IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-164

No. COA20-331

Filed 20 April 2021

Lincoln County, Nos. 16 CRS 51007, 642

STATE OF NORTH CAROLINA

v.

CHRISTOPHER DEAN HALL

Appeal by defendant, by writ of certiorari, from judgment entered 28 March 2018 by Judge Lisa C. Bell in Lincoln County Superior Court. Heard in the Court of Appeals 26 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Helms, for the State.

Sigler Law PLLC, by Kerri L. Sigler, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Christopher Dean Hall appeals from the judgment entered upon a jury's verdict finding him guilty of trafficking in dihydrocodeinone (hydrocodone) by possession, by sale, and by transport. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

¶ 2 Russell Clark, a confidential informant, asked Defendant if he could obtain

hydrocodone pills to sell. When Defendant replied that he could, Clark and the Lincolnton Police Department arranged for a controlled purchase of the drugs from Defendant. Law enforcement officers provided Clark with money to purchase the drugs and a cell phone on which to record the transaction.

¶ 3 On 3 November 2015, after being searched by detectives, Clark went to Defendant's house, where he saw Defendant with a friend. Clark spoke with Defendant and gave him money for the drugs. Defendant went and spoke with the other man, then returned and presented Clark with some pills. As instructed, Clark recorded the exchange on the cell phone. While continuing to record, Clark took the drugs back to his residence, then met the detectives at a prearranged parking lot, and gave them the drugs and the cell phone.

¶ 4 On 11 July 2016, a Lincoln County grand jury returned true bills of indictment charging Defendant with three counts of trafficking in opium/heroin/opiates: one count each by possession, by sale, and by transport. The grand jury also returned a true bill of indictment charging Defendant with attaining the status of habitual felon.

¶ 5 On 26 March 2018, Defendant's case came on for trial in Lincoln County Superior Court before the Honorable Lisa C. Bell. At the conclusion of a three-day trial, the jury returned its verdict finding Defendant guilty of the three trafficking charges. Defendant then pleaded guilty to attaining the status of a habitual felon. The trial court consolidated the trafficking charges and sentenced Defendant to 110

to 144 months in the custody of the North Carolina Division of Adult Correction. The trial court also entered civil judgments against Defendant for $50,000 plus court costs.

¶ 6 On 22 August 2019, Defendant filed a petition for writ of certiorari with this Court, seeking a belated appeal from the judgment in this case. On 29 August 2019, this Court allowed Defendant's petition.

Discussion

¶ 7 On appeal, Defendant argues that (1) the trial court erred by denying his motion to dismiss the charges; (2) the trial court committed plain error by allowing lay-opinion testimony in violation of Evidentiary Rule 701; (3) the trial court committed plain error by allowing irrelevant and unreliable expert testimony in violation of Evidentiary Rule 702; and (4) the trial court abused its discretion by allowing the jury, during its deliberations, to view an exhibit that was neither offered nor admitted into evidence.

I.

¶ 8 Defendant first contends that the trial court erred by denying his motion to dismiss because the State failed to produce substantial evidence that the pills that Clark purchased from Defendant contained a controlled substance. We disagree.

A. Standard of Review

¶ 9 Upon a criminal defendant's motion to dismiss, "the question for the Court is

whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

¶ 10 "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citation omitted).

B. The Color of the Pills

¶ 11 Defendant's arguments turn on an alleged discrepancy in the State's evidence, concerning the color of the pills. Defendant argues that the State's evidence "reveals that while only one set of 16 pills were *at issue*, two sets of pills were *at play*: white pills and orange pills." It is Defendant's contention that, while he allegedly sold white pills to Clark, the State failed to present any evidence that the white pills contained hydrocodone, only offering its expert's testimony that the orange pills contained hydrocodone.

¶ 12 At trial, the State presented testimony from three witnesses: Clark, the

confidential informant; Sgt. Dwayne McAllister of the Lincolnton Police Department; and Special Agent Miguel Cruz-Quinones, a forensic drug chemist with the North Carolina State Crime Laboratory. The State also presented Clark's cell-phone video recording of the transaction, and a bag containing one set of 16 pills ("Exhibit 4"). As discussed below, although Exhibit 4 was repeatedly discussed at trial, the State never offered it into evidence and the trial court never admitted it into evidence.

