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NO. COA11-444
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 09 CRS 201239, 09 CRS
35624

ANTHONY HUDSON

Appeal by defendant from judgment entered 4 October 2010 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General David W. Boone, for the State.

Unti & Lumsden LLP, by Sharon L. Smith, for defendant-appellant.

STEELMAN, Judge.

Defendant's attacks upon the State's fingerprint expert went to the weight of her testimony, not its admissibility. The expert's testimony concerning the verification of the fingerprint analysis was the result of invited error by counsel for defendant. The State introduced substantial evidence of each element of the crime of breaking and entering and that defendant

was the perpetrator of the crime. The trial court did not err in denying defendant's motion to dismiss. By failing to request a limiting instruction at trial and not arguing plain error on appeal, defendant waived his arguments concerning the habitual felon stage of the trial.

I. Background

Melody and John Hogan returned home on 13 December 2008 and discovered that someone had broken into their residence and that several items were missing. There were no witnesses to the break-in. The Charlotte Mecklenburg Police Department ("CMPD") noted that the back door of the home had been forced open. {T. 68-69}. A CMPD crime scene technician discovered a latent fingerprint on a filing cabinet. {T. 113-15}. The police developed Anthony Hudson ("defendant") as a suspect, and they obtained a search warrant for his fingerprints. {T. 123, 128-30}. Amanda Wiltzius, a CMPD Laboratory fingerprint examiner, matched the latent fingerprint found at the Hogan's residence to defendant. {T. 161, 185}.

On 13 April 2009, defendant was indicted for one count of felonious breaking and entering and one count of felonious larceny. {R. 7-8}. On 1 June 2009, he was indicted for being an habitual felon. {R. 9}. Before and during trial, defendant

sought to exclude Wiltzius's testimony. The trial court denied defendant's motion to exclude Wiltzius's testimony after she testified at trial. {T. 132-40, 199-201}. The trial court also denied defendant's motion to dismiss the charges against him for insufficiency of the evidence. {T. 199-201}. The jury found defendant guilty of breaking or entering but found him not guilty of larceny. {T. 229-30}. The jury also found defendant guilty of being an habitual felon. {T. 1045}. Defendant was sentenced to an active term of imprisonment of 120-153 months. {T. 1054}.

Defendant appeals.

II. Non-constitutional Expert Issues

In his first argument, defendant contends that the trial court erred by (1) approving Wiltzius's methodology; (2) qualifying Wiltzius as an expert; (3) limiting the scope of cross-examination on Wiltzius's qualifications; and (4) denying his motion to question Wiltzius on *voir dire* outside the presence of the jury. We disagree.

A. Standard of Review

Absent a showing of abuse of discretion, a trial court's ruling on the qualification of an expert or the admissibility of her testimony will not be reversed on appeal. *Howerton v. Arai*

Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). We also review a trial court's rulings on the scope of cross-examination for abuse of discretion. *State v. Ziglar*, 308 N.C. 747, 753, 304 S.E.2d 206, 212 (1983). Decisions concerning *voir dire* hearings are generally reviewed for abuse of discretion as well. See *State v. Ward*, 354 N.C. 231, 253, 555 S.E.2d 251, 266 (2001) (stating that "the trial court is vested with broad discretion to regulate" *voir dire*, and that in order to show reversible error, the appellant must show a clear abuse of discretion). "A trial court abuses its discretion if its determination is 'manifestly unsupported by reason' and is 'so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

B. Analysis

Defendant argues that the trial court erred in admitting Wiltzius's testimony because she was not qualified to testify as an expert and because her analysis was not sufficiently reliable. "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." N.C. Gen. Stat. § 8C-1, Rule 702 (2009). *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995) controls the admission of expert testimony. Under the *Goode* test, (1) the method of proof must be sufficiently reliable, (2) the witness must be qualified as an expert in the area of testimony, and (3) the testimony must be relevant. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing *Goode*, 341 N.C. at 527-29, 461 S.E.2d at 639-41).¹

Defendant first argues Wiltzius failed to adhere to the Analysis, Comparison, Evaluation, and Verification ("ACE-V") methodology, which Wiltzius purported to apply in her analysis, making her method of proof insufficiently reliable. Defendant contends that the proper methodology for fingerprint analysis requires independent verification, and that a person who supervises the initial testing cannot provide independent verification. David Schultz, who was Wiltzius's supervisor, was

¹ Session Law 2011-283 amended Rule 702 of the North Carolina Rules of Evidence to adopt the standard for expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993). This amendment was effective 1 October 2011 and applies only to "causes of action" arising on or after that date. See 2011-4 N.C. Adv. Legis. Serv. 408, 408, 410 (LexisNexis).

identified as the verifying examiner on her report. Because Schultz supervised Wiltzius, defendant argues he could not have conducted an independent examination of the work.

