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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1118

Filed: 4 August 2020

McDowell County, Nos. 15 CRS 51179-81, 15 CRS 51225

STATE OF NORTH CAROLINA

v.

JERRY RYAN ECHOLS, Defendant.

Appeal by defendant from judgment entered 6 March 2019 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 12 May 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney Generals Joseph L. Hyde and Peter A. Regulski, for the State.*

*Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.*

BERGER, Judge.

On March 5, 2019, a McDowell County jury found Jerry Ryan Echols (“Defendant”) guilty of first-degree murder, felonious operation of a motor vehicle to elude arrest, possession of a firearm by a felon, and misdemeanor possession of marijuana. Defendant appeals, arguing that the trial court violated his

constitutional rights by (1) excluding expert testimony and (2) prohibiting cross-examination of a witness. We disagree.

Factual and Procedural Background

As of June 16, 2015, Chris English (“English”) lived with his parents on Serenity Drive. After being released from prison in October 2014, English began using drugs again and was a regular user of methamphetamine. English suffered from “[p]aranoia and . . . auditory and visual hallucinations.” Specifically, on the night of June 16, English was “talking crazy . . . and not making any sense.”

Around 11:00 p.m., English was standing outside Olen McKinney’s (“Olen”) house. Carly Beam (“Carly”) then invited English inside. Olen had asked English to leave because “he was acting funny” and “growling like a dog.” Then, Carly, Olen, and Deana McKinney (“Deana”) went into a separate room from English and smoked methamphetamine. Before English left, Joel Robinette (“Joel”) smoked methamphetamine with him in the living room. Joel then joined Carly, Olen, and Deana. English had left by the time the group finished smoking. Shortly thereafter, there were five or six gunshots and the sound of a car accelerating.

Around 12:00 a.m. on June 17, 2015, Defendant’s live-in girlfriend, Shirley Hollifield (“Hollifield”), went to fill their car with gas. When she left the house, she texted Defendant, “some man just stopped me at the end of the driveway.” Approximately twenty minutes later, Hollifield returned home “very upset” and was

“sobbing pretty bad.” Defendant then decided he “want[ed] to go out there” to “talk to this guy . . . [about] why he [was] approaching [Hollifield at] this time of night.” Defendant and Hollifield drove to Pinnacle Heights where they saw English. According to Defendant, English was talking about “radios and . . . looking around crazy.” English then “[got] down on all . . . fours, and start[ed] growling.” English began approaching the car and a physical altercation between Defendant and English ensued, during which Defendant ended up on top of English on the ground. Once Defendant let go of English, English then “put[] all four – hands on the ground, feet on the ground, and then start[ed] growling and . . . running towards [Defendant].” English then reached into his pants, and Defendant shot him twice believing he had a weapon. English, now wounded, continued to run towards Defendant. Defendant fired “three or four more times” before retreating to his vehicle. Thereafter, Defendant and Hollifield returned home.

At approximately 1:00 a.m. on June 17, 2015, Lieutenant Burlin Ballew (“Lt. Ballew”) located English’s body with a gunshot wound on Pinnacle Church Road. Lt. Ballew identified a .380 caliber brass shell casing next to his body. English’s body was transported by ambulance to the hospital, where English was pronounced dead.

Around 8:00 p.m. on June 19, 2015, Defendant left his house in an SUV to get a pack of cigarettes. Thereafter, Special Agent Van Williams (“Agent Williams”) activated his blue lights when he saw Defendant drive through a stop sign without

STATE V. ECHOLS

*Opinion of the Court*

stopping. Once the lights came on, Defendant sped away. Defendant reached speeds around 85 miles per hour for over three miles where the posted speed limit was 55 miles per hour. Defendant then pulled over and was arrested. Agent Williams searched Defendant's vehicle and identified a .380 handgun under the driver's seat. Defendant later admitted that this was the same gun he used to shoot English.

On June 20, 2015, Defendant was indicted for murder, felony fleeing to elude arrest, possession of a firearm by a felon, driving with a revoked license, and possession of marijuana. On February 25, 2019, Defendant's case came on for trial before a McDowell County jury.

At trial, Elizabeth Wilson, a former firearm specialist with the North Carolina State Crime Laboratory, testified that the recovered .380 semi-automatic pistol discharged the .380 caliber brass shell casing collected at the crime scene, and fired the bullet recovered from English's body.