¶ 13 Each of the State's three witnesses provided testimony regarding the color of the pills. First, Clark testified that the pills he purchased from Defendant were "[w]hite and shaped kind of oblong, I think." On cross-examination, however, Clark admitted that he was "not sure of the colors" of the pills. Further, the bag containing the pills is briefly visible in the video Clark recorded. In the video recording, the pills appear light in color.

¶ 14 Next, Sgt. McAllister positively identified Exhibit 4 as containing "the pills [Clark] gave us on November 3, 2015." On cross-examination, Sgt. McAllister testified that, in his written request for physical examination of Exhibit 4, he described the bag as "containing 16 peach-colored pills." Defendant's counsel then asked Sgt. McAllister: "that's -- the peach-colored pills that you put in your report are allegedly the peach-colored pills in this bag; is that correct?" Sgt. McAllister replied: "That's correct, yes."

¶ 15 Finally, Special Agent Cruz-Quinones testified on cross-examination that in

his lab report, he described the item that was submitted for his examination as a "cellophane wrapper containing 16 orange oval tablets." Defendant's counsel asked to confirm: "And that's what you observed? Sixteen orange oval tablets?" Special Agent Cruz-Quinones replied: "Yes. That's based on my observations, the description of the items that I did on the day of analysis."

C. Analysis

¶ 16 Defendant argues that, because of these discrepancies in the State's evidence, the State failed to produce substantial evidence that the pills Defendant allegedly sold to Clark contained a controlled substance. Defendant claims that the State's evidence "established that if [he] sold any pills at all, they were white[,]" while the State only produced evidence that the orange pills contained a controlled substance.

¶ 17 However, Defendant's argument is based not on a *lack of* evidence, but rather a *discrepancy in* that evidence. The State's evidence included several discrepancies about the color of the pills; indeed, Defendant does not separately address Sgt. McAllister's testimony that the pills he described were "peach-colored." However, it is well established that, when considering a motion to dismiss, discrepancies in evidence "are for the jury to resolve." *Scott*, 356 N.C. at 596, 573 S.E.2d at 869. The very existence of this discrepancy concerning the color of the pills raises a question for the jury, not a question for this Court or the trial court to resolve. *See id.*

¶ 18 Moreover, there was substantial evidence offered at trial that Defendant sold

Clark pills containing hydrocodone. The State's other, unchallenged evidence included testimony from both Sgt. McAllister and Clark describing the transaction, as well as the video recording of the transaction, which was shown in full to the jury. Further, the State demonstrated an unbroken chain of custody of the pills from Clark to Sgt. McAllister—who sealed the pills inside the evidence bag marked as Exhibit 4—to Special Agent Cruz-Quinones' lab. Both Sgt. McAllister and Special Agent Cruz-Quinones positively identified Exhibit 4 based on their observations, and Special Agent Cruz-Quinones confirmed that he performed a chemical test on a sample of the pills and determined that they contained "a Schedule III preparation of" hydrocodone. Finally, Special Agent Cruz-Quinones' laboratory report, documenting his analysis of the pills contained in Exhibit 4, was admitted into evidence without objection.

¶ 19 In light of our standard of review of a motion to dismiss, affording the State "every reasonable inference" from the evidence presented, "whether competent or incompetent," *Smith*, 300 N.C. at 78, 265 S.E.2d at 169, the State met its burden to show by substantial evidence that the pills that Defendant sold to Clark contained a controlled substance.

¶ 20 Here, Defendant's arguments regarding the discrepancy in the testimony pertaining to the color of the pills concerns not a lack of evidence, but rather a conflict in the evidence; thus, the trial court properly determined that the question was

properly for the jury to resolve. Accordingly, the trial court did not err by denying Defendant's motion to dismiss. Defendant's argument is overruled.

II.

¶ 21 Defendant next argues that the trial court committed plain error by admitting the lay-opinion testimony of Sgt. McAllister identifying the pills as hydrocodone, and the expert testimony of Special Agent Cruz-Quinones as to the chemical composition of the pills. We disagree.

