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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1082

Filed: 1 December 2020

Mecklenburg County, Nos. 16 CRS 244124-26, 17 CRS 21140

STATE OF NORTH CAROLINA

v.

CLIFTON MCKINNIE, JR., Defendant.

Appeal by Defendant from Judgment entered 7 August 2019 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Heard in the Court of Appeals 8 September 2020.

*Attorney General Joshua H. Stein, by Steven A. Mange, for the State.*

*Sandra Payne Hagood for Defendant.*

McGEE, Chief Judge.

Clifton McKinnie, Jr. (“Defendant”) was found guilty by a jury on 7 August 2019 of felony possession of stolen goods, felony larceny after breaking or entering, and felony breaking or entering. Defendant pleaded guilty to attaining habitual felon status. The trial court arrested judgment on Defendant’s conviction of felony possession of stolen goods and consolidated Defendant’s convictions of felony breaking

or entering and larceny after breaking or entering for judgment. On appeal, Defendant argues the trial court erred in admitting expert testimony under Rule 702 of the North Carolina Rules of Evidence. We hold the trial court did not err.

I. Factual and Procedural History

Early in the morning of 28 November 2016, around 2:00 a.m., a rock was thrown through the window of a Rack Room Shoes store in Charlotte, North Carolina, triggering the store's security alarm. Video surveillance equipment recorded a person entering the store through the broken window and leaving shortly thereafter. Sergeant David Ross and Officer Rick Smith, both of the Charlotte-Mecklenburg Police Department ("CMPD"), responded to dispatch's report of the triggered security alarm. When Sergeant Ross and Officer Smith arrived at the store, they observed a person, later identified as Defendant, walking away from the front entrance of the store.

Officer Smith and Sergeant Ross got out of their patrol car and commanded Defendant to get on the ground. Defendant cooperated and Sergeant Ross and Officer Smith approached Defendant and put him in handcuffs. Officer Smith and Sergeant Ross also observed a vehicle in the store's parking lot; after speaking with the occupants, however, Officer Smith and Sergeant determined they were not associated with Defendant. Additional CMPD officers arrived at the scene and secured the store. The officers located the rock used to break the front window and saw several boxes

and displays in disarray inside the building. In particular, Officer Smith noticed a shoebox that looked as if it had been opened and hastily returned to the shelf. Officer Smith opened the shoebox, which was supposed to contain Tamarack brand boots, and instead found a pair of worn New Balance sneakers. Officer Smith pointed out the shoebox to Crime Scene Investigator Shari Walton, who dusted it for and collected latent fingerprints off the surface of the shoebox. The shoebox was collected for evidence and sent to CMPD's Property Control Division for processing.

That night Defendant was taken into custody on suspected larceny and transported to CMPD's University Division for additional interviewing. At the time of his arrest, Defendant was wearing a pair of brown and black Tamarack boots, which were taken into evidence.

Defendant was indicted 31 July 2017 on charges of felonious possession of stolen goods, larceny after breaking or entering, felonious breaking or entering, and habitual felon status. Defendant was tried on 5 August 2019. At trial, the State called Nancy Kerns (Ms. Kerns), a latent<sup>1</sup> fingerprint examiner from the fingerprint section of the CMPD Crime Lab, to testify regarding prints Investigator Walton lifted from the shoebox. Ms. Kerns described her more than 33 years of experience with CMPD and indicated she had testified as a fingerprint expert in over 600 hundred

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<sup>1</sup> Ms. Kerns testified a latent print is one that has been "dusted or chemically processed."

cases. Ms. Kerns was subsequently proffered as an expert witness in fingerprint and palm print analysis, and accepted without objection.

Ms. Kerns testified CMPD uses “a method called ACE-V.” in finger and palm print analysis. Ms. Kerns described the process:

[F]irst of all we decide if it's a finger or a palm, and then if we decide it's a finger, we're going to say, now, what pattern type is it? Is it an arch? Is it a whirl? Is it a loop? And then, once we decide, if it's a palm, we're going to say, can we tell if it's a right palm? Can we tell if it's a left palm? Can we tell which part of the palm it is?

Once the type of print is identified, Ms. Kerns continued:

I would look at the inked or known prints, and I would do a comparison, looking at the characteristics. Once I look at the characteristics, if I see that they[ ] are similar and no dissimilarities, then it's identified. Once it's identified, it goes to a peer reviewer. That person either says that they agree, they don't agree. If they agree, a report is made, and the detective is notified.

