

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2779

September Term, 2015

ANDRES VITERVO CORTEZ

v.

STATE OF MARYLAND

Arthur,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: December 14, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant, Andres Vitervo Cortez, was convicted in the Circuit Court for Wicomico County of driving under the influence of alcohol, driving while impaired by alcohol, and driving without a license. Appellant presents one question for our review, which we have rephrased as follows:

Did the trial court err in admitting testimony of appellant’s sobriety without first qualifying the witness as an expert witness?¹

We shall hold that the circuit court did not err and shall affirm.

I.

Appellant was charged in the Circuit Court for Wicomico County with driving under the influence of alcohol, driving while impaired by alcohol, and driving without a license. The jury convicted him on all three counts. The circuit court sentenced appellant to a term of incarceration of 30 days, all suspended, 24 months supervised probation, and \$500.00 fine.

The following evidence was presented at trial: On the evening of September 5, 2015, William J. Criner, an employee at the Shore Stop on Friendship Road in Wicomico County, witnessed appellant swerve his van off the highway and into a ditch. Mr. Criner testified that he then observed appellant exit the driver’s side of the vehicle and walk to the

¹ Appellant’s question presented was stated originally as follows:
“Did the trial court err in admitting prejudicial expert testimony from a lay witness?”

passenger side to retrieve his cellular phone. He testified further that appellant entered the store and purchased a Red Bull drink.

Trooper Nicholas Frock responded to the scene at around 11:30 p.m. Upon arriving, Trooper Frock observed a silver minivan submerged partially in the ditch. When he walked up to the vehicle, he observed that the keys were still in the ignition, the radio and lights were still on, and nobody was inside. Trooper Frock was then informed by a gas station worker that the driver was inside the store. During Trooper Frock's conversation with appellant, he smelled the odor of alcohol coming from appellant's breath. He observed that appellant's pants were wet and grassy, and that appellant was barefoot and in socks.

After having appellant step out of the store, Trooper Frock asked if he had driven the van, which appellant denied initially, then subsequently admitted to the fact of driving the vehicle. Trooper Frock removed a pair of shoes from underneath the gas pedal of the van, which appellant initially denied belonged to him, but subsequently admitted were his. Appellant denied drinking any alcohol and said that he was heading home after a soccer game.

Trooper Frock testified that, during the encounter, appellant seemed confused and dazed, and that appellant had to constantly lean up against Trooper Frock's vehicle to maintain his balance. When he asked appellant to perform a field sobriety test, appellant refused. When he asked appellant for his driver's license, appellant produced a Mexican

identification card. Trooper Frock confirmed through a METERS/NCIC² check that appellant did not have a valid Maryland license. Trooper Frock arrested appellant and charged him with driving under the influence of alcohol. Trooper Frock testified that, after he placed appellant into his vehicle, appellant immediately passed out in the passenger’s seat until he was woken up at the barracks.

Trooper Jamie Kekich, who also responded to the scene that night, testified that she observed appellant to be very unbalanced, and that there was a strong odor of alcohol emanating from appellant.

Appellant testified that he smelled like alcohol because he drank two beers earlier that night after playing soccer.

During trial, the defense objected to Trooper Frock’s testimony on appellant’s state of intoxication as being that of an expert witness without the Trooper having been offered or qualified as one as follows:

“THE STATE: Okay. Now, based on your training and experience and your observations of the Defendant that night, can you make any opinion as to how he appeared?

[DEFENSE COUNSEL]: Objection.

* * *

² The Maryland Telecommunications Enforcement Resource System (METERS) is a gateway through which all Maryland agencies have access to the National Crime Information Center (NCIC), which is a computerized database of documented criminal justice information. Maryland Capitol Police Directive Manual, 3-109, [http://mcp.maryland.gov/Directive%20Manual/3-109%20%20\(new%204-16\).pdf](http://mcp.maryland.gov/Directive%20Manual/3-109%20%20(new%204-16).pdf) (last visited November 18, 2016).

THE COURT: Are you offering him as an expert in the field of intoxication?

THE STATE: Not as an expert, Your Honor.

THE COURT: Just as a lay witness?

THE STATE: Yes, as a lay witness. And there is case law.