A. Standard of Review

¶ 22 "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . 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). "Under the plain error rule, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

¶ 23 Defendant acknowledges that his counsel did not object to the admission of the portions of Sgt. McAllister's and Special Agent Cruz-Quinones' testimony that he now "specifically and distinctly" contends amount to plain error, and of which he seeks review on appeal. Our Supreme Court has explained that unpreserved evidentiary or instructional error in criminal cases is reviewed only for plain error, and "requires

the defendant to bear the heavier burden of showing that the error rises to the level of plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. at 518, 723 S.E.2d at 334 (citations and internal quotation marks omitted).

B. Identification of a Controlled Substance

¶ 24 "In the context of a controlled substance case, the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution." *State v. Carter*, 255 N.C. App. 104, 106, 803 S.E.2d 464, 466 (citation and internal quotation marks omitted), *disc. review denied*, 370 N.C. 282, 805 S.E.2d 493 (2017). To properly meet that burden, "the State is required to present either a scientifically valid chemical analysis of the substance in question or some other sufficiently reliable method of identification." *Id.* at 107, 803 S.E.2d at 466–67. Hence, "testimony identifying a controlled substance based on visual inspection—whether presented as expert or lay opinion—is inadmissible." *Id.* at 107, 803 S.E.2d at 467.

1. Sgt. McAllister's Testimony

¶ 25 Defendant contends that the trial court committed plain error by permitting Sgt. McAllister to offer his lay opinion that the pills in question were hydrocodone tablets. As Sgt. McAllister described the procedures followed to conduct the controlled buy from Defendant, the following exchange occurred, without objection:

> Q. Okay. So once these things were done, Russell Clark went to the buy location and bought some pills and returned. What happened then?
>
> A. Once he returns from the buy, we get the evidence of the drugs from him. And then we package them into our evidence bag, get a little bit more information as far as what he saw, what he did, and then take the video and recording surveillance back from him, search him again, and then usually that's the end of the deal.
>
> Q. Okay. And you mentioned that you -- they give you the drugs or whatever it is that they buy. Was that done in this case?
>
> A. Yes. *He brought back hydrocodone pills*.
>
> Q. Do you recall how many?
>
> A. Just off of memory, 16.

(Emphasis added).

¶ 26 Defendant argues that Sgt. McAllister's characterization of the pills as hydrocodone "was offered as lay witness testimony and was based solely on the visual-inspection method and his position in the Narcotics Unit." In support of this argument, Defendant highlights Sgt. McAllister's lone reference to hydrocodone in

his testimony. However, our precedent does not "prohibit testimony by an officer regarding visual identification of a controlled substance for the limited purpose of explaining the officer's investigative actions." *Id.* at 108, 803 S.E.2d at 467 (concluding that, where a law enforcement officer repeatedly testified without objection that a substance was cocaine, this Court could not determine "whether [the testimony] was offered to establish the actual nature of the substance or merely to explain [the agent]'s subsequent actions in seizing the substance and arresting [the d]efendant").

¶ 27 By contrast, in the instant case, Sgt. McAllister made a fleeting reference to hydrocodone, which was not further explored by the State. Moreover, the reference to hydrocodone was not prompted by a question from the State. Nor did the State attempt to expand on that identification; instead, the prosecutor immediately returned to Sgt. McAllister's investigative process. Upon review of the full context of Sgt. McAllister's testimony, it is clear that his testimony was "for the limited purpose of explaining [his] investigative actions." *Id.*

¶ 28 As Defendant asserts, Sgt. McAllister "did not testify as an expert. . . . He did not testify that he had any training or experience whatsoever in identifying the chemical composition of any substances, or of pills specifically." This underscores the fact that the State did not offer Sgt. McAllister's testimony for the purpose of identifying the controlled substance at issue—the State clearly intended for Special

Agent Cruz-Quinones to provide testimony identifying the substance's chemical makeup. We thus discern no error, let alone plain error, in the admission of Sgt. McAllister's testimony. *See Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

2. Special Agent Cruz-Quinones' Expert Testimony and Lab Report

¶ 29 Defendant also maintains that the trial court committed plain error by admitting Special Agent Cruz-Quinones' expert testimony and lab report regarding the chemical composition of the pills "because the testimony of [Special Agent Cruz-Quinones] and his lab report were inadmissible under Rule of Evidence 702's threshold tests of relevance and reliability."

