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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-419

No. COA20-738

Filed 3 August 2021

Avery County, Nos. 18CRS050492; 19CRS000093

STATE OF NORTH CAROLINA

v.

BOBBY RAY MARTIN

Appeal by Defendant from judgment entered 12 February 2020 by Judge Marvin P. Pope Jr. in Avery County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Carl Newman, for the State-Appellee.

William D. Spence for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Bobby Ray Martin appeals from judgment entered upon jury verdicts of guilty of possession of a controlled substance on prison premises and attaining the status of habitual felon. Defendant contends that the trial court committed plain error by allowing the State's expert to give certain opinion testimony and erred by denying Defendant's motion to dismiss his habitual felon charge. The

trial court erred, but did not commit plain error, by allowing the State's expert to give certain opinion testimony. The trial court erred by denying Defendant's motion to dismiss his habitual felon charge.

I. Background

¶ 2 Defendant was indicted on 8 April 2019 for possession of a controlled substance on prison premises and attaining habitual felon status. Defendant was charged with possessing buprenorphine, a Schedule III controlled substance, on the premises of Mountain View Correctional Facility. Defendant's case came on for trial on 11 February 2020, and the jury found Defendant guilty of both charges. The trial court sentenced Defendant to an active prison sentence of 108 to 142 months, to run at the expiration of a sentence he was already serving. Defendant timely filed written notice of appeal.

II. Analysis

A. Expert Testimony

¶ 3 Defendant first contends that the trial court committed plain error by allowing the admission of certain opinion testimony from the State's expert without laying a proper foundation under Rule 702(a). We disagree.

¶ 4 "Whether expert 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); *see* N.C. Gen. Stat. § 8C-1,

Rule 104(a) (2019) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court[.]"). Generally, the standard of review for a trial court's ruling on the admissibility of expert testimony is abuse of discretion. *McGrady,* 368 N.C. at 893, 787 S.E.2d at 11 (citation omitted). However, "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[.]" *State v. Hunt,* 250 N.C. App. 238, 246, 792 S.E.2d 552, 559 (2016). As Defendant acknowledges his failure to object at trial but specifically and distinctly argues plain error on appeal, *see* N.C. R. App. P. 10(a)(4), we review this issue for plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial" which "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence,* 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotation marks and citations omitted). A fundamental error is one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation marks and citations omitted).

¶ 5 Under Rule 702 of the North Carolina Rules of Evidence, "[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 may testify as to his or her opinion if the following can be shown: (1) "[t]he testimony is based upon sufficient facts or data[,]" (2) "[t]he testimony is the product of reliable principles and methods[,]" and

(3) "[t]he witness has applied the principles and methods reliably to the facts of the case." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019). When the State seeks to use expert testimony to prove the identity of a controlled substance, such testimony is only admissible when it is "based on scientifically valid chemical analysis and not mere visual inspection." *State v. Ward,* 364 N.C. 133, 142, 694 S.E.2d 738, 744 (2010).

¶ 6 The State called Kamilah Gonzalez, an employee of the North Carolina State Crime Lab currently assigned to the drug chemistry section. After Gonzalez answered a series of questions regarding her qualifications and four years of experience with the Crime Lab, she was tendered as an expert in the field of forensic chemistry. The trial court asked Defendant if he wished to voir dire the witness. Defendant responded, "Your Honor, I would object, but I don't wish to be heard." The trial court found Gonzalez to be an expert in the field of forensic drug chemistry.

¶ 7 Gonzalez testified that the crime lab received 5 sublingual films, a hypodermic syringe, a ballpoint pen, an empty packet of coffee creamer, and a piece of printed paper. She analyzed one of the sublingual films. She first "utilized a color test as the preliminary test" and then "utilized pharmaceutical information as well as our GCMS instrument."[1] She testified, "my opinion is that the one sublingual film was analyzed

[1] Although the State's expert did not define or explain the acronym GCMS, our courts have used this acronym for a gas chromatography mass spectrometer. *See State v. Pabon,* 850 S.E.2d 512, 518 (N.C. Ct. App. 2020) ("The State Crime Lab then conducted confirmatory

and found to contain Buprenorphine, which is a Schedule 3 controlled substance." The four other sublingual films were visually examined and "found to be consistent with a pharmaceutical preparation containing Buprenorphine." Her lab report was also admitted into evidence, and it stated that one sublingual film "was analyzed and found to contain Buprenorphine."

¶ 8 Defendant argues that the trial court committed plain error by allowing Gonzalez to testify without a proper foundation, "explaining what she did, how the testing was performed, how any of the machinery worked, or what they were designed to do, or the result of any of her testing[.]" He further argues that "[t]here was no testimony as to whether or not her testing procedures and/or instruments were widely accepted in the field of drug testing."

