IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-162

No. COA20-529

Filed 20 April 2021

Alamance County, No. 12CRS54599, 12CRS54600, 12CRS7986

STATE OF NORTH CAROLINA

v.

ALFONZA DAWNTA COLTRANE

Appeal by defendant from judgment entered 28 October 2015 by Judge Alan Baddour in Alamance County Superior Court. Heard in the Court of Appeals 23 February 2021.

Joshua H. Stein, Attorney General, by Liliana R. Lopez, Assistant Attorney General, for the State-appellee.

William D. Spence, for Defendant-appellant.

CARPENTER, Judge.

I. Factual and Procedural Background

¶ 1 On 5 November 2012, Defendant Alfonza Dawnta Coltrane ("Defendant") was indicted for two counts of possession with the intent to sell and deliver cocaine, two counts of selling cocaine, and for obtaining the status of habitual felon. The case came

on for trial at the 27 October 2015 Criminal Session of the Alamance County Superior Court before the Honorable Alan Baddour.

¶ 2 The Alamance County Sheriff's Department arranged two "controlled buys" where Deputy Krystal Neil ("Deputy Neil") acted as an undercover buyer and purchased narcotics from Defendant. Defendant sold Deputy Neil 0.32 grams of crack cocaine during the first buy and 0.8 grams of crack cocaine during the second buy.

¶ 3 Meredith Lisle ("Lisle") is a forensic drug chemist employed by the North Carolina State Crime Laboratory. Lisle was qualified as an expert in the field of forensic drug chemistry and testified for the State at Defendant's trial. Defendant did not object to the State's tender of Lisle as an expert witness, and Defendant does not dispute on appeal that Lisle was qualified as an expert in the field of forensic drug chemistry.

¶ 4 Lisle testified she received the substances from the controlled buys and performed two different tests. "The first is a preliminary test . . . called a microcrystalline test, and the second is called . . . a conforming test. [The conforming test is] an instrumental analysis using what we call an infrared spectrometer." Lisle testified the results of the tests concluded both substances tested were crack cocaine. Reports from the North Carolina State Crime Laboratory indicated the results generated from the chemical analyses of both substances were positive for crack cocaine. Both reports were admitted into evidence without objection from Defendant.

¶ 5 A jury found Defendant guilty on all counts on 28 October 2015. Defendant filed a writ of certiorari to review this matter on 15 July 2019. By order of this Court, Defendant's writ was allowed on 26 July 2019.

II. Jurisdiction

¶ 6 Defendant's petition for writ of certiorari was previously granted by this Court pursuant to N.C. R. App. 21(a)(1) (2019). Therefore, this Court retains jurisdiction to consider the merits of Defendant's appeal.

III. Issues

¶ 7 The issues on appeal are (1) whether the trial court plainly erred in admitting expert witness testimony that the substance examined was cocaine base and (2) whether the trial court plainly erred by allowing the State's witnesses to refer to the substances in question as "drugs," "narcotics," "cocaine," and/or "crack cocaine," based on their visual observations of the substances.

IV. Analysis

A. Expert Testimony

¶ 8 Defendant contends the trial court plainly erred in admitting, without a proper foundation under Rule 702(a), expert witness testimony that the substance examined was cocaine base. "An 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 in North Carolina state courts." *State v. Hunt*, 250 N.C. App. 238,

245, 792 S.E.2d 552, 559 (2016). As is the case here, when a defendant does not challenge the admission of the expert testimony at trial, we review only for plain error. *Id.* at 238, 792 S.E.2d at 559.

> The plain error rule "is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record," the error is found to have been "so basic, so prejudicial, so lacking in its elements that justice cannot have been done" or that it had "a probable impact on the jury's finding that the defendant was guilty."

State v. Theer, 181 N.C. App. 349, 363, 639 S.E.2d 655, 665 (2007) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). A defendant must also show such error prejudiced him, such "that absent the error the jury would probably have reached a different verdict." *State v. Riley*, 159 N.C. App. 546, 551, 583 S.E.2d 379, 383 (2003); *see also* N.C. Gen. Stat § 15A-1443(a) (2019).

¶ 9 "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). To be reliable, the testimony must satisfy a three-part test: "(1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case." *State v. Piland*, 263 N.C. App. 323, 338, 822 S.E.2d 876, 887-888 (2018), citing *McGrady* at 890, 787 S.E.2d at 9 (alteration in

original); *see* N.C. Gen. Stat. § 8C-1, Rule 702(a). "[T]he trial court has discretion in determining how to address the three prongs of the reliability test." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (citation omitted).