Danielle Bradley ("Bradley") testified that on or about June 15, 2015, Defendant texted her about someone shining a light in his vehicle and said, "[t]hat [English] was going to get shot if he didn't quit messing around, because he didn't know who he was messing with." Bradley testified that Defendant always carried a .380 caliber gun with him. Bradley also testified that Defendant admitted to shooting English.

Defendant also sought to introduce the testimony of Dr. Wilkie A. Wilson (“Dr. Wilson”), a neuropharmacologist. During a voir dire hearing outside the presence of the jury, Dr. Wilson testified that his opinion, based on previously admitted evidence, would be that Defendant’s aggressive and strange behavior is “consistent with methamphetamine intoxication.” The trial court excluded Dr. Wilson’s testimony on the basis that his testimony violated Rule 702(a)(1) because he could not “apply the principles and methods reliably to the facts of the case,” Rule 401 because his testimony would be “based on speculation,” Rule 405 because “expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior,” and Rule 403 because the trial court found that the danger of unfair prejudice substantially outweighed the testimony’s probative value since English was already “acting bizzarely” prior to taking the methamphetamine.

On March 5, 2019, a McDowell County jury found Defendant guilty of first-degree murder, felonious operation of a motor vehicle to elude arrest, possession of a firearm by a felon, and misdemeanor possession of marijuana. Defendant appeals, arguing that the trial court violated his constitutional rights by (1) excluding expert testimony and (2) prohibiting cross-examination of a witness. We disagree.

### Analysis

#### I. Constitutional Issues

Defendant argues that the trial court violated his constitutional rights when it precluded his expert witness, Dr. Wilson, from testifying, and prohibited Defendant from cross-examining Deana about criminal charges that were voluntarily dismissed. Because Defendant failed to preserve these two issues, we dismiss these issues on appeal.

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). “Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal.” N.C. Gen. Stat. § 15A-1446(b) (2019). “[A]n issue that was not preserved by objection noted at trial and that is not deemed preserved . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4).

Under plain error review, a defendant “must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). This rule

is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is . . . something so basic, so prejudicial, so lacking in its elements that justice cannot

have been done . . . or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings.

*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (*purgandum*).

[C]onstitutional arguments not raised at trial are not preserved for appellate review: In order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error.

*State v. Jones*, 216 N.C. App. 225, 230, 300 S.E.2d 896, 900 (2011) (*purgandum*). *See also State v. Miller*, 371 N.C. 266, 269, 814 S.E.2d 81, 83 (2018) (holding that constitutional issues that are not preserved at trial will not be reviewed for the first time on appeal).

Here, Defendant failed to raise these alleged constitutional violations at trial. Because these issues were not properly preserved, we dismiss Defendant's arguments related to purported constitutional violations.

## II. Expert Testimony

Defendant further contends the trial court violated the Rules of Evidence when it prohibited Dr. Wilson from testifying. Specifically, Defendant argues that Dr. Wilson's testimony would have supported his self-defense argument by aiding "the jury in understanding [that] the possible effects of methamphetamine included aggressive and violent behavior." We disagree.

A. Rule 702

Defendant argues that the trial court erred in concluding that because “no one examined English while he was exhibiting the bizarre behavior” that Dr. Wilson’s testimony was therefore inadmissible under Rule 702. We disagree.

“Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a).” *State v. McGrady*, 368 N.C. 880, 892, 787 S.E.2d 1, 10 (2016) (citations omitted). The trial court’s decision regarding the admissibility of the expert testimony “will not be reversed on appeal absent a showing of abuse of discretion. And [a] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.” *Id.* at 893, 787 S.E.2d at 11 (*purgandum*).

Rule 702(a) of the North Carolina Rules of Evidence provides, in part:

(a) 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, or otherwise, *if all of the following apply*:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a)(1-3) (2019) (emphasis added).



“The burden of satisfying Rule 702(a) rests on the proponent of the evidence.” *State v. Gray*, 259 N.C. App. 351, 355, 815 S.E.2d 736, 740 (2018) (citation omitted). The trial court has the discretion to determine how to address each prong of the Rule 702 reliability test. *Id.* at 356, 815 S.E.2d at 740.

