IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-435

No. COA21-13

Filed 21 June 2022

Wake County, No. 15 CRS 227741-42

STATE OF NORTH CAROLINA,

v.

BRANDON JAMES LEE, Defendant.

Appeal by Defendant from judgments entered 3 October 2019 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 12 January 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Jarvis John Edgerton, IV, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Brandon James Lee ("Defendant") appeals from his convictions for first-degree murder. On appeal, Defendant contends the trial court erred by prohibiting a defense expert witness from issuing an opinion under Rules 702 and 403 of the North Carolina Rules of Evidence and that the exclusion of the expert witness' testimony deprived Defendant of his right to present a defense under the United States Constitution. After careful review of the record and applicable law, we

find no error.

I. Factual and Procedural Background

¶ 2 In December 2015, Defendant was employed at Time Warner Cable and resided with his mother, Christa Lee ("mother"). While attending Time Warner Cable's employment training, Defendant met Krystal Hylton ("Hylton"). Shortly thereafter, Defendant and Hylton began a romantic relationship, which Defendant described as "an explosive love," but "rocky."

¶ 3 After Defendant and Hylton began their relationship, Hylton befriended another co-worker by the name of Derik Stephens ("Stephens"). Hylton confided in Stephens that Defendant was physically abusive, such that it would cause her to miss work. At times, Defendant was "belligerent, upset," and had previously "strangle[d] . . . and hit" Hylton. Hylton also told Stephens that Defendant "drank a lot, that he was just always angry." Hylton recounted to Stephens one specific instance, in which Defendant became enraged while Hylton was driving. Defendant shouted that he didn't "give a dam [sic] about [her], about [his] life, about [her] life" and that he "will kill both of [them] right now," grabbed the steering wheel, and caused the car to crash. Hylton shared this story with Stephens a few weeks before she was killed. After the incident, Hylton told Stephens that she wanted to terminate her relationship with Defendant and that she feared for her safety, believing the Defendant might "kill [her] at any moment."

¶ 4 On or around December 13, 2015, Defendant had an argument with his mother while at her apartment. Defendant testified that his mother began screaming at him and "cursing up a storm" and that she then grabbed a knife from the kitchen. In response, Defendant closed the door to his bedroom and waited until he did not hear his mother anymore. When Defendant came out of the room, his mother also came out of her room and resumed screaming at Defendant. According to Defendant, his mother told him to sit on the couch in the living room and began to tell him that she wanted him to get a bottle of pills and kill himself. His mother then handed him four Prozac pills, and he took two of them. Defendant left his mother's residence and obtained an alcoholic beverage and a pack of cigarettes.

¶ 5 Later, he returned to the residence, wherein his mother reportedly insulted him. In response to her insults, Defendant stated, "You want to die? You die. You die." and began choking his mother. According to Defendant, his mother did not fight back. Dr. Nabila Haikal, a State's witness, testified Defendant's mother died from strangulation. After his mother died, Defendant dragged her body from the living room to the bathroom and placed her body in the bathtub.

¶ 6 Approximately an hour later, Defendant left the residence, went to Harris Teeter, and purchased a bottle of wine and several bags of ice. Defendant returned to the residence and dumped the ice in the bathtub over his mother's body. Although Defendant testified that he planned to turn himself in, he did not report his mother's

death that day. Instead, the following day, Defendant went to Time Warner Cable, his former employer, and approached Stephens. Stephens testified that he "immediately smelled alcohol" and noticed Defendant swaying. Stephens described how Defendant attempted to intimidate him and demanded that he stay away from Hylton. Later that day, Stephens received a threatening text message from Defendant warning him to stay away from Hylton. After learning of Defendant's visit to Time Warner Cable and confrontation with Stephens, Hylton told Stephens that she feared for her life. Stephens suggested to Hylton that to avoid interacting with Defendant she should not stay at her house and that she should either stay with him or with other friends. On the evening of December 18, 2015, Hylton went to Stephens' residence to watch movies, and subsequently, stayed overnight. The following day, Saturday, Hylton returned to her residence.

¶ 7 That same day, Defendant, believing that Hylton was romantically involved with Stephens, traveled to Hylton's residence "to catch her cheating on [him]." Defendant entered Hylton's residence by climbing through a cracked window. Hylton, who was alone in the apartment, became angry with Defendant and asked what he was doing there and why he broke her window screen. Defendant testified that he and Hylton began to argue and that he "snapped on her." Defendant brought her to the ground, placed two hands on her neck, and proceeded to choke her in the same way he had choked his mother. Defendant testified that he was "just full of just

-- just hate her." Dr. Haikal testified Hylton died from this strangulation. Defendant used a marker to write the words "whore," "drug addict," and "cheater" on her abdomen after choking her. Later that day, Defendant sent text messages to Stephens from Hylton's phone, with the last text sent being, "This is all your fault." Stephens testified that at the time he received those messages he was unaware Hylton was dead. The next day, after staying at Hylton's apartment overnight, Defendant called 911 to report the two killings.

¶ 8 Defendant was indicted for two counts of first-degree murder on January 3, 2018. Defendant's trial began on September 23, 2019. At trial, Defendant called several witnesses and testified on his own behalf. According to Defense counsel, "Defendant's only defense was that he was acting under mental and emotional disturbances that negatively impacted his ability to act rationally and with intent." To carry forth this defense, Defense counsel called Dr. Moira Artigues ("Dr. Artigues") to testify as an expert in the fields of psychiatry and forensic psychiatry. Dr. Artigues testified that she had evaluated Defendant in order to ascertain his mental state and psychological condition at the time he committed the murders. Dr. Artigues examined Defendant in 2018 and 2019 and, based on the results of the examinations, diagnosed Defendant with several mental disorders, including severe alcohol use disorder and either Major Depressive Disorder or Alcohol Use Related Depression. Dr. Artigues also diagnosed Defendant as having disrupted effects of brain

development. Dr. Artigues further testified Defendant suffered from these conditions in December of 2015, such that Defendant was acting under an emotional and mental disturbance that affected his ability to act rationally when he committed the crimes.

¶ 9 Thereafter, Defendant called Dr. Daniel Chartier ("Dr. Chartier") as an expert witness in psychology and quantitative electroencephalogram ("qEEG"). Dr. Chartier conducted a qEEG assessment of Defendant's brain function. On direct examination, Dr. Chartier first explained that EEG "is the appliance of multiple sensors on the scalp that are capable of picking up the electrical activity that the brain is generating" and mapping out what is happening in different regions of the brain. The qEEG specifically looks at how different parts of the brain are operating within a particular person. Therefore, qEEG combines traditional EEG and computer technology to analyze and save the brain's electrical activity results through digital storage on a computer disk. Dr. Chartier testified that qEEG is recognized as a legitimate and effective tool for psychologists in the use of evaluating patients and has been subjected to many peer-reviewed textbook articles and other publications. Dr. Chartier further testified that he utilizes qEEG in his private practice to provide objective understanding of various problems that people may be experiencing and noted that "virtually any identifiable abnormality of behavior [that] has a corresponding brain signature" that is identifiable by qEEG. Dr. Chartier further testified that in 2006 he began evaluating individuals with qEEG in civil and criminal

court cases and has evaluated over 30 people in relation to criminal cases. Dr. Chartier also noted that he had personally testified about his findings of a defendant based on qEEG in "14 or 15 [criminal cases] in the last five, six years." Dr. Chartier stated that there are reliable methods and procedures for using qEEG, known as standards of practice.

¶ 10 In explaining the process of the qEEG evaluation, Dr. Chartier reported that he first interviews the client to gather medical history of their symptoms and to identify problems. Next, he gathers qEEG data by applying sensors to the client's scalp and having them perform a series of tasks including opening their eyes, closing their eyes, silently reading for comprehension, and performing a series of math problems. Dr. Chartier then analyzes this data for normal and abnormal findings. If abnormal findings are present, Dr. Chartier sends the data to Scottsdale Neurofeedback Institute, a third-party office with a licensed additional database to analyze the kind of abnormality the brain is showing. According to Dr. Chartier, these same techniques were applied in Defendant's case.

¶ 11 After gathering data from these tests, Dr. Chartier completed a "first-level analysis" in which he determined Defendant had abnormal brain functioning. Dr. Chartier stated that after having interpreted Defendant's results as abnormal, the data was sent to the Scottsdale Neurofeedback Institute to compare Defendant's results to patient populations with known diagnoses. Dr. Chartier was called as a

witness to testify that Defendant's brain function was abnormal, and thus affected how Defendant dealt with stressors, his acting impulsively, and his poor capacity for executive function. The State objected, and the trial court held a *voir dire* hearing.

¶ 12 After hearing Dr. Chartier's *voir dire* testimony and reviewing his expert report, the trial court sustained the State's objection and ruled that Dr. Chartier's expert testimony did not meet the standards of admissibility under North Carolina Rules of Evidence 702 and 403. Under the *Daubert* analysis of Rule 702, the court found that there is a dispute to qEEG's general acceptance within the relevant scientific community based upon the evidence presented at the trial. The court also expressed concerns about whether Dr. Chartier followed the methodology and principles that occur before or during a qEEG examination. Further, the trial court noted that Dr. Chartier's testimony would be confusing to the jury, therefore any probative value of the testimony would be substantially outweighed by prejudice.

¶ 13 The State called Dr. Nancy Laney, a forensic psychologist, as a rebuttal witness to Dr. Chartier's testimony. Dr. Laney testified that she interviewed Defendant to assess whether Defendant possessed the ability to think, plan, initiate actions, weigh decisions, make choices, and sustain his attention at the actual moments in which the killings occurred. Dr. Laney testified it was her belief that Defendant had, at the time of the offenses, the mental abilities to form the intent to make and carry out the plans to strangle his mother and his girlfriend. During *voir*

dire, Dr. Laney, also clarified that she did not rely upon qEEG's results or report in forming her opinion about Defendant's mental status at the time of the offenses.

¶ 14 Defendant was convicted of both counts of first-degree murder on October 3, 2019. Thereafter, the trial court sentenced Defendant to life imprisonment without parole. Defendant timely gave oral notice of appeal in open court. The printed record on appeal does not contain a written notice of appeal.

II. Discussion

¶ 15 On appeal, Defendant argues the trial court erred by excluding Dr. Chartier's testimony under Rules 702 and 403 of the North Carolina Rules of Evidence. Defendant also argues that this exclusion violated his right to present a defense under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Each argument will be addressed in turn.

A. Appellate Jurisdiction

¶ 16 As a preliminary matter, we note that Defendant's submitted record on appeal does not contain a notice of appeal. Rule 4 of our rules of appellate procedure governs appeals in criminal cases. N.C. R. App. P. 4. Rule 4 permits a criminal defendant to provide oral notice of appeal. N.C. R. App. P. 4(a)(1).

¶ 17 Rule 9, however, governs the contents of a record on appeal. N.C. R. App. P. 9. Under subsection (3)(h), a copy of the notice of appeal shall be included in the record on appeal. N.C. R. App. P. 9(3)(h). Accordingly, Defendant's record on appeal does

not comply with our rules of appellate procedure. However, based upon our reasoning in *State v. Barker*, 257 N.C. App. 173, 176, 809 S.E.2d 171, 174 (2017), this Court has jurisdiction over this appeal. In *Barker*, the Court looked to see if the trial court's judgment provided in the appellate record reflected if Defendant had given an oral notice of appeal per Rule 4. *Id.* Here, the superior court's judgment reflects that Defendant gave oral notice of appeal from the judgment of the trial court. We believe that this document is "sufficient to show that Defendant gave oral notice of appeal to the superior court under N.C. R. App. 9(a)(3)(h)." *Id.*

B. North Carolina Rules of Evidence

¶ 18 Defendant first argues that the trial court abused its discretion by excluding Dr. Chartier's testimony under Rules 702 and 403. We disagree.

¶ 19 The trial court's rulings on evidentiary issues under Rules 702 and 403 are reviewed for an abuse of discretion. *See State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citations omitted). "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. Abrams*, 248 N.C. App. 639, 641, 789 S.E.2d 863, 865 (2016) (cleaned up).

1. N.C. Rule of Evidence 702

¶ 20 Rule 702(a) provides in pertinent part:

> (a) 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.

N.C. Gen. Stat. § 8C-1, R. 702(a) (2019). In 2011, our State adopted the federal standard for the admission of expert testimony under Rule 702, as "articulated in the *Daubert* line of cases." *McGrady*, 368 N.C. at 884, 787 S.E.2d at 5 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). Our "[i]nquiry under . . . Rule 702(a) . . . involves a three-step framework." *Abrams*, 248 N.C. App. at 642, 789 S.E.2d at 865 (citation omitted). The expert's testimony must satisfy each step to be admissible. *Id.* These steps are: "evaluating qualifications, relevance, and reliability." *Id.* In consideration of the reliability step, the expert testimony must meet the three prongs enumerated in N.C. Rules of Evidence 702(a)(1)-(3), as the "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 9 (cleaned up).

¶ 21 Our Supreme Court further held that the reliability inquiry varies from case

to case "depending on the nature of the proposed testimony" and that the trial court possesses the discretion in determining "how to address the three prongs of the reliability test." *Id.* In determining reliability, the trial court may consider other factors as enumerated in *Daubert* and by our Supreme Court:

> In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." Those factors are part of a "flexible" inquiry, so they do not form "a definitive checklist or test." And the trial court is free to consider other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony."

Abrams, 248 N.C. App. at 643, 789 S.E.2d at 865-66 (internal citations and alterations omitted). Additionally, our Supreme Court emphasized that Rule 702(a) "does not mandate particular 'procedural requirements for exercising the trial court's gatekeeping function over expert testimony.' " *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11 (quoting Fed. R. Evid. 702).

¶ 22 Here, the trial court excluded Dr. Chartier's testimony because the evidence presented was insufficient to show "that the methodology or the techniques enjoy general acceptance within the relevant scientific community." The court further explained that it "has real concerns about whether the witness followed the methodology and principles that he described take place before or during a qEEG examination"; and concluded Dr. Chartier was impermissibly "rendering an opinion as to someone's state . . . of mind at the time of an event."

¶ 23 Although Defendant argues that the general acceptance of qEEGs was established through Dr. Chartier's *voir dire* testimony in that it is "recognized as a legitimate and effective tool for psychologists in the use of evaluating patients"; academic institutions sometimes use qEEGs; and that a qEEG can be "helpful in a forensic setting[,]" a review of the transcript reveals that the State cast sufficient doubt as to qEEGs' general acceptance in the scientific community.

¶ 24 During *voir dire*, the State introduced an article, originally published in 1997 and reprinted in 2011 in the American Academy of Neurology's journal *Neurology,* entitled, "Assessment of digital EEG, quantitative EEG, and EEG brain mapping." Authored by Marc Nuwer, MD, Ph.D., the article addressed the forensic and legal uses of qEEG. The article stated that "on the basis of clinical and scientific evidence, opinions of most experts, and the technical and methodological shortcomings, qEEG is not recommended for use in civil or criminal judicial proceedings." Further, Dr.

Nuwer gave qEEG a negative recommendation "based on everyday ineffectiveness or lack of efficacy." The article also addressed the possibility of "false positive" results of qEEG in legal disputes, in that patients can receive incorrect diagnoses. Moreover, the article stated that "[w]hen statistical testing is used to compare a patient to a normative database, statistical 'abnormalities' detected may be clinically meaningless." The article further revealed that, "[t]he use of these techniques to support one side or the other in court proceedings can readily result in confusion, abuse, and false impressions. These are contrary to the qualities cited as suitable for scientific evidence used in the courtroom." Additionally, the publication noted that the lack of general acceptance of qEEG in the scientific community has been "cited in state and federal court decisions disallowing the use of EEG brain mapping under the . . . recent [*Daubert*] rules."

¶ 25 For example, Dr. Chartier conceded that insurance companies Aetna and Blue Cross Blue Shield categorize qEEG as experimental and do not cover the cost of such testing for investigational procedures. Dr. Chartier further conceded he was not a neurologist and the qEEG standing alone is generally not sufficient to "make a determination of behavior." Thereafter, Dr. Chartier argued that the article produced by the State was more of an opinion piece and was not based on scientific study.

¶ 26 Additionally, we previously noted in *State v. Jackson*, that Dr. Chartier "[administers] a controversial diagnostic tool called a qualitative

electroencephalograph (qEEG)." 258 N.C. App. 99, 102, 810 S.E.2d 397, 399 (2018).[1] In *Jackson*, the State's rebuttal witness opined that qEEGs were "not helpful 'with assisting in a psychiatric diagnosis,' " she would not administer qEEGs, and that she did not know of any psychiatrists with whom she had worked at any facility who used qEEGs for psychiatric diagnostic purposes. *Id.* at 106, 810 S.E.2d at 401. In this case, because the State presented sufficient evidence to call into question the acceptance and reliability of qEEGs, the trial court could reasonably conclude that the use of qEEG for psychiatric diagnostic purposes has not achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 594, 113 S. Ct. at 2797, 125 L. Ed. 2d at 483.

¶ 27 As previously stated, the trial court "is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony[,]" and an abuse of discretion occurs where the