In this case, Ms. Kerns testified the latent print lifted from the shoebox was a palm print. Ms. Kerns compared the latent palm print from the shoebox to Defendant's known palm print, and Ms. Kerns testified in her opinion there were no dissimilarities between the latent print and Defendant's known palm print. Ms. Kerns identified the latent palm print as belonging to Defendant, at which point Defendant objected to her testimony. The trial court inquired: “Is there some standard in the [CMPD] Crime Lab for how many points of identification have to be met?” To which Ms. Kerns replied, “No.” Ms. Kerns continued:

Once we compare, and they are all similar, and we see no dissimilarities, we know for a fact when we are doing the ACE-V, the analyze/compare/evaluate, first of all we see that it's a left palm. I know from looking at many that it's the interdigital, the top part. Looking at these characteristics on the top and the bottom, we have quite a few. We don't count them. Actually, that stopped many years ago because of all the information. When -- years ago when we were looking at the points, people were failing to recognize that we know that at it's a left palm and we know that it's the interdigital of the palm, but when you're looking at these two areas here, it's quite a few. For us, we don't --we haven't counted points in many, many years.

At this point, the trial court dismissed the jury to conduct *voir dire*.

Defense counsel explained, "my objection was to lack of foundation at this point . . . for Ms. Kerns to say that it's a match that [D]efendant left a palm print at the location. And my objection is based on due process, right to a fair trial, and all other constitutional grounds." Ms. Kerns continued her testimony before the trial court and counsel.

[The State:] Now Ms. Kerns, when you're normally doing this, can you tell us a little bit about the setup, as in the type of instruments you are using? When you're actually doing the initial analysis of this, what is it that you're using?

[Ms. Kerns:] We're using a magnifying glass, which is two and a half times -- the ridges. With the naked eye we can see a lot more gray area than most cameras can. We also use pointers, which would be like pencils, and we start with one point on the latent, and we try to find that point on the known print, and from there we start our comparison. We go down --when we're doing comparisons, we're looking at the characteristics. In this case we are looking at also the creases, and we're looking in basically the same area of each print, and also we are looking at the space in between the ridges.

After describing her process in general, Ms. Kerns described, step-by-step, her analysis of the latent print and Defendant's known print in the present case. Ms. Kerns testified the CMPD Crime Lab had no error rate and is accredited every three years. The trial court also inquired of Ms. Kerns: "Did you find in that comparison any differences that would have you exclude the latent print as having come from the known print?" And Ms. Kerns stated, "We compare the latent print to the known print, and if there were any differences we would stop and we would exclude that person." However, Ms. Kerns conceded the trial court was correct when it questioned, "[b]ut there is no overall standard or – that says you have to find this many consistencies in order to testify that the prints match?"

At the conclusion of *voir dire* of Ms. Kerns, defense counsel again objected to Ms. Kerns' testimony on the basis it was not sufficiently reliable and therefore "should be excluded pursuant to [Rule 702], as well as based on due process grounds, right to a fair trial." The trial court determined Ms. Kerns may

testify that the prints are consistent, and may identify the various points that she's got on her exhibits to state, or to illustrate, or define or explain the consistencies between the two. However, under *McPhaul*, since there's no standard or no recognized methodology to be applied, she can't testify that they match.

In accordance with the trial court's instructions, Ms. Kerns testified before the jury. Ms. Kerns stated her process for examining the latent and known palm prints and described each step in her process. Ms. Kerns explained in comparing the prints

she used a “brighter lamp, along with a magnifying glass that magnifies two and a half times . . . .” Ms. Kerns then walked the jury through her examination process, starting with the latent print and noting unique similarities between the prints. Ms. Kerns testified that in the event she finds dissimilarities between a latent and known print, she then excludes the print as a match. Ms. Kerns testified—specific to this case—she did not find any dissimilarities between the latent and known print and therefore that the prints were similar. Defense counsel again objected.