Rules 702’s requirement that “expert opinions be supported by *sufficient facts or data* means that the expert considered sufficient data to employ the methodology.” *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374, 770 S.E.2d 702, 710 (2015) (emphasis added) (citation and quotation marks omitted). An expert witness “may rely on data and other information supplied by third parties,” however, the trial court may reject the expert’s testimony if it is “too speculative.” *Id.* at 374, 770 S.E.2d at 710 (citation and quotation marks omitted).

Here, Defendant sought to admit Dr. Wilson as an expert witness who would testify regarding English’s behavior as a result of methamphetamine use. Outside the presence of the jury, the trial court conducted a voir dire of Dr. Wilson. Dr. Wilson testified that “there [was] a great terrific correlation between the use of methamphetamine and the behaviors [English] was exhibiting.” However, Dr. Wilson acknowledges that at no point had he examined English, and that he based his opinion on witness statements and a medical report from 2014.

Specifically, to the effect of methamphetamine on English, Dr. Wilson testified as follows:

Well, I can – I can only know what the effects of the methamphetamine would've been on Mr. English by knowing, in general, what the effects of methamphetamine were on, possibly, on his brain. If you wanted – had wanted to know what the effects of meth were on his brain, *you'd have to find him alive and give him some meth to test him. So it's the best we could do.* It's the best anybody could do.

The trial court then concluded that

[T]here's a real problem here with whether the facts and data that he is using to render such an opinion is correct. While he says that, you know, the effects on the brain and the principal methods are reliable, applying these principles and methods reliably to the facts of this case is missing. So I do, you know, I have real trouble with this opinion. Now, there is a difference in – between saying, saying that, you know, I listened to the testimony, I listened to the evidence, and his actions were consistent with a person under the influence of methamphetamine. That's a totally different analysis, but he's not testifying to that. He's testifying that methamphetamine causes a person to be aggressive and violent, and this person was acting consistent with the person who was using methamphetamine. And also, again, you are trying to use an expert to set out character for aggressiveness and violent behavior, at particular time, just flies in the face of 405.

...

[T]here are numerous other causes that would explain the victim's behavior, and that this witness confirms and admits that it is speculative to determine a particular reason for his behavior and whether it is some other psychological problem or methamphetamine use. So as a result, thereof, his testimony is not based upon sufficient facts or data.

As far as the testimony is a product of reliable principles and methods, the Court does not dispute this

expert's ability to know the principles and methods and effect – general effect – of the use of drugs on the body and effects on people from a general standpoint. However, we are talking about a particular person at a particular time, which makes those general principles less reliable. So while the principles and methods are generally reliable, as to this particular witness they are not reliable.

Also, too, as a result of not having sufficient facts or data, the witness cannot apply the principles and the methods reliably to the facts of this case, particularly when he has not listened to the testimony – actual testimony – of witnesses in regard to what the witness – what the victim did at a particular time. As a result, thereof, the testimony of this witness should be excluded under Rule 702.

Because Dr. Wilson's testimony was "not based upon sufficient facts or data," N.C. Gen. Stat. § 8C-1, Rule 702(a)(1), the trial court did not abuse its discretion in excluding the testimony under Rule 702(a).

**B. Rule 405**

Defendant argues that the trial court erred in finding Dr. Wilson's testimony inadmissible under Rule 405 because Dr. Wilson was "merely restating testimony and evidence that was already before the jury" that had been admitted under Rule 404. We disagree.

"Evidence of a person's character or a trait of his character is [generally] not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) (2019). "Whether character evidence is admissible under Rule 404(a)(2) is merely a threshold inquiry, separate from the determination of the method by which character may be proved, which is

governed by Rule 405.” *State v. Bass*, 371 N.C. 456, 543, 819 S.E.2d 322, 327 (2018).

“In all cases in which evidence of character or a trait of character of a person is admissible,” Rule 405 permits character evidence through “testimony as to reputation or by testimony in the form of an opinion.” N.C. Gen. Stat. § 8C-1, Rule 405(a) (2019). However, “[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.” N.C. Gen. Stat. § 8C-1, Rule 405(a).

“The standard of review for this Court assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Gettys*, 243 N.C. App. 590, 594-95, 777 S.E.2d 351, 355 (2015).

At trial, Defendant sought to introduce Dr. Wilson’s testimony to show English’s use of methamphetamine caused him to “behav[e] psychotically.” Defendant also sought to show that English is the type of person who “goes crazy when they abuse methamphetamine.”

After hearing from Dr. Wilson, the trial court made the following conclusion:

Well, it appears to me that saying that this gentleman was acting violently and aggressively as a result of methamphetamine is pure speculation. I mean, it – and it could be caused by a number – numerous events. And it seems to fly in the face of Rule 405 . . . .

[T]he attempt of the defendant is to produce his testimony in such a manner that the character traits of

aggressiveness and violence existed within this victim, and that he acted consistent, therewith, at a particular time and that while the character of the victim may be allowed under Rule 404(a), the defense is attempting to use an expert testimony on character or this trait of character regarding aggressiveness and violence, which is specifically forbidden by Rule 405(a), where it states “expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.” So this testimony would be forbidden and not allowed under Rule 405(a).

Because Dr. Wilson was attempting to testify about English’s character through reputation and opinion evidence which was based on speculation, we find that the trial court did not abuse its discretion in concluding that the evidence was inadmissible under Rule 405.

C. Rules 401, 402, and 403

Defendant also argues that the trial court erred in finding that Dr. Wilson’s testimony was speculative and inadmissible. We disagree.

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2019). Rule 402 generally provides that any relevant evidence is admissible, unless another Rule of Evidence provides for its exclusion. *See* N.C. Gen. Stat. § 8C-1, Rule 402. The trial court found that Dr. Wilson’s testimony was irrelevant under Rule 401 because his testimony, “in regard to the behavior of this particular victim,

at particular time, is based on speculation and that that speculation, as a result, makes his testimony irrelevant pursuant to Rule 401.

Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2019). This determination is left to the sound discretion of the trial court. *See State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). “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. We determine whether a trial court abused its discretion by looking at the totality of the circumstances.” *State v. Ross*, 207 N.C. App. 379, 389, 700 S.E.2d 412, 419 (2010).

Dr. Wilson testified to the following during voir dire:

[THE STATE]. . . . All right. So it wasn’t just, in general, what’s the effect of meth on a brain, it’s how – what is this effect on Mr. English?

[DR. WILSON]. Well, I can – I can only know what the effects of the methamphetamine would’ve been on Mr. English by knowing, in general, what the effects of methamphetamine were on, possibly, on his brain. If you wanted – had wanted to know what the effects of meth were on his brain, *you’d have to find him alive and give him some meth to test him. So it’s the best we could do.* It’s the best anybody could do.

[THE STATE]. So we could *speculate* that it was methamphetamine-induced. We could *speculate* that it was

psychosis from another source. Is that correct? Would you agree with that?

[DR. WILSON]. You would have to agree – *I would have to agree with you, yes.*

(Emphasis added). Moreover, at trial, Defendant did not challenge that English's behavior could have been because of methamphetamine use, psychosis, or any number of other causes.

With regards to Rules 401, 402, and 403, the trial court made the following conclusion:

Also, too, the Court finds that the testimony of this witness, in regard to the behavior of this particular victim, at a particular time, is based on speculation and that that speculation, as a result, makes his testimony irrelevant pursuant to Rule 401.

In addition, under Rule 403, the Court would find that even if his testimony was somehow relevant, that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury. As a result of testimony of violence or aggressiveness being tied to a methamphetamine use, the amount of which was, basically, attributable to close to one dosage, at best, minutes before this happened, after a particular person was already acting bizarrely; so as a result, thereof, this testimony would not be admitted under Rule 403.

Because Dr. Wilson stated that his testimony was speculative in nature, we find that the trial court did not abuse its discretion in finding the testimony inadmissible under Rules 401, 402, and 403.

### III. Deana's Dismissed Charges

As stated above, Defendant failed to preserve his argument concerning the challenged evidence. Defendant makes a statement, as an alternative argument, that the trial court plainly erred when it prohibited him from cross-examining Deana regarding her voluntarily dismissed charges. However, Defendant fails to make any argument in support of this alleged error.

“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.” N.C. R. App. P. 28(b)(6). Furthermore, “[i]t is not the duty of this Court to supplement an appellant’s brief with legal authority or arguments not contained therein.” *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005); N.C. R. App. P. 28. Therefore, Defendant’s has abandoned this argument.

Conclusion

For the reasons stated herein, we dismiss in part and find no error in part.

DISMISSED IN PART; NO ERROR IN PART.

Judges BRYANT and MURPHY concur.

Report per Rule 30(e).