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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-382

Filed: 7 January 2020

Wilson County, No. 16CRS053737

STATE OF NORTH CAROLINA

v.

KOBIE STEPHEN HEWITT, Defendant.

Appeal by Defendant from judgment entered 6 November 2018 by Judge Walter H. Godwin, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 4 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly S. Murrell, for the State.

Edward Eldred for Defendant.

BROOK, Judge.

Kobie Stephen Hewitt (“Defendant”) appeals from judgement entered upon a jury verdict finding him guilty of selling heroin. Defendant argues the trial court committed plain error by allowing the State’s expert to identify the sold substance as heroin because the expert did not testify that she performed a chemical analysis on the substance. We hold the trial court did not commit plain error.

I. Procedural and Factual History

On 29 September 2016, Joshua Mullett, a confidential informant for the Wilson County Sheriff's Department, contacted Defendant to purchase four bags of heroin. Mr. Mullett and Defendant arranged to meet at a Shell gas station on the corner of Black Creek Road. Before the meeting, Detectives Brandon Barberi and Carol Whitfield gave Mr. Mullett money to purchase the heroin, a video camera installed in a key fob attached to a key chain, and set up surveillance on Mr. Mullett. Mr. Mullett testified he drove straight from meeting with Detective Barberi to the gas station and that he did not make any stops along the way.

Mr. Mullett testified he parked his car in front of the gas station and walked to Defendant's car at a gas pump. Defendant sat in the driver's seat while his passenger pumped gas outside. Mr. Mullett testified he got into the passenger side of Defendant's car, asked Defendant for four bags of heroin, and Defendant then handed him four bags of heroin. At trial, the jury watched a portion of the video recording from the key fob that Mr. Mullett wore during his encounter with Defendant. The video shows Defendant in the passenger seat of his car reaching out a balled fist to Mr. Mullett, and Mr. Mullett handing Defendant money.¹

¹ The video recording did not reveal what Defendant passed to Mr. Mullett. The car console separated Mr. Mullett and Defendant and obstructed any view of what Defendant had in his lap. Likewise, when Defendant extended his fist to Mr. Mullett, his hand was closed which hid what he held.

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Mr. Mullett testified he then walked back to his car and drove to a predetermined meeting location to give the heroin and key fob to the detectives. He testified he did not make any stops or meet anyone along the way. Detective Barberi testified that he followed Mr. Mullett to and from the Shell gas station and confirmed Mr. Mullett did not make any stops on either leg of the trip. He further testified they conducted a thorough search of Mr. Mullett and his vehicle before and after the sale and there were no drugs or contraband on Mr. Mullett or in his car.

The jury also heard from expert witness Jamie Weathers, a forensic scientist in the drug chemistry section of the State Crime Laboratory in Raleigh. Ms. Weathers testified she had worked in the crime lab for 11 years and analyzed substances in over 4,500 cases. Ms. Weathers further testified that she performed “a color test and an instrumental analysis test” on the substance recovered from the controlled buy, and those tests allowed her to form the opinion that the substance sold was heroin. Ms. Weathers testified the tests are commonly used in her field and she followed the standard techniques in conducting those tests.

At trial, Defendant represented himself and testified on his own behalf. Defendant testified that he did not sell Mr. Mullet heroin but in fact sold him pain pills that were left over from his mouth surgery. Defendant testified he had sold Mr. Mullett prescriptions of his in the past, “[b]ut as far as any heroin, I wouldn’t even, I

wouldn't even know where to get heroin from like . . . I don't even know where that comes from.”

Following the two-day trial which lasted from 5 November 2018 to 6 November 2018, the jury found Defendant guilty of selling a Schedule I controlled substance. The trial court determined Defendant to be a record level II and sentenced Defendant to 12 to 24 months in prison.

Defendant filed written notice of appeal on 13 November 2018 but failed to do any of the following: (1) designate the judgment from which the appeal was taken; (2) designate the court to which the appeal was taken; (3) reflect proper service on the State; and (4) sign the appeal. N.C. R. App. P. 4. Appellate counsel was appointed on 15 January 2019, and Defendant filed a petition for writ of certiorari.

This Court has discretion to grant a petition for writ of certiorari and hear an appeal, and we exercise that discretion here. *See State v. McKoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) (“While this Court cannot hear [a] defendant’s direct appeal [for failure to comply with Rule 4], it does have the discretion to consider the matter by granting a petition for writ of *certiorari*.”).

II. Analysis

On appeal, Defendant challenges the expert witness’s testimony that the substance Defendant sold to Mr. Mullett was heroin because Defendant contends the expert, Ms. Weathers, did not testify as to the methods employed in her chemical

analysis. We hold the trial court did not commit plain error in admitting the expert's testimony.