¶ 30 Rule 702(a) provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," an expert witness may offer opinion testimony if: "(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) (2019).

> In addition, even if expert scientific testimony might be reliable in the abstract, to satisfy Rule 702(a)'s relevancy requirement, the trial court must assess whether that reasoning or methodology properly can be applied to the facts in issue. This ensures that expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. The Supreme Court [of the United States] referred to this as the "fit" test.

State v. Babich, 252 N.C. App. 165, 168, 797 S.E.2d 359, 362 (2017) (citations and internal quotation marks omitted).

¶ 31 "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *State v. McGrady*, 368 N.C. 880, 890, 787 S.E.2d 1, 9 (2016). We have observed that

> Rule 702 does not mandate particular procedural requirements, and its gatekeeping obligation was not intended to serve as a replacement for the adversary system. Rather, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof continue as the traditional and appropriate means of attacking shaky but admissible evidence.

State v. Gray, 259 N.C. App. 351, 355, 815 S.E.2d 736, 739–740 (2018) (citations and internal quotation marks omitted).

¶ 32 The relevance portion of Defendant's argument rests entirely on his presumption that Special Agent Cruz-Quinones purportedly analyzed a different set of pills than those that Defendant allegedly sold to Clark, thereby rendering his analysis irrelevant to the ultimate issues in this case. However, as discussed above, the State put forth substantial evidence to support the existence of only one set of pills, sufficient for the question to be put to the jury. Defendant asks us to accept as given an assumption that is, at best, open to interpretation. This does not rise to the level of demonstrating error, let alone plain error. *See Jordan*, 333 N.C. at 440, 426

S.E.2d at 697.

¶ 33 As for the issue of reliability, Defendant asserts that Special Agent Cruz-Quinones "offered no testimony explaining how he used reliable principles and methods, and offered no testimony that he applied those principles to the facts of this case[,]" and therefore, Special Agent Cruz-Quinones' testimony was admitted in violation of Rule 702. *See McGrady*, 368 N.C. at 892, 787 S.E.2d at 10. However, at trial, Special Agent Cruz-Quinones testified in detail as to the procedure he followed in determining the presence of hydrocodone in the tablets:

> The preliminary test is a non-specific test which can indicate the drug class present but cannot conclusively identify the substance. And the confirmatory tests are -- is a specific test that can identify a substance. So, for example, we use the -- for the color test -- for the preliminary test we use color tests. Those are reagents that will produce a color, and that will indicate the class of chemical compounds present. Also, databases online in cases of pharmaceutical tablets, those are preliminary tests. And confirmatory tests we use scientific instrumental techniques, such [as] an infrared spectrometer, and also we have the gas chromatograph mass spectrometers.
>
> . . . .
>
> [F]or the confirmatory instrumental analysis, what we get is data that we can then compare with data in our libraries. And based on a direct visual comparison, we can identify substances that way. For the preliminary test, it's more of a physical test. It's based on visual observations, the color that is produced, or information found in databases online in the case for -- the case of pharmaceutical tablets.

. . . .

First, I receive the evidence from the evidence control technician. When I receive the evidence, I make sure that the evidence is properly sealed and what appears to be the initials not only from the evidence control technician but also the initials of the requesting officer. If everything is correct and intact, then I place the evidence in my evidence locker -- and I'm the only person with a key to access it -- until I analyze it.

When I am -- When I analyze this exhibit in the laboratory, the first thing I do is I open all the packagings. And in this case I had a sealed envelope followed by a sealed plastic bag followed by the -- it was a cellophane wrapper, smaller plastic bag, that contained 16 4-inch [sic] oval tablets. And the first thing I do is I inspected all the tablets. I counted them. They all have the same imprints. They all have the same color. They all have the same shape. And then using the inference and other physical characteristics, I use a database online which is called drugs.com. It's a database online for pharmaceutical preparations. And I found a document that indicated that these tablets were manufactured by a pharmaceutical company.

And so once I have that indication that they are pharmaceutically prepared, we have sampling standards in place. And the only sampling standard that applied to pharmaceutical preparations is called the Administrative Sample Selection. And this particular sample standard requires me to randomly select one of the tablets and submit it to chemical analysis, and that's what I did. I selected one. I obtained a weight of the one tablet. And then I analyzed it on the -- using the gas chromatograph mass spectrometer. And with this scientific instrumental technique, I confirmed the presence of hydrocodone in the one tablet.

