536, 669 S.E.2d at 259. Moreover, Defendant has not met his burden to show the remarks at issue were

"extreme" or "clearly calculated to prejudice the jury." *See Parker*, 377 N.C. 466, 2021-NCSC-64, ¶ 17. Lastly, the evidence in this case supporting Defendant's impaired driving conviction, including the officers' testimonies concerning Defendant's poor performance on field sobriety tests, which formed the basis of their opinions that Defendant was appreciably impaired by an impairing substance, and Defendant's admission to taking pain pills and "possibly" smoking marijuana the day prior, was overwhelming. *See Huey*, 370 N.C. at 181, 804 S.E.2d at 470. Therefore, we conclude the trial court did not abuse its discretion by not intervening *ex mero motu*, and we deny Defendant's motion for appropriate relief. *See Roache*, 358 N.C. at 297–98, 595 S.E.2d at 415.

V. Expert Witness Testimony

¶ 26 We now address the argument set forth in Defendant's appellant brief. Defendant contends he is entitled to a new trial because the trial court committed reversible error by allowing an expert witness to testify that Defendant was impaired by a central nervous system depressant, and specifically by methamphetamine, where the expert witness did not hold a current certification as a DRE. After careful review, we conclude the trial court erred by admitting expert testimony inconsistent with that allowed under Rule 702(a1), but nevertheless conclude the error did not prejudice Defendant.

¶ 27 Defendant concedes he did not object to the expert witness testimony that he

challenges on appeal; therefore, Defendant contends this Court should review his argument under the plain error standard. This Court

> may review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence. Plain error arises when the error is so basic, so prejudicial, so lacking in its elements the justice cannot have been done . . . .

State v. Killian, 250 N.C. App. 443, 446, 792 S.E.2d 883, 885 (2016) (citations and quotation marks omitted), *disc. rev. denied*, 369 N.C. 536, 797 S.E.2d 11 (2017). To show plain error, "[a] defendant must convince this Court not only that there was error, but that absent that error, the jury probably would have reached a different result." *Id.* at 446, 792 S.E.2d at 885 (citations, quotation marks, and emphasis omitted). Because Defendant has "specifically and distinctly" alleged the error amounted to plain error, we address Defendant's argument. *See* N.C. R. App. P. 10(a)(4) (describing when an unpreserved issue in a criminal case may be reviewed for plain error).

¶ 28 Rule 702 of the North Carolina Rules of Evidence governs expert testimony and provides:

> 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[; or]
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2021). Subsection (a1) of Rule 702 specifically addresses expert testimony regarding impairment and provides:

> Notwithstanding any other provision of law, a witness 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 [HGN t]est when the test is administered in accordance with the person's training by a person who has successfully completed training in HGN.
>
> (2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances, if the witness holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services.

N.C. Gen. Stat. § 8C-1, Rule 702(a1)(1)–(2) (2021).

¶ 29 Here, Officer Laws was tendered as an expert in the administration and interpretation of HGN testing. Officer Laws testified Defendant exhibited six out of six clues considered in the HGN test. Officer Laws was then asked on direct examination what Defendant's exhibition of the six clues meant, based on Officer Laws' training and experience with the HGN test. Officer Laws responded, "[it] means that the individual had consumed a central nervous system depressant."

Additionally, the following exchange occurred between the State prosecutor and Officer Laws later during Officer Laws' testimony:

> [State Prosecutor]: And after he admitted to you that he had been smoking marijuana, what happened next?
>
> [Officer Laws]: I formed an opinion that he was impaired on a sufficient amount of impairing substance and placed him under arrest for driving while impaired. Upon search incident to arrest, [Defendant] did advise me of a hypodermic needle that was in his pocket. It was uncapped, and I had to take that and dispose of it.
>
> [State Prosecutor]: To the best of your recollection, was there anything in the needle?
>
> [Officer Laws]: I don't recall.
>
> [State Prosecutor]: And just to be clear, did you form an opinion satisfactory to yourself that [D]efendant had consumed a sufficient amount of some impairing substance so as to appreciably impair his mental and/or physical faculties?
>
> [Officer Laws]: Yes.
>
> [State Prosecutor]: What was that opinion?
>
> [Officer Laws]: I formed my opinion that the defendant had consumed a sufficient quantity of an impairing substance so that his mental and physical faculties were appreciably impaired.
>
> [State Prosecutor]: What did you base that opinion on?
>
> [Officer Laws]: Methamphetamine.
>
> [State Prosecutor]: No, no, no. What kind of -- what kind of signs and symptoms of impairment did you base that opinion on?

> [Officer Laws]: I'm sorry. Due to the number of clues and the tests that I conducted, those clues formed by opinion.

¶ 30 In this case, it can be reasonably inferred from Officer Laws' testimony that Defendant's exhibition of six out of six clues on the HGN test indicated Defendant "had consumed a central nervous system depressant." Furthermore, Officer Laws opined that Defendant had consumed "a sufficient quantity of [methamphetamine] so that his mental and physical faculties were appreciably impaired." Upon being asked "what kind of signs and symptoms of impairment did [Officer Laws] base [his] opinion on," Officer Laws responded, "[d]ue to the number of clues and the tests that I conducted . . . ."

¶ 31 Based on the plain language of N.C. Gen. Stat. § 8C-1, Rule 702(a1)(2), Officer Laws could not testify that Defendant "was under the influence of one or more impairing substances, and the category of such impairing substance or substances" because he did not hold a current certification as a DRE. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a1). Moreover, the statute did not allow Officer Laws to testify as to the specific substance he believed was causing Defendant's impairment—only "the category of [the] impairing substance or substances." *See id.* We conclude the trial court erred in allowing this testimony; however, Defendant has not shown the error was prejudicial where Officer Miller, a certified DRE, offered similar testimony as to his opinion regarding Defendant's impairment and the category of substances he

believed was impairing Defendant. *See id.* at 446, 792 S.E.2d at 886; *see also* N.C. Gen. Stat. § 8C-1, Rule 702(a1).

¶ 32 Furthermore, both Officer Laws and Officer Miller testified they each performed sobriety field tests on Defendant, and opined Defendant was appreciably impaired by an impairing substance based on his poor performance on these sobriety tests. Defendant admitted to taking a Roxi 15 pain pill and to "probably" smoking marijuana the previous day. Defendant also described he took Roxi 15 pills by "breaking [them] down and us[ing them] intravenously[.]" Officer Laws found an uncapped, hypodermic needle in Defendant's pocket, and Sergeant Miller observed what he believed were recent track marks on Defendant's elbow bend. Thus, there is substantial evidence upon which the jury could reasonably conclude Defendant was driving his vehicle "[w]hile under the influence of an impairing substance"; therefore, Defendant has not shown the jury would have probably reached a different verdict absent Officer Laws' improper testimony. *See id.* at 446, 792 S.E.2d at 886; *see also* N.C. Gen. Stat. § 20-138.1.

VI. Conclusion

¶ 33 Our review of the record reveals Defendant received a fair trial, free from prejudicial error. We deny Defendant's motion for appropriate relief because he has failed to show that statements in the State's closing argument were so "grossly improper" that the trial court abused its discretion by not intervening *ex mero motu*.

NO PLAIN ERROR.

Judges DIETZ and GORE concur.

Report per Rule 30(e).