A. Standard of Review

This Court reviews the trial court's admission of expert testimony pursuant to Rule 702 of the North Carolina Rules of Evidence for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citation omitted). Abuse of discretion results when the trial court's "ruling [is] manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (citation omitted).

"[A]n unpreserved challenge to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review." *State v. Hunt*, 250 N.C. App. 238, 246, 792 S.E.2d 552, 559 (2016). "For error to constitute plain error, a defendant must demonstrate . . . that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 247, 792 S.E.2d at 559. As is the case here, when a defendant does not challenge the admission of the expert testimony at trial, we review for plain error. *Id.*

B. Expert Testimony

"Whether expert testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a)." *McGrady*, 368 N.C. at 892, 787 S.E.2d at 10. To be admissible, expert testimony must satisfy a three-part

test: “(1) [t]he testimony [must be] based upon sufficient facts or data[;] (2) [t]he testimony [must be] the product of reliable principles and methods[; and] (3) [t]he witness [must have] applied the principles and methods reliably to the facts of the case.” *Id.* at 890, 787 S.E.2d at 9 (citation omitted).

Our Supreme Court has held it is necessary to perform “a chemical analysis to accurately identify controlled substances before the criminal penalties of N.C.G.S. § 90-95 are imposed.” *State v. Ward*, 364 N.C. 133, 143-44, 694 S.E.2d 738, 744-45 (2010) (“[A] scientifically valid chemical analysis of alleged controlled substances is critical to properly enforcing the North Carolina Controlled Substances Act.”). This Court has previously held it is “error for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify to the methodology of her chemical analysis.” *State v. Piland*, __ N.C. App. __, __, 822 S.E.2d 876, 888 (2018).

In *Piland*, during a defendant’s trial for various drug-related offenses, the State’s expert testified that she performed a “chemical analysis on a single tablet” and based on those results determined that tablet to be hydrocodone. *Id.* We held that the trial court abused its discretion in allowing this testimony as the witness “did not identify, describe, or justify the procedure she employed to determine whether the pills contained a controlled substance.” *Id.* We further held, however, that this did “not amount to plain error because the expert testified she performed a

‘chemical analysis’ and as to the results of that chemical analysis.” *Id.* (“[T]he expert performed a chemical analysis. The evidence merely lacks any discussion of that analysis.”).

In this case, the expert witness testified as follows:

[The State]: And what chemical analysis did you conduct?

[Ms. Weathers]: I performed a color test and an instrumental analysis on one of the bags.

...

[The State]: Now as a result of your chemical analysis, were you able to form an opinion as to what substance it was?

[Ms. Weathers]: Yes, I was.

[The State]: What’s your opinion?

[Ms. Weathers]: My opinion is that State’s Exhibit Number 1 contained Schedule 1 controlled substance heroin with net weight of material of less than .1 grams.

Defendant argues Ms. Weathers’s testimony was inadmissible because she did not describe or explain her methodology in obtaining her results. Defendant contends this case is distinguishable from *Piland* because Ms. Weathers did not testify she performed a “chemical analysis.”

However, Ms. Weathers testified she ran a color test and instrumental analysis in response to the question, “[W]hat chemical analysis did you conduct?” Implicit in her answer is that these tests were types of chemical analyses. Furthermore, the

facts of this case are nearly identical to *Piland* where we held that it was an abuse of discretion for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify as to the methodology of her chemical analysis. *Piland*, ___ N.C. App. at ___, 822 S.E.2d at 888. But, as we held in *Piland*, the error does not amount to plain error because “the expert witness testified that she performed a ‘chemical analysis’ and as to the results of that chemical analysis.” *Id.* Finally, the expert here did testify as to which tests she conducted but simply failed to “discuss[] . . . that analysis.” *Id.*

In closing, we note that there is a clerical error in the judgment. The trial court sentenced Defendant under N.C. Gen. Stat. § 90-95(a)(1) for feloniously selling heroin. The judgment form, however, notes in the offense description column “sell cocaine” rather than “sell heroin.” When this Court discovers a clerical error in its review, we can direct the trial court to correct the error on remand. *See State v. Hendricks*, 138 N.C. App. 668, 672, 531 S.E.2d 896, 900 (2000). We therefore remand to the trial court for entry of a corrected judgment.

III. Conclusion

For the above reasons, we hold the trial court’s admission of expert testimony regarding the chemical analysis of the evidence was an abuse of discretion, but that error does not rise to the level of plain error. However, we remand for correction of the judgment form.

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NO PLAIN ERROR; REMANDED FOR CORRECTION OF CLERICAL
ERROR.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).