On cross-examination, Ms. Kerns reiterated the “[CMPD Crime Lab] ha[s] not been found to be in error.” Ms. Kerns continued:

[A]ll of our [print] identifications are peer-reviewed. We also have a federal fingerprint auditor that comes every three years. They get a list of all of our fingerprint identifications, and they can request anywhere from 10 to 20 cases. They review them from the start to the finish. We also have defense experts to come in and view our work for court purposes.

Ms. Kerns again described her methodology before the jury. Ms. Kerns testified the CMPD Crime Lab has the software capabilities to analyze prints digitally, but that she did not subject the latent and known prints in this case to digital analysis. Ms. Kerns reiterated that after she made her determination, the latent and known prints were peer-reviewed by her colleague.

At both the close of the State’s evidence and the close of all evidence, Defendant moved to dismiss all charges against him. The trial court denied Defendant’s motions. The jury returned verdicts finding Defendant guilty of felony possession of

stolen goods, felony larceny after breaking or entering, and felony breaking or entering. Defendant pleaded guilty to attaining habitual felon status. The trial court arrested judgment on the charge of felony possession of stolen goods and consolidated for judgment Defendant's convictions of felony breaking or entering and larceny after breaking or entering. After finding several mitigating factors, the trial court sentenced Defendant in the mitigated range to a minimum of 84 months and a maximum of 113 months imprisonment. Defendant gave oral notice of appeal in open court.

## II. Analysis

Defendant's sole argument on appeal is that the trial court erred in allowing the State's expert to testify regarding fingerprint evidence under Rule 702 of the North Carolina Rules of Evidence and that such testimony was prejudicial to Defendant. We disagree.

This Court reviews the "admissibility of expert testimony for abuse of discretion." *State v. McPhaul*, 256 N.C. App. 303, 314, 808 S.E.2d 294, 303 (2017). "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." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 22 (2016) (alteration, citation, and quotation marks omitted). "Under the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial



court but instead to decide whether the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 899, 787 S.E.2d at 15 (citations and quotation marks omitted).

Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 702 (2019). In relevant part, Rule 702(a) provides:

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.

*Id.* § 8C-1, Rule 702(a).

Our General Assembly amended Rule 702(a) in 2011 to mirror the federal standard as stated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993). *McGrady*, 368 N.C. at 884, 787 S.E.2d at 7 ("We hold that the 2011 amendment [to Rule 702] adopts the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases.") "Subsections (1)-

(3) compose the three-pronged reliability test which is new to the amended rule.” *McPhaul*, 256 N.C. App. at 313, 808 S.E.2d at 303.

In the present case, Defendant argues Ms. Kerns’ testimony was not sufficiently reliable under Rule 702(a), specifically contending it was “misleading because the expert claimed that latent fingerprint identification is based on science, overstated its reliability, and made discredited claims.” The crux of Defendant’s argument cites to a report by the National Academy of Sciences, which Defendant argues discredited latent fingerprint analysis as being scientifically reliable.<sup>2</sup> Defendant also cites to this Court’s prior, unpublished opinion in *State v. Leonard* in support of his argument. *State v. Leonard*, 225 N.C. App. 266, 736 S.E.2d 647 (2013) (unpublished).<sup>3</sup> Indeed, in *Leonard* this Court acknowledged the Report “concluded that the ACE-V ‘method’ of latent fingerprint analysis is likely not as reliable as often portrayed.” *Id.* (slip op. at 6) (citation omitted). However, the *Leonard* Court continued: “[I]t is not correct to assert that the National Academy Report concluded that latent fingerprint evidence is too unreliable to be admitted at trial.” *Id.* (slip op. at 7).

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<sup>2</sup> National Academy of Sciences, Nat’l Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (National Academy Report), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

<sup>3</sup> Although we recognize *Leonard* is an unpublished decision and therefore not binding as precedent, it was cited by Defendant; thus, we discuss it here and find its analysis persuasive. N.C.R. App. P. 30(e) (2020).

This Court has recognized “[t]rial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony under Rule 702.” *State v. Griffin*, 268 N.C. App. 96, \_\_\_, 834 S.E.2d 435, 438 (2019) (citation and quotation marks omitted), *disc. rev. denied* 373 N.C. 592, 838 S.E.2d 192 (2020). Our Supreme Court further emphasized that “[t]he primary focus of the inquiry is on the reliability of the witness’s principles and methodology, ‘not on the conclusions that they generate[.]’” *McGrady*, 368 N.C. at 890, 787 S.E.2d at 17 (citations and quotation marks omitted).