¶ 9 The trial court erred by admitting Gonzalez's testimony without testimony about the methodology used, the reliability of her chemical analysis, and whether she applied the principles and methods reliably to the facts of this case, as required by Rule 702(a) of our North Carolina Rules of Evidence. However, Defendant did not object to the expert's testimony so our review is limited to plain error review. We

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testing of the urine samples using gas chromatography mass spectrometry ('GCMS')."); *State v. Sasek,* 271 N.C. App. 568, 570, 844 S.E.2d 328, 331 (2020) ("Next [the State's expert] performed a 'gas chromatography mass spectrometer' test (the 'GCMS test') on the substance."); *State v. Gray,* 259 N.C. App. 351, 352-53, 815 S.E.2d 736, 739 (2018) ("[T]he analyst performs additional testing on the substance with a gas chromatography mass spectrometer ('GCMS').")

must determine whether the trial court committed an error "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Bush,* 164 N.C. App. 254, 258, 595 S.E.2d 715, 718 (2004) (quotation marks and citations omitted). "The standard is so high in part at least because the defendant could have prevented any error by making a timely objection." *State v. Piland,* 263 N.C. App. 323, 339, 822 S.E.2d 876, 888 (2018) (quotation marks and citation omitted).

¶ 10 Essentially, Defendant is asking this Court to find plain error and reverse his conviction because the trial court failed "to *sua sponte* render a ruling" that the State failed to elicit the proper testimony to satisfy Rule 702. *Hunt,* 250 N.C. App. at 247, 792 S.E.2d at 560. Although Rule 702 imposes a special gatekeeping role upon the trial court to ensure the reliability of expert testimony, "the trial court's role as a gatekeeper is not intended to serve as a replacement for the adversary system." *Id.* at 247-48, 792 S.E.2d at 560 (quotation marks and citation omitted).

¶ 11 Our Courts has previously held a criminal defendant failed to establish plain error when an expert testified that a chemical analysis was performed, but the evidence lacked any discussion of that analysis. *See Piland,* 263 N.C. App. at 340, 822 S.E.2d at 888 ("[The expert's] testimony stating that she conducted a chemical analysis and that the result was hydrocodone does not amount to 'baseless speculation,' and therefore her testimony was not so prejudicial that justice could not have been done.") (citation omitted); *see also Sasek,* 271 N.C. App. at 574, 844 S.E.2d

at 334 (finding no plain error when the State's expert "testified that she conducted the GCMS test in this case, obtained positive results identifying the substance the informant received from Defendant to be methamphetamine, and produced a lab report recording the results of her analysis").

¶ 12 Here, Gonzalez testified that she conducted a GCMS test and obtained a positive result identifying the substance as Buprenorphine, a Schedule III controlled substance, and Gonzalez's lab report, stating that one sublingual film "was analyzed and found to contain Buprenorphine," was admitted into evidence. Defendant did not object to this testimony or seek clarification of the methodology applied. Thus, consistent with our decisions in *Piland* and *Sasek*, Gonzalez's testimony that she conducted a GCMS test and obtained a positive result identifying the substance as Buprenorphine "does not amount to 'baseless speculation,' and therefore her testimony was not so prejudicial that justice could not have been done." *Piland,* 263 N.C. App. at 340, 822 S.E.2d at 888 (citation omitted). Accordingly, the trial court did not commit plain error by admitting Gonzalez's expert testimony.

B. Motion to Dismiss

¶ 13 Defendant next argues that the trial court erred by denying his motion to dismiss the charge of having attained the status of habitual felon. We agree.

¶ 14 "We review the trial court's denial of a motion to dismiss de novo. Under a de novo standard of review, this Court considers the matter anew and freely substitutes

its own judgment for that of the trial court." *State v. Walters*, 2021-NCCOA-72, ¶ 18 (quotation marks and citation omitted). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Golder,* 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (quotation marks and citations omitted).

¶ 15 Here, Defendant was charged with having attained the status of habitual felon based on three prior felony convictions: (1) breaking and entering a motor vehicle in Lincoln County on 1 June 2005; (2) obtaining property by false pretenses in Lincoln County on 31 August 2011; and (3) obtaining property by false pretenses in Gaston County on 3 September 2014. *See* N.C. Gen. Stat. § 14-7.1(a) ("Any person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon[.]"). Defendant contends, and the State concedes, that the State failed to present substantial evidence to prove that Defendant had three prior felony convictions because a careful review of the record shows that the State introduced no evidence of Defendant's 31 August 2011 conviction for obtaining property by false pretenses in Lincoln County and only introduced evidence of two prior felony convictions. Accordingly, the trial court erred by denying Defendant's motion to dismiss and his conviction for attaining the status of habitual felon must be reversed.

III. Conclusion

¶ 16 The trial court erred but did not commit plain error by allowing Gonzalez to

offer her expert opinion. We reverse Defendant's conviction for having attained the status of habitual felon because the State failed to present sufficient evidence that Defendant had three prior felony convictions. Because the trial court consolidated Defendant's conviction for having attained the status of habitual felon with his conviction for possession of a controlled substance, we remand for resentencing as to the possession of a controlled substance conviction. *See State v. Fuller* 196 N.C. App. 412, 426, 674 S.E.2d 824, 833 (2009).

NO PLAIN ERROR IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING.

Chief Judge STROUD and Judge WOOD concur.

Report per Rule 30(e).