IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY,
FLORIDA

LARRICIA L. JONES,

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

CASE NO: 2014-AP-29-A-O
Lower Case No. 2014-CT-266-A-O
2014-MM-344-A-O

Appeal from the County Court
for Orange County, Florida
Dorothy J. Russell, Senior Judge

Robert Wesley, Public Defender
and Lisa J. Ramsey, Assistant Public Defender,
for Appellant

Jeffrey Ashton, State Attorney
and Carol Leven Reiss, Assistant State Attorney,
for Appellee

Before MYERS, WHITEHEAD, J. KEST, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant seeks review of her conviction for driving under the influence and resisting an officer without violence. According to the testimony at trial, she was stopped by an Orange County deputy after he observed her driving erratically. He saw signs of impairment and called for assistance. A second deputy arrived and attempted to perform sobriety exercises and a horizontal gaze nystagmus (HGN) test, but Appellant was uncooperative and failed or refused to follow directions. She was placed under arrest and resisted the deputies' efforts to put her into a patrol car. She refused a breath test.

Appellant contends that the trial court erred in allowing a deputy to testify as an HGN expert. Because HGN is a scientific test, opinion testimony relating to HGN test results requires a qualified expert. *Robinson v. State*, 982 So. 2d 1260, 1261 (Fla. 1st DCA 2008). It is within the trial court's discretion to determine a witness's qualifications as an expert and that determination will not be reversed absent a clear abuse of discretion. *Robinson v. State*, 818 So. 2d 588, 589 (Fla. 5th DCA 2002). An abuse of discretion should not be found unless the trial court's ruling is arbitrary or fanciful, or unless no reasonable person would take the trial court's view. *Reynolds v. State*, 934 So. 2d 1128, 1159 (Fla. 2006).

The deputy testified that he had been a certified drug recognition expert (DRE) for years; although he let his certification lapse in the months before trial, he testified that he continued to take the necessary classes to be certified. He had attended the National Highway Traffic Safety Administration's DUI school and DUI instructor school. He took extensive drug recognition training courses, some of which focused on the HGN test. He said medical personnel taught the DRE courses. He had been a DUI school instructor himself and he said he had administered thousands of HGN tests. He had testified in numerous other trials as an expert on this subject. As it cannot be said that no reasonable person could conclude this person was an HGN expert, there was no abuse of discretion in recognizing him as one. The fact that Appellant failed to complete the test did not preclude the deputy from testifying about his observations as he attempted to administer it.

Appellant contends that the trial court erred in denying counsel's motion for a mistrial after the deputy was asked about his experience in arresting DUI drivers. In establishing the deputy's qualifications, the prosecutor asked him how many DUI investigations he had conducted. He answered, "Somewhere north of a thousand." The prosecutor asked him if all of

those had resulted in an arrest. He answered that they had not and added that between 500 and 600 of them had. The court sustained defense counsel's objection to testimony about the deputy's rate of arrest, but it denied a motion for mistrial. Instead, it gave a curative instruction, advising the jury that deputy's arrest history was irrelevant and directed them to disregard anything said about other arrests or nonarrests.

During cross-examination, defense counsel asked the deputy, "when you say you've done 50 or 60 or 100 arrests, you've done -- let me back up. How many DUI investigations have you done since January?" The deputy answered, **"**I don't know. I've made about 50 – probably 200 -- made about 50 arrests, something like that." Counsel made another motion for mistrial. The court instead gave another curative instruction advising the jury to disregard testimony about the deputy's arrest rate.

Appellant cites to *McKeown v. State*, 16 So. 3d 247, 249 (Fla. 4th DCA 2009) as supporting grounds for a mistrial. In that case, an officer's statement that he arrested about half of the DUI suspects he investigated improperly bolstered his credibility by implying that he would not have arrested the defendant if she were not guilty. The trial court had overruled defense counsel's objection on this point and the prosecutor emphasized the arrest rate in closing arguments. Under that scenario, it could not be found that the error was harmless.

Where a trial court has recognized an error and given a curative instruction, the appellate court reviewing the denial of a motion for mistrial should not perform a harmless error analysis; instead, abuse of discretion is the proper standard of review. *Espute v. State*, 85 So. 3d 532, 535 (Fla. 4th DCA 2012); *Goodwin v. State*, 751 So. 2d 537, 547 (Fla. 1999). A mistrial is not necessary unless the error vitiates the entire trial. *Lundy v. State*, 51 So. 3d 1171, 1174 (Fla. 5th DCA 2010). Here, where it recognized the error and gave curative instructions, the trial court

did not abuse its discretion in denying the motions for mistrial. The arrest rate remarks did not vitiate the entire trial and the curative instructions were sufficient to correct the errors.

Appellant also argues that the trial court erred in denying a motion for mistrial when the deputy testified that Appellant threatened to have him killed. While he was describing Appellant's behavior immediately before and after her arrest, the deputy said that she told him she would get her father to shoot him. The deputy said he did not feel threatened by the remark and that Appellant appeared to be "just spouting off." As the trial court noted, this testimony was relevant to the charge of resisting arrest and was a possible indication of Appellant's level of impairment. The testimony was properly admitted and was not a basis for a mistrial.

It is therefore **ORDERED AND ADJUDGED** that the trial court is **AFFIRMED**.

DONE AND ORDERED in Orlando, Orange County, Florida this 29th day of June 2015.

/S/
DONALD A. MYERS, Jr.
Presiding Circuit Court Judge

J. KEST and WHITEHEAD, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **the Honorable Dorothy J. Russell,** Orange County Courthouse, 425 North Orange Avenue, Orlando, Florida 32801**; Carol Leven Reiss, Assistant State Attorney,** 435 N Orange Avenue, Orlando, Florida 32801; and to **Lisa J. Ramsey, Assistant Public Defender**, 415 N. Orange Avenue, Orlando, Florida 32801 this 1st day of July , 2015.

/S/
Judicial Assistant