Defendant does not offer an explanation as to why this alleged deviation from standard ACE-V protocol renders Wiltzius's analysis unreliable under *Goode*. Adherence to guidelines established by forensic organizations does not conclusively establish that the methodology is sufficiently reliable. Similarly, a deviation from standard operating procedures, assuming that this occurred here, does not necessarily mean the proffered methodology automatically fails under *Goode*. *Cf. McLean v. McLean*, 323 N.C. 543, 556, 374 S.E.2d 376, 384 (1988) (concluding that deficiencies in the expert's methodology were relevant in considering the expert's credibility and the weight to be given to his testimony, but that they did not render his opinion inadmissible). It is the trial court's role to determine whether the specific methodology employed by an expert was sufficiently reliable. The expert's testimony need not "be proven conclusively reliable or indisputably valid before it can be admitted into evidence." *Arai Helmet*, 358 N.C. at 460, 597 S.E.2d at 687. While independent verification is certainly desirable, we cannot hold

that it is required in every case. *Cf. State v. Barnes*, 333 N.C. 666, 680, 430 S.E.2d 223, 231 (1993) (holding that a forensic serologist's failure to conduct or provide for additional, independent testing of blood samples went to the weight of the evidence, not its admissibility). Defendant has failed to establish that the trial court's decision could not have been the result of a reasoned decision. This argument is without merit.

Defendant next argues Wiltzius was not qualified to testify as an expert.

It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. It is enough that the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.

Arai Helmet, 358 N.C. at 461, 597 S.E.2d at 688 (quoting *Goode*, 341 N.C. at 529, 461 S.E.2d at 640) (internal quotation marks omitted). Wiltzius testified to her qualifications prior to being accepted as an expert witness by the trial court. These included fingerprint courses while earning her bachelor of science degree in forensic science, a 400-hour internship in fingerprint analysis with CMPD {T. 149-50}, identification of hundreds of people by comparison of inked fingerprints with

latent fingerprints, thousands of comparisons of inked fingerprints with latent fingerprints, and testifying in court as a fingerprint expert approximately a dozen times. {T. 152}.

Defendant contends that Wiltzius's education and experience were insufficient to qualify her as an expert. He points to several alleged problems with her credentials in support of this argument. She was not "released" to conduct independent fingerprint analysis according to CMPD regulations. In other words, she was viewed as a "trainee." {T. 185-86}. Wiltzius was not in complete compliance with guidelines created by forensic organizations. Wiltzius was not certified by the International Association of Identifications ("IAI") to conduct latent print examinations. She was not familiar with recent IAI resolutions stating that individuals lacking two years of full-time experience should not testify regarding probable, possible, or likely latent print identifications. {T. 194-95}.

As discussed above, adherence to or deviation from forensic operating procedures does not conclusively determine whether the methodology employed complies with *Goode*. The same principle applies when the trial court determines whether a witness can testify as an expert. *Cf.* N.C. Gen. Stat. § 8C-1, Rule 702 (stating that witness may qualify as an expert based on

"knowledge, skill, experience, training, or education"). It is the responsibility of the trial court to evaluate the degree to which an expert must comply with guidelines and the impact of any deviation from those guidelines. Once the trial court determines the expert meets the minimum qualifications to qualify as such, deviations from guidelines go to the weight of the expert's testimony, not admissibility. We discern no abuse of discretion in the trial court's decision to allow Wiltzius to testify as an expert. This argument is without merit.

Defendant next contends that he would have been able to establish that Wiltzius was not qualified to testify as an expert had the trial court not prohibited his counsel from questioning Wiltzius about a famous fingerprint-related court case during cross-examination. However, "the latitude of cross-examination rests largely in the trial court's discretion." *State v. Fields*, 25 N.C. App. 664, 665, 214 S.E.2d 280, 281 (1975). Defendant fails to explain how knowledge of a celebrated fingerprint-related court case is the *sine qua non* of fingerprint expert qualification. The historical significance of this case, and a witness's familiarity with it, can have little, if any, impact on an evaluation of Wiltzius's technical knowledge and skills. Balancing her education and experience

against her status as a "trainee" who was not authorized to conduct independent tests under CMPD regulations lies within the discretion of the trial court. The court did not abuse its discretion in limiting cross-examination Wiltzius. This argument is without merit.

Defendant finally contends that the trial court erred by denying defendant's motion to allow a *voir dire* examination of Wiltzius outside the presence of the jury. As defendant concedes, the decision whether to hold preliminary hearings on the qualification of expert witnesses outside the presence of the jury is a matter of discretion for the trial judge unless such a hearing is required by "the interests of justice." See N.C. Gen. Stat. § 8C-1, Rule 104 (2009) (stating that hearings on matters other than the admission of confessions or other motions to suppress evidence in criminal cases shall be conducted "out of the hearing of the jury" "when the interests of justice require"). When the trial court denied defendant's motion, the court stated that the testimony that would have been elicited on *voir dire* could be given during trial. The court further explained that defendant would not be prejudiced by the examination of Wiltzius concerning her qualifications in the

presence of the jury because the State's case would fail if the trial court rejected Wiltzius as an expert. {T. 134 }.

Defendant argues that saving time is not a legitimate basis for declining to hold a hearing outside the presence of the jury. We disagree, however, and conclude that the trial court's decision was a proper exercise of discretion. *See, e.g.*, § 8C-1, Rule 102 (2009) (stating that the goal of eliminating unjustifiable delay should be considered when interpreting the rules of evidence). Furthermore, it does not appear defendant was prejudiced by holding the hearing in the presence of the jury. Therefore, the "interests of justice" did not compel holding a *voir dire* hearing. This argument is without merit.