THE COURT: I understand. What is your objection, Counsel?

[DEFENSE COUNSEL]: Well, the question is, based on your knowledge and experience, how did he appear. I think it calls for speculation and is drawing a strong inference that just based on falling asleep he's intoxicated, nothing more, we're not getting into the breath or anything like that, I just think that it's speculation beyond the officer's expertise.

THE COURT: Well, there is case law that says a layperson is qualified to render an opinion about whether somebody appears to be impaired or intoxicated. So, I'm going to overrule your objection.

* * *

THE STATE: Officer, you may answer the question as to his overall appearance.

[TROOPER FROCK]: His overall appearance, he was very confused and continued to fall asleep.

THE STATE: And your opinion on what that means?

[TROOPER FROCK]: *He was heavily intoxicated by alcohol."*

Following sentencing, appellant noted this timely appeal.

II.

In this appeal, appellant contends that the circuit court erred by allowing Trooper Frock to give prejudicial expert testimony without being offered or qualified as an expert witness. Appellant does not dispute that police officers may offer lay opinions on whether the defendant was drunk, if they are rationally based on the officers' perception of the defendant's condition. Rather, appellant argues that because the State asked Trooper Frock to render an opinion specifically based on his training, experience, and observations, the wording effectively transformed the Trooper's testimony into an expert testimony.

The State contends that the circuit court allowed Trooper Frock's testimony as lay opinion properly, because Trooper Frock's testimony was rationally based on his perception of appellant and did not constitute expert testimony. The State argues that perceiving whether someone is intoxicated does not require specialized knowledge because the condition of intoxication and its common accompaniments are a matter of general knowledge.

III.

“[T]he decision to admit lay opinion testimony lies within the sound discretion of the trial court.” *Thomas v. State*, 183 Md. App. 152, 174 (2008). Also, “the decision as to whether to require a witness to testify as an expert is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.” *Prince v. State*, 216 Md. App. 178, 198 (2014).

Moreover, “[t]o constitute an abuse of discretion, the decision has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *DeLeon v. State*, 407 Md. 16, 21 (2008) (citation and internal quotation marks omitted).

The circuit court admitted Trooper Frock’s testimony as lay opinion testimony under Maryland Rules of Evidence 5-701, which provides as follows:

“If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.”

Md. Rule 5-701. Expert testimony, on the other hand, is “based on specialized knowledge, skill, experience, training, or education,” and “need not be confined to matters actually perceived by the witness.” *Ragland v. State*, 385 Md. 706, 717 (2005). Also, “expert opinion testimony may not be offered in the guise of lay opinion testimony. *Warren v. State*, 164 Md. App. 153, 167 (2005).

Appellant’s contention that the State triggered *Ragland* and converted Trooper Frock’s testimony into an expert testimony by saying the magic words – “based on [his] training and experience” – is meritless. This Court is loath to require the use of such magic words, which would elevate form over substance. *State v. Norton*, 443 Md. 517, 549 n.29 (2015). “The governing principle is that, in applying statutes, other enactments, pleadings, or legal principles, courts must ordinarily look beyond labels . . . and make determinations

based on . . . substance.” *In re Nicole B.*, 410 Md. 33, 65 (2009) (citation and internal quotation marks omitted).

As appellant concedes, it is well-established that “[p]erceiving whether someone is intoxicated does not require specialized knowledge, because the condition of intoxication and its common accompaniments are . . . a matter of general knowledge.” *Warren*, 164 Md. App. at 167 (citation and internal quotation marks omitted). As in *Warren*, Trooper Frock’s testimony was “rationally based on his perception of appellant’s condition,” and “[his] testimony included not only his opinion concerning appellant’s alcohol impairment, but also a description of his actual observations of appellant.” *Id.* at 168-69. Even more, the Trooper’s opinion testimony was “relevant to the issues in this case” and “helpful to the jury.” *Id.* at 169.

We hold that the circuit court did not abuse its discretion or err in accepting Trooper Frock’s testimony as a lay opinion testimony. For the reasons stated above, we shall affirm.

**JUDGMENT OF THE CIRCUIT
COURT FOR WICOMICO COUNTY
AFFIRMED. COSTS TO BE PAID
BY APPELLANT.**