(Alteration in original).

¶ 34 Special Agent Cruz-Quinones also explained the sampling standard that he applied:

> It's called sampling standard. So we have different sampling models in place. Some models apply to known pharmaceutical preparations like plastic baggies or other type of controlled substances that are not prepared or manufactured by chemical companies. And then we have the Administrative Sample Selection that apply only to pharmaceutical preparations. So once I made that determination that they are pharmaceutically prepared, then I have to strictly follow what the sampling standard requires me. And in this case it required me to randomly select one of the pills and submit it to chemical analysis.

¶ 35 In the case at bar, Defendant did not vigorously cross-examine Special Agent Cruz-Quinones, nor did Defendant present any contrary evidence. *See Gray*, 259 N.C. App. at 355, 815 S.E.2d at 740. Defendant neither asked any questions during *voir dire* nor objected when the State tendered Special Agent Cruz-Quinones as an expert witness. Defendant did not object to any of the testimony that he now challenges on appeal, nor did he object to the lab report's admission into evidence. Moreover, on cross-examination, Defendant only asked Special Agent Cruz-Quinones to confirm the color of the pills that he analyzed; Defendant did not question or otherwise scrutinize the standards and procedures that Special Agent Cruz-Quinones employed in reaching his ultimate conclusions regarding the chemical composition of the pills. Based on the testimony and evidence produced through the adversarial process of

trial, we cannot say that the trial court erred in conducting its gatekeeping obligation under Rule 702 in this case.

¶ 36 As our Supreme Court explained in *Lawrence*, because our courts utilize the adversarial model of deciding guilt or innocence, "the plain error standard of review imposes a heavier burden on the defendant" in order to spur criminal defendants "to object at trial and thereby preserve the error for harmless error review." *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330. Under *Lawrence*, Defendant has not met the "heavier burden" required to demonstrate plain error. *Id.*

¶ 37 "Based upon the evidence presented through the adversarial process, the trial court did not err by admitting [Special Agent Cruz-Quinones' expert] testimony. Since there was no error in admitting [this] testimony, Defendant is unable to show plain error." *Gray*, 259 N.C. App. at 358, 815 S.E.2d at 741. Defendant's argument is, therefore, overruled.

III.

¶ 38 Lastly, Defendant argues that the trial court abused its discretion by allowing the jury, during its deliberations, to view Exhibit 4—the evidence bag containing the pills that Sgt. McAllister received from Clark—despite it not having been offered or admitted into evidence. While we agree that the trial court erred, we conclude that the error was harmless.

A. Standard of Review

¶ 39 "The decision to grant or deny a jury request for a review of evidence is committed to the discretion of the trial court." *State v. Porter*, 340 N.C. 320, 329, 457 S.E.2d 716, 720 (1995); N.C. Gen. Stat. § 15A-1233(a) ("The judge in his discretion . . . may permit the jury to reexamine in open court the requested materials admitted into evidence."). Where the trial court errs in violation of section 15A-1233(a), a new trial will only be warranted upon a "showing that the error prejudiced [the] defendant." *State v. Orellana*, 260 N.C. App. 110, 120, 817 S.E.2d 480, 487 (2018). To show prejudice, Defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a).

B. Analysis

¶ 40 Defendant argues that the trial court abused its discretion "by allowing the jury to view materials not actually in evidence, causing further confusion as to which pills were and were not relevant to the charges facing [Defendant] and to the elements the State had the burden of proving."

¶ 41 Our Supreme Court has well established that "[t]he trial court has no authority to permit the jury to examine . . . exhibits which have not been introduced into evidence." *State v. Cannon*, 341 N.C. 79, 84, 459 S.E.2d 238, 242 (1995); *see also State v. Bacon*, 326 N.C. 404, 417, 390 S.E.2d 327, 334 (1990).

