

Only Experts Can Testify About HGN

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Author's note: I added the conclusory paragraph at the end of this post shortly after its initial publication in response to helpful questions from readers about the significance of State v. Godwin and State v. Torrence.

Like [Supercalifragilisticexpialidocious](#), horizontal gaze nystagmus is a mouthful. Unlike Supercalifragilisticexpialidocious, not just anyone can utter horizontal gaze nystagmus and sound wise beyond her years. Two recent court of appeals opinions hold that that a witness be qualified as an expert before testifying about the results of a horizontal gaze nystagmus test.

What is HGN? The horizontal gaze nystagmus (HGN) test is one of three standardized field sobriety tests that law enforcement officers employ to determine whether a driver is impaired by alcohol.

To administer the test, an officer holds a pointer, which may be a finger, a pen, a penlight, or another similar object, 12 to 15 inches in front of a suspect's nose. The officer then tells the suspect to hold his head still and to follow the pointer with his eyes as the officer moves the pointer laterally to the edge of the suspect's peripheral gaze in a given direction. The officer observes the suspect's eye to see whether it smoothly follows the pointer or whether it involuntarily jerks as it moves along--a phenomenon termed nystagmus. A "lack of smooth pursuit" is considered a clue that a person is impaired. When the pointer reaches the outermost edge of the suspect's gaze, the officer holds the pointer still for at least four seconds. In this phase, the officer again looks at the suspect's eye to see whether it involuntarily jerks. "Distinct and sustained nystagmus" at "maximum deviation" also is considered a clue of impairment. Finally, the officer again moves the pointer across the suspect's field of vision to ascertain the angle at which the eye begins to jerk. The "onset of nystagmus prior to 45 degrees" is a third clue of impairment. The steps are performed for each eye, which may result in a maximum tally of six clues.

The backstory. The North Carolina Supreme Court held in *State v. Helms*, 348 N.C. 578 (1998), that the HGN test was a scientific test that required a proper foundation to be admissible. The court explained that the test does not measure behavior that a lay person would commonly associate with intoxication, but instead represents specialized knowledge that must be presented to the jury by a qualified expert.

Rule 702 1.0. The state legislature amended Rule 702(a1) of the North Carolina Rules of Evidence after *Helms* was decided to permit a qualified witness to "give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to . . . the results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN."

State v. Smart. The court of appeals in *State v. Smart*, 195 N.C. App. 752 (2009), again considered the admissibility of evidence regarding a defendant's performance on an HGN test. In *Smart*, the court determined that amended Rule 702(a1) "obviate[ed] the need for the State to prove that the HGN testing method is sufficiently reliable" and rejected the defendant's argument that a person testifying about the results of an HGN test must be an expert on the scientific principles correlating a person's performance on the test with impairment. Thus, the court of appeals determined that the trial court did not err by allowing a law enforcement officer who had been trained in administering the HGN test to

testify as an expert witness about the defendant's performance on the test.

Rule 702 2.0. *Smart* might have been the end of the story had the legislature not again amended Rule 702. In [2011](#), however, the General Assembly amended the rule to adopt the federal *Daubert* standard. Under current [Rule 702](#), trial judges faced with a proffer of expert testimony must determine whether the testimony is based on sufficient facts or data, is the product of reliable principles and methods, and whether the witness has applied the principles and methods reliably to the facts of the case. Subsection (a1) of Rule 702, which specifically allows a qualified witness to testify to the results of HGN, was not amended in 2011 and continues to contain the same language analyzed in *Smart*.

What happened last week? The court of appeals held in [State v. Godwin](#), ___ N.C. App. ___ (2016), that Rule 702(a1) requires a witness to be qualified as an expert before he may testify to the issue of impairment related to HGN test results. At Godwin's trial on charges of driving while impaired, the court permitted a law enforcement officer to testify about the HGN test he performed on the defendant, the clues he noted, and his opinion regarding Godwin's impairment based on those clues. The defendant objected, arguing that the officer had to first qualify as an expert witness. The trial court overruled the objection, and the defendant was convicted of driving while impaired.

The court of appeals held that the trial court erred by allowing the officer to testify under Rule 702(a1) about the defendant's impairment based on the HGN test results without first requiring that he be qualified as an expert. The court further held that the error was prejudicial and awarded the defendant a new trial.

The court noted that the first sentence of Rule 702(a1), which was enacted after *Helms* held that HGN test results represented "specialized knowledge that must be presented to the jury by a qualified expert," requires that before a witness can testify about HGN test results he must be "qualified as an expert by knowledge, skill, experience, training, or education." (Slip op. at 6 (quoting *Helms*, 348 N.C. at 580-81)). If the witness is so qualified and a proper foundation is established, the witness then may give expert testimony as to HGN results. That testimony is limited by Rule 702(a1) to the issue of impairment and may not include a specific alcohol concentration, and the test must have been administered by a person who has successfully completed training in HGN.

The *Godwin* court rejected the State's argument that *State v. Smart* required a different interpretation. The court noted that the witness in *Smart* was qualified as an expert and that, while the defendant in *Smart* initially attacked the officer's qualifications as an expert witness, the "actual challenge went toward the testimony itself." (Slip op. at 8). The *Godwin* court (in an opinion written by Judge Elmore, who also authored *Smart*) said that *Smart* held that subsection (a1) of Rule 702 eliminated the need for the State to prove under the prior version of Rule 702(a) that the HGN testing method was reliable. *Godwin* explained:

Our holding in *Smart* went no further, and it has no application here. While some may even question whether *Smart* survives the amendment to Rule 702(a), that issue is not the one presently before us.

(Slip op. at 9).

One more for the reporters. The court of appeals similarly held in [State v. Torrence](#), ___ N.C. App. ___ (2016), decided the same day as *Godwin*, that the trial court erred by permitting a law enforcement officer to testify as a lay witness about the defendant's performance on the HGN test. As in *Godwin*, the *Torrence* court found the error prejudicial and awarded the defendant a new trial. The testimony in *Torrence* was doubly problematic because not only was the officer not qualified as an expert, but he testified that, based on the results of the HGN test, there was more than a 77 percent chance that the defendant's blood alcohol concentration was .10 or higher.

May a law enforcement officer trained in HGN testify about the results as an expert? The answer is unclear. *Godwin* requires not only that a witness be qualified as an expert to provide such testimony, but also requires that a "proper foundation" be established. (Slip op. at 6.) Under current Rule 702(a), a proper foundation entails a showing

that the testimony is the product of reliable principles and methods. I don't know whether law enforcement officers will be able to cross this threshold.