III. Confrontation Clause

In his second argument, defendant argues that he is entitled to a new trial because several statements by Wiltzius violated his constitutional right to confront the witnesses against him. We disagree.

A. Standard of Review

Defendant's argument raises a question of law, which we review *de novo*. *State v. Nickerson*, 715 S.E.2d 845, 846 (2011).

B. Analysis

During cross-examination, Wiltzius testified that her conclusions had been "verified" and "checked" by other analysts. Defendant argues that these statements violated his constitutional rights under the federal and North Carolina confrontation clauses. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); N.C. Const. art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony"). However, these statements were elicited by *defense counsel's* own questions. Any error was thus invited error, which is not a basis for a new trial. *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971); *see also* N.C. Gen. Stat. § 15A-1443(c) (2011) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."). Furthermore, defense counsel did not attempt to mitigate the harm arising from these allegedly offending responses by moving that the court strike them and give a limiting instruction to the jury. *Cf. State v. Burgin*, 313 N.C. 404, 409, 329 S.E.2d 653, 657 (1985) ("The one

objection made was lodged after the witness responded to the question. Defendant did not move to strike the answer, and therefore waived the objection.").

This argument is without merit.

IV. Motion to Dismiss

In his third argument, defendant contends that there was insufficient evidence of breaking or entering and larceny to support submissions of those charges to the jury. We disagree.

A. Standard of Review

When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." This Court reviews the trial court's denial of a motion to dismiss *de novo*.

State v. Smith, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citations omitted).

B. Analysis

In *State v. Miller*, a case that also involved a charge of breaking and entering, our Supreme Court explained that fingerprint evidence corroborated by circumstantial evidence can be

sufficient evidence to warrant submission of the case to the jury:

[T]estimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury.

289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975). Defendant first contends Wiltzius was not a "qualified expert" and that there were discrepancies in her fingerprint analysis. We previously rejected this argument in Section II.B of this opinion.

Defendant also maintains that there was insufficient circumstantial evidence from which the jury could conclude that defendant could only have impressed his fingerprints on the filing cabinet at the time the crime was committed. In *Miller*, the Supreme Court concluded that there was sufficient evidence where the State's evidence established that (1) the defendant's thumb print was found on a storefront lock at the scene of the crime; (2) no other fingerprints were found at the scene; and (3) the defendant conceded he had lied when he claimed he had never been in the premises after he was initially confronted

with evidence of the fingerprint. 289 N.C. at 5, 220 S.E.2d at 574.

In the instant case, Ms. Hogan testified that she had never met defendant and that she had never given him permission to enter their home. {T. 88-89}. Ms. Hogan's testimony established sufficient circumstances indicating that defendant could have made the fingerprint impression only during the time that the crime was committed. Defendant does not direct us to any evidence supporting an inference that the print was left at a different time. Based upon *Miller*, we conclude that the State presented substantial evidence of each element of the offense and that defendant was the perpetrator. See generally N.C. Gen. Stat. § 14-54(a) (2011) (stating elements of felonious breaking or entering).

This argument is without merit.

V. Habitual Felon Phase

In his fourth argument, defendant contends that it was prejudicial error to admit irrelevant evidence during the habitual felon phase of his trial. We disagree.

A. Standard of Review

"[E]ven though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed

under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991).

B. Analysis

During the habitual felon phase of the trial, the State published documentary evidence to the jury of defendant's prior convictions in order to establish that he was an habitual felon. As to each of the prior felony convictions that supported defendant's status as an habitual felon, the judgments contained additional multiple convictions. The trial court refused to redact the convictions that were *not* a basis for the habitual felon indictment.

Evidence of any conviction that the State is not attempting to prove in order to obtain an habitual felon conviction is irrelevant and therefore inadmissible. *See State v. Lotharp*, 148 N.C. App. 435, 444-45, 559 S.E.2d 807, 812, *rev'd on other grounds*, 356 N.C. 420, 571 S.E.2d 583 (2002). A trial court errs when it fails to redact such evidence. *See id.* In *Lotharp*, this court concluded that such an error did not amount to prejudicial error because the trial court issued a limiting instruction directing the jury to consider only the convictions related to the habitual felon proceeding. *Id.* at 445, 559 S.E.2d at 812.

In this case, the trial court erred by refusing to redact the convictions that were not the basis for the habitual felon indictment. Defendant argues this error was prejudicial because the trial court did not give a limiting instruction. However, defendant failed to request a limiting instruction, and on appeal he is entitled only to plain error review. *State v. Demos*, 148 N.C. App. 343, 348-49, 559 S.E.2d 17, 21 (2002) (reviewing only for plain error when defendant failed to request limiting instruction). By "failing specifically and distinctly" to argue plain error in his brief, defendant has waived review of this issue. *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995).

This argument is dismissed.

VI. Conclusion

For the reasons state above, we find

NO ERROR.

Judges ERVIN and McCULLOUGH concur.

Report per Rule 30(e).