¶ 10 In *Piland*, this Court also reviewed the decision of a trial court to admit expert testimony under the plain error standard. *Piland*, 263 N.C. App. at 338, 822 S.E.2d at 887. The facts in *Piland* involved expert testimony showing the expert conducted a chemical analysis and stated the results of that chemical analysis. *Id*. at 340, 822 S.E.2d at 888. However, there was no "discussion of that analysis." *Id*. at 339, 822 S.E.2d at 888. In *Piland*, we found that while it was 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 . . . the error does not amount to plain error because the expert testified that she 'performed a chemical analysis' and as to the results of that chemical analysis." *Id*. at 339-340, 822 S.E.2d at 888.

¶ 11 The facts in the case at bar are analogous. Lisle testified she received the substances from the controlled buys, and she performed two different tests. "The first is a preliminary test . . . called a microcrystalline test, and the second is called . . . a conforming test. [The conforming test is] an instrumental analysis using what we call an infrared spectrometer." Reports from the North Carolina State Crime Laboratory containing the results generated from both chemical analyses were admitted into evidence without objection from Defendant. Further, Lisle testified at

trial that based upon the results of the chemical analyses it was her opinion that the substances tested were cocaine base, also known as crack cocaine. Lisle's testimony as to the reports of the chemical analyses did not amount to the kind of "baseless speculation" equivalent to the testimony of a layperson. *See State v. Brunson*, 204 N.C. App. 357, 360, 693 S.E.2d 390, 392 (2010).

¶ 12 Although Lisle's testimony lacked a thorough discussion of the methodology involved in the chemical analysis, we do not find that the introduction of this testimony was an error "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). We conclude here, as we concluded in *Piland*, that while it was error for the trial court not to properly exercise its gatekeeping function and require the expert to testify to the methodology of her chemical analysis, the error does not amount to plain error.

B. State's Witnesses' References to Substances

¶ 13 Defendant next contends the trial court plainly erred by allowing the State's witnesses to refer to the substances in question as "drugs," "narcotics," "cocaine," and/or "crack cocaine," based on their visual observations of the substances. Defendant correctly notes that Deputy Neil and two other officers called by the State as witnesses referred to the substances as such throughout Defendant's trial. Because Defendant did not object to such references at trial, this Court reviews for

plain error. N.C. R. App. P. 10(a)(4) provides:

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless 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) (2019).

¶ 14 Generally, testimony identifying a controlled substance based on visual inspection alone—whether presented as expert or lay opinion—is inadmissible. *State v. James*, 215 N.C. App. 588, 590, 715 S.E.2d 884, 886 (2011) (explaining that an officer's "visual identification testimony would be inadmissible because testimony identifying a controlled substance 'must be based on a scientifically valid chemical analysis and not mere visual inspection'") (quoting *State v. Ward*, 364 N.C. 133, 142, 694 S.E.2d 738, 744 (2010)).

¶ 15 Our precedent prohibits the lay opinion testimony of an officer that a substance was cocaine, based on visual inspection alone, if offered as substantive evidence. *State v. Carter*, 255 N.C. App. 104, 108, 803 S.E.2d 464, 467 (2017) (referring to the lay testimony of an officer that the substance in question was crack cocaine). In *State v. Ward*, the North Carolina Supreme Court noted that its decision did not prohibit law enforcement officers from using visual identification of controlled substances for investigative purposes. *Ward*, 364 N.C. at 147–48, 694 S.E.2d at 747.

This Court has previously opined that we "do not understand *Ward* . . . to prohibit testimony by an officer regarding visual identification of a controlled substance for the limited purpose of explaining the officer's investigative actions." *Carter*, 255 N.C. App. at 108, 803 S.E.2d at 467. Here, the opinions of the State's witnesses amount to lay opinions that the substance in question was crack cocaine.

¶ 16 If defense counsel does not object to the testimony at trial, this Court has no way of knowing on appeal whether the testimony was offered to establish the actual nature of the substance or merely to explain an officer's subsequent actions in seizing a substance and making an arrest. *Id*. at 108, 803 S.E.2d at 467.

¶ 17 Here, defense counsel did not object to the testimony at trial. Defendant has not demonstrated these references were offered as substantive evidence. Further, the same references were made by defense counsel throughout trial. Therefore, we cannot say the references by the State's witnesses to the substances in question as "drugs," "cocaine," and the like served to prejudice Defendant at trial such that they amounted to plain error.

VI. Conclusion

¶ 18 We find that while it was error for the trial court to not properly exercise its gatekeeping function and require the expert to testify to the methodology of the chemical analysis performed, the error does not amount to plain error. Further, we cannot say the references by the State's witnesses to the substances in question as

"drugs," "cocaine," and the like served to prejudice Defendant at trial such that they amounted to plain error. For those reasons, we affirm the orders of the trial court. *It is so ordered.*

NO PREJUDICIAL ERROR.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).