This Court has recently considered cases dealing with the admissibility of expert testimony on latent fingerprint analysis under Rule 702. In *State v. McPhaul*, this Court concluded the expert’s testimony was insufficient to satisfy Rule 702, but, in light of additional evidence, the error was not prejudicial to the defendant. *McPhaul*, 256 N.C. App. at 316, 808 S.E.2d at 305. In *McPhaul*,

[the expert] previously testified that during an examination, she compares the pattern type and minutia points of the latent print and known impressions until she is satisfied that there are ‘sufficient characteristics and sequence of the similarities’ to conclude that the prints match. However, [the expert] provided no such detail in testifying how she arrived at her actual conclusions *in this case*. Without further explanation for her conclusions, [the expert] implicitly asked the jury to accept her expert opinion that the prints matched.

*Id.* (emphasis in original). This Court’s holding emphasized Rule 702’s requirement that “an expert witness must be able to explain not only the abstract methodology

underlying the witness’s opinion, but also that the witness reliably applied that methodology to the facts of the case.” *Id.* Although this Court ultimately determined the testimony was insufficient under Rule 702, it did not conclude that expert testimony regarding fingerprint analysis is not sufficiently reliable on its own. Instead, this Court held the trial court abused its discretion on the basis “[the expert] failed to demonstrate that she ‘applied the principles and methods reliably to the facts of the case,’ as required by Rule 702(a)(3)[.]” *Id.*

Similarly, in *State v. Koiyan*, this Court held the expert’s testimony was not sufficiently reliable under Rule 702 because “it fail[ed] to show that [the expert] applied accepted methods and procedures reliably to the facts of this case in order to reach his conclusion that the fingerprints were a match.” *State v. Koiyan*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 841 S.E.2d 351, 355 (2020). Although the expert in *Koiyan* “explained that he examines fingerprints by looking for three levels of detail” and “takes the latent fingerprints, puts it beside an inked fingerprint, magnifies the prints, and examines the likenesses or dissimilarities[.]” the Court determined the expert “failed to provide any such detail when testifying as to *how* he arrived at his conclusions *in this case*.” *Id.* at \_\_\_, 841 S.E.2d at 354–55. (emphasis in original). Notably, neither the *McPhaul* Court nor the *Koiyan* Court held the expert’s testimony was insufficient based upon the underlying facts or data.

At Defendant’s trial, Ms. Kerns testified she had 47 years of experience examining finger and palm prints, 33 of which were spent at the CMPD Crime Lab. Ms. Kerns described the ACE-V methodology and elaborated before the jury that she used a magnifying glass and went through unique characteristics of the latent and known prints. Consistent with the trial court’s direction, Ms. Kerns only testified the latent and known prints were “similar” and “consistent with one another”; Ms. Kerns expressly did not state whether they were a “match.” In contrast, in both *Koivan* and *McPhaul*, the experts ultimately testified that the latent and known fingerprints in each case were a “match.” *Koivan*, \_\_\_ N.C. App. at \_\_\_, 841 S.E.2d at 355 (“[W]hen asked whether any of the prints matched, [the expert] merely stated that they did and provided no further explanation for his conclusions.”); *McPhaul*, 256 N.C. App. at 316, 808 S.E.2d at 305 (“[The expert] implicitly asked the jury to accept her expert opinion that the prints matched.”).

In the case before us, the trial court expressly directed, “under *McPhaul*, since there’s no standard or no recognized methodology to be applied, [Ms. Kerns] can’t testify that they match.” Ms. Kerns proceeded accordingly and walked the jury through her application of the ACE-V methodology to her analysis of the latent and known prints at issue. Ms. Kerns testified that as she analyzed the two prints, she did not find any dissimilarities. Accordingly, the trial court’s decision to allow Ms. Kerns to testify was clearly not “so arbitrary that it could not have been the result of

STATE V. MCKINNIE

*Opinion of the Court*

a reasoned decision.” *McGrady*, 368 N.C. at 893, 787 S.E.2d at 22. Defendant’s objection that the trial court abused its discretion in admitting Ms. Kerns testimony is overruled. Because we conclude the trial court did not abuse its discretion, we do not reach Defendant’s argument regarding prejudice.

NO ERROR.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).