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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-263

No. COA 20-424

Filed 1 June 2021

Johnston County, Nos. 19 CRS 52193-94

STATE OF NORTH CAROLINA

v.

ANTENIO T. WILLIAMS

Appeal by Defendant from Judgments entered 30 January 2020 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 24 March 2021.

Attorney General Joshua H. Stein, by Senior Policy & Strategy Counsel Steven A. Mange, for the State.

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

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Antenio T. Williams (Defendant) appeals from Judgments entered 30 January 2020 upon jury verdicts convicting him of Trafficking in Opium or Heroin by Possession, Trafficking in Opium by Transportation, and Possession with Intent to Sell or Deliver Heroin. The Record tends to reflect the following:

¶ 2 On 16 April 2019, Detective Johnathan Solomon (Detective Solomon), a narcotics detective with the Selma Police Department, was conducting "some proactive traffic enforcement" near the Days Inn hotel in Selma. Upon observing a vehicle with "a brake light out[,]" Detective Solomon conducted a vehicle stop, interviewed the occupants of the vehicle, and, based on his observations, determined the occupants were involved in using heroin. The passenger in the vehicle agreed to assist Detective Solomon in arranging what he described as "a narcotics transaction." Detective Solomon accompanied the passenger to the Selma Police Department, where the passenger made a phone call to arrange a buy at the Days Inn. After they returned to a restaurant parking lot near the Days Inn, the passenger received a phone call directing them to the Days Inn. Shortly thereafter, Detective Solomon witnessed Defendant exit a black pick-up truck, bend down behind the front passenger seat where Defendant proceeded to "do[] something[,]" leave the vehicle, and walk toward the side door of the Days Inn. Detective Solomon got out of his unmarked vehicle, approached Defendant, and identified himself. Upon seeing Detective Solomon, Defendant ran away. Detective Solomon chased Defendant behind the hotel and into a wooded area, where Detective Solomon saw Defendant discard something from his right hand. Defendant fell, and Detective Solomon was able to handcuff him. Detective Solomon then collected evidence from the scene—a bag containing a "powdery substance" found in the pick-up truck and "a bag with a

brown powdery substance laying on the ground" discarded by Defendant mid-pursuit. This evidence was ultimately transferred to the North Carolina State Crime Lab for analysis. Courtney Dupper (Ms. Dupper), a forensic scientist in the drug chemistry section of the State Crime Lab, concluded the contents of the substances recovered by Detective Solomon contained heroin. She then prepared a written laboratory report reflecting these findings (Lab Report).

¶ 3 Defendant was indicted on counts of Trafficking, Opium or Heroin by Possession; Trafficking, Opium or Heroin by Transportation; Trafficking, Opium or Heroin by Manufacture; Possession with Intent to Manufacture, Sell, or Deliver Heroin; Conspiracy to Sell or Deliver Heroin; and Conspiracy to Traffic Heroin.

¶ 4 On 3 January 2020, the State provided written notice to Defendant it intended to introduce the Lab Report along with a chain of custody statement into evidence at trial pursuant to N.C. Gen. Stat. 90-95(g)-(g1). The Record does not indicate that Defendant filed any written objection in response to this notice.

¶ 5 Defendant was tried before a jury in Johnston County Superior Court during the court's 27 January 2020 Criminal Session. At trial, Ms. Dupper testified for the State and was accepted by the trial court as an expert witness, as a forensic scientist with a specialization in drug chemistry. In pertinent part, Ms. Dupper testified as to the contents of the substances seized from Defendant, identified as State's Exhibits 2 and 4, as follows:

Q. Okay. Now, did you examine -- first let's deal with State's Exhibit Number 2.

A. Yes, I did.

Q. All right. Please briefly describe the purpose of that examination and the type of chemical analysis that you conducted on State's Exhibit Number 2?

A. The purpose of a drug chemistry analysis is to determine what, if any, controlled substance is present to identify that substance or to identify that no controlled substances are present.

Q. Okay. And as a result of your chemical analysis of State's Exhibit Number 2, were you able to form an opinion about what the substance that you examined contained?

A. Yes.

Q. And what was your opinion?

A. Item 1[1] contained heroin, a schedule I controlled substance.

. . .

Q. . . . Now, as it relates to State's Exhibit Number 4, did you also examine State's Exhibit Number 4, your Item Number 2?

A. Yes, ma'am.

Q. All right. Please -- as a result of that analysis, were you able to form an opinion about what the substance contained in State's Exhibit Number 4 was?

A. I was.

Q. All right. What was your opinion?

[1] The State's Exhibit 2 had been labeled as Item 1 at the State Crime Lab.

> A. State's Exhibit Number 4 contained heroin, a schedule I controlled substance.

Defendant's trial counsel did not object to this testimony.