¶ 42 Defendant correctly maintains that the State neglected to offer Exhibit 4 into

evidence, and thus the trial court did not admit it into evidence. The transcript reflects that the State's questioning of Sgt. McAllister regarding Exhibit 4 at trial proceeded without the exhibit being offered into evidence:

> [Q.] And can you tell us what that is?
>
> A. This is a Lincolnton Police Department evidence bag.
>
> Q. And is there something inside it?
>
> A. Yes. There are pills.
>
> (State's Exhibit 4 was identified.)
>
> Q. Okay. And how do you recognize that bag?
>
> [DEFENDANT'S COUNSEL]: Your Honor, may I just ask one question on voir dire with the jury present maybe?
>
> (There was a conference at the bench with [Defendant's counsel] and [the prosecutor].)
>
> Q. (By [the prosecutor]) Does it appear to be -- Well, when did you see it last?
>
> A. Before I took it out of the package, the last time I saw it was on November 3rd of 2015.
>
> Q. And how do you know that?
>
> A. I have it notated here in the notes, and as well as I had my signature on it to show any chain of custody where I put it into evidence.
>
> Q. Okay. And does that -- are those the drugs that Russell Clark -- or pills that Russell Clark gave you?

> A. Yes, these are the pills that Russell gave us on November 3, 2015.
>
> Q. And with the exception of what was done at the crime lab, does it appear to be in the same condition?
>
> A. Yes.
>
> Q. Thank you.

¶ 43 Accordingly, the trial court had "no authority to permit the jury to examine" Exhibit 4 during its deliberations, and abused its discretion by doing so. *Cannon*, 341 N.C. at 84, 459 S.E.2d at 242.

¶ 44 However, our careful review of the transcript reveals that Defendant's counsel agreed to allow the jury to view Exhibit 4 during its deliberations:

> THE COURT: I have received a note from the jury. The jury would like to see the pills submitted as evidence.
>
> I can handle it one of two ways. I can bring them all them [sic] back in and let them see them up close, or if there's not any objection, I could have the deputy take them into the deliberation room, allow them to review them, and bring them back out. I'm not going to send them back in there unattended.
>
> The State have a preference?
>
> [THE STATE]: We're fine with the deputy if he's going to go in there and...
>
> [DEFENDANT'S COUNSEL]: *Agreed*.
>
> THE COURT: Are you okay with that or --

> THE BAILIFF: I am.
>
> Are you wanting them to be able to handle it or me just visibly --
>
> THE COURT: I would just -- You hold it and then just allow them --
>
> THE BAILIFF: Okay. Very good.
>
> THE COURT: I'm going to step down and take a look at it.
>
> (The Court left the bench and viewed the exhibit at the exhibit table.)
>
> THE COURT: Well, they are in the sealed envelope, and you actually can't see very well.
>
> I'm going to let them come in, and they can pass it among themselves. Just bring them back in. I think that the way the packaging it's just -- I think they may need to manipulate the package a little bit not -- to see the contents, if that's what they're looking for. So they can come back in.

(Emphasis added).

¶ 45 Not only did Defendant's counsel fail to object to the trial court's decision permitting the jury to review Exhibit 4, but Defendant's counsel *consented* to the trial court's action. We hold, therefore, that Defendant has waived his right to assert, on appeal, that the trial court abused its discretion by permitting the jury to review Exhibit 4. *See State v. Helms*, 93 N.C. App. 394, 401, 378 S.E.2d 237, 241 (1989).

¶ 46 Even assuming, *arguendo*, that this issue was properly preserved for our

review, Defendant only offers a conclusory argument to show that he was prejudiced by the trial court's error: "The jury's request to view the pills indicated that it believed those pills to be relevant, if not necessary, to its deliberations. It is therefore likely that those pills, which were not in evidence, were a significant factor in the jury's verdicts." Defendant does not explain how the jury's examination of Exhibit 4 created "a reasonable possibility that, had the error in question not been committed, a different result would have been reached[.]" N.C. Gen. Stat. § 15A-1443(a). Indeed, it is equally possible that the trial court's error could have redounded to Defendant's benefit: had the jury accepted Defendant's assertion that there were two sets of pills, viewing the pills may have confirmed that interpretation of the evidence.

¶ 47 The burden of showing prejudice is upon Defendant. *Id.* Even if Defendant had not waived his right to appeal the trial court's error on this issue, Defendant fails to carry his burden of showing that this error was prejudicial.

Conclusion

¶ 48 For the foregoing reasons, Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Chief Judge STROUD and Judge GORE concur.

Report per Rule 30(e).