¶ 6 Ms. Dupper also testified about the Lab Report she prepared providing the results of her analysis of the State's Exhibits 2 and 4 and her conclusion each contained heroin. When the State moved to introduce the Lab Report into evidence, Defendant's counsel objected: "We would object for the record, Your Honor; don't wish to be heard." The trial court overruled the objection and allowed the Lab Report to be admitted into evidence.

¶ 7 Following the close of the State's evidence, the State conceded the Conspiracy to Sell or Deliver Heroin; and Conspiracy to Traffic Heroin should be dismissed, and the trial court dismissed both of those charges. Defendant elected not to present evidence on his own behalf. The remaining counts were submitted to the jury.

¶ 8 On 30 January 2020, the jury found Defendant: not guilty of Trafficking in Opium or Heroin by Manufacture; guilty of Trafficking in Opium or Heroin by Possession; guilty of Trafficking in Opium or Heroin by Transportation; and guilty of Possession with Intent to Sell or Deliver Heroin. The trial court entered Judgments sentencing Defendant to two active terms of 70-93 months for the two counts of trafficking, to run consecutively, and to an active term of 8-19 months on the count of Possession with Intent to Sell or Deliver Heroin, to run concurrently with the second

trafficking count. On 3 February 2020, Defendant, through trial counsel, filed a written Notice of Appeal.

Appellate Jurisdiction

¶ 9 Recognizing Defendant's Notice of Appeal filed by his trial counsel pursuant to N.C.R. App. P. 4, although timely, may contain technical defects precluding appellate review of the criminal Judgments entered in this case, Defendant's appellate counsel has filed a Petition for Writ of Certiorari with this Court requesting this Court accept jurisdiction of Defendant's appeal. Specifically, Defendant's Notice of Appeal failed to specify the appeal was to be taken to this Court, does not contain a Certificate of Service on the State, and appealed the "verdict" as opposed to identifying the Judgments. *See* N.C.R. App. P. 4(b) (2021). The State acknowledges whether to allow the Petition is in our discretion. It is clear Defendant intended to timely give Notice of Appeal from the Judgments entered on the jury verdicts. Moreover, the failure to certify service of a Notice of Appeal or to identify to which court appeal is taken may not actually constitute jurisdictional defects requiring dismissal. *See, e.g.*, *State v. Baungartner*, 850 S.E.2d 549, 551 (2020) (recognizing at least one prior instance where these defects did not mandate automatic dismissal). Nevertheless, we allow the Petition for Writ of Certiorari in this case to ensure our appellate jurisdiction over Defendant's appeal.

Issues

¶ 10 The dispositive issues on appeal are whether: (I) the trial court committed plain error in admitting Ms. Dupper's testimony the substance recovered from Defendant contained heroin; and (II) the trial court abused its discretion in admitting the Lab Report.

Analysis

I. Whether Admission of Expert Testimony Was Plain Error

¶ 11 Defendant claims Ms. Dupper's testimony failed to establish the reliability of her expert testimony as required by Rule 702 of the North Carolina Rules of Evidence because there was no testimony as to the methodology she applied, and argues it was plain error for the trial court to admit her expert testimony into evidence.

A. Standard of Review

¶ 12 "[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 in North Carolina state courts." *State v. Piland*, 263 N.C. App. 323, 338, 822 S.E.2d 876, 887 (2018) (citation omitted). Because Defendant did not challenge the admission of the expert testimony at trial, we review the admission of Ms. Dupper's expert testimony for plain error.

B. Admission of Chemical Analysis Evidence without Objection

> "Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides

> pursuant to Rule 104(a)." . . . 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." . . . "[T]he trial court has discretion in determining how to address the three prongs of the reliability test."

Id. at 338, 822 S.E.2d at 887-88 (brackets in original) (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017); *State v. McGrady*, 368 N.C. 880, 890, 892, 787 S.E.2d 1, 9-10 (2016)).

¶ 13 In *State v. Piland*, as in the case at bar:

> [the] [d]efendant challenge[d] the trial court's admission of expert testimony. The State's expert testified that she conducted a chemical analysis of the evidence but failed to testify as to the methodology of her chemical analysis. Defendant challenge[d] her testimony as unreliable and allege[d] that the trial court committed plain error in failing to execute its gatekeeping function under N.C.G.S. § 8C-1, Rule 702.

Id. at 325, 822 S.E.2d at 880. There, while we agreed with the defendant that the trial court erred in failing to require evidence of the methodology of the chemical analysis, we ultimately held—in the absence of a valid objection at trial by the defendant—it did not rise to plain error "because the expert testified that she performed a 'chemical analysis' and as to the results of that chemical analysis." *Id.* at 340, 822 S.E.2d at 888. Specifically, in that case, the expert testimony was as follows:

> *The State*: Okay. Once you received [the pill bottle], how

> did you begin your analysis of it?
>
> *Expert Witness*: [T]he first thing I did was examine all the tablets for consistency. . . . I then performed a chemical analysis on a single tablet to confirm that they did in fact contain what the manufacturer had reported.
>
> . . . .
>
> *The State*: And what did you find those pills to contain?
>
> *Expert Witness*: Based on the results of my analysis, . . . hydrocodone, which is a Schedule III preparation of an opium derivative.

Id. at 338-39, 822 S.E.2d at 888 (alterations in original).

> Since our review [wa]s limited to plain error review, we ask[ed] whether the trial court committed an error "*so basic, so prejudicial, so lacking in its elements that justice cannot have been done*." . . . Here, 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. However, the error d[id] not amount to plain error because the expert testified that she performed a "chemical analysis" and as to the results of that chemical analysis. Her testimony stating that she conducted a chemical analysis and that the result was hydrocodone d[id] not amount to "baseless speculation," and therefore her testimony was not so prejudicial that justice could not have been done.

Id. at 339-40, 822 S.E.2d at 888 (citations omitted) (emphasis added).

¶ 14 The testimony in the present case is not meaningfully distinguishable from the testimony in *Piland*. Here, Ms. Dupper testified she conducted analyses of both State's Exhibits 2 and 4, formulating an opinion that both exhibits contained heroin. Like in *Piland*, the testimony "lack[ed] any discussion of th[ese] analys[e]s[,]" but asserted the analyses were, in fact, performed. *See id.* at 339, 822 S.E.2d at 888.

Defendant did not object to this testimony or seek clarification of the methodology applied. Thus, consistent with our prior decision in *Piland*, Ms. Dupper's "testimony stating that she conducted a chemical analysis and that the result was [heroin] does not amount to 'baseless speculation,' and therefore her testimony was not so prejudicial that justice could not have been done." *See id.* at 340, 822 S.E.2d at 888. Therefore, it was not plain error for the trial court to admit Ms. Dupper's expert testimony.

II. Whether Admission of Laboratory Report Was an Abuse of Discretion

¶ 15 Next, Defendant claims the trial court abused its discretion in admitting the Lab Report over Defendant's objection, again arguing on appeal it was admitted without proper foundation to establish the reliability of the methodology used.

A. Standard of Review

¶ 16 As a preliminary matter, the parties dispute whether the objection to the admission of the Lab Report was preserved and, in turn, the proper standard of review on this issue. Here, when the State moved to enter the Lab Report into evidence, Defendant's trial counsel stated, "We would object for the record, Your Honor; don't wish to be heard." The State contends, because Defendant did not state specific grounds for his objection, the issue is not preserved for appellate review, and therefore plain error review should apply. Conversely, Defendant argues it was apparent from the context—an expert's laboratory report offered into evidence—the

objection was "foundational." Thus, according to Defendant, the issue was properly preserved, and this Court should review for abuse of discretion.

¶ 17 Assuming *arguendo*, however, it was clear from the context Defendant's objection was foundational, the trial court did not abuse its discretion in admitting the Lab Report where admission of the Lab Report would have otherwise been permitted by N.C. Gen. Stat. § 90-95(g) even had Ms. Dupper not testified:

> Whenever matter is submitted to the North Carolina State Crime Laboratory . . . for chemical analysis to determine if the matter is or contains a controlled substance, *the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication and without the testimony of the analyst* in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, the provisions of this subsection may be utilized by the State only if:
>
> (1) The State notifies the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and
>
> (2) The defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the report into evidence.
>
> If the defendant's attorney of record, or the defendant if that person has no attorney, fails to file a written objection as provided in this subsection, *then the objection shall be deemed waived and the report shall be admitted into evidence without the testimony of the analyst*. Upon filing a timely objection, the admissibility of

> the report shall be determined and governed by the appropriate rules of evidence.

N.C. Gen. Stat. § 90-95(g) (2019) (emphasis added).

¶ 18 Here, the State gave Defendant 25 days' written notice of its intention to introduce the Lab Report at trial. The Record does not show Defendant filed any written objection to the admissibility of the Lab Report with the trial court. Therefore, the Lab Report was "admissible without further authentication and without the testimony" of Ms. Dupper. *See id.*

¶ 19 Moreover, the same evidence had already been admitted without objection via Ms. Dupper's testimony. Specifically, Ms. Dupper had already testified, without objection, consistently with the content of the report, including as to the quantity and identity of the substances seized from Defendant, and that this identification was the product of her chemical analysis. "When evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Corbett*, 307 N.C. 169, 179, 297 S.E.2d 553, 560 (1982) (citations omitted). Having already concluded admission of Ms. Dupper's testimony was not plain error where Defendant did not object to that testimony, and thus, that testimony was permissibly considered by the jury, we cannot conclude the trial court's admission of the Lab Report itself into evidence arises to an abuse of discretion.

Conclusion

¶ 20 Accordingly, the trial court did not commit plain error by admitting Ms. Dupper's expert testimony and did not abuse its discretion in admitting the Lab Report.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judges ARROWOOD and CARPENTER concur.

Report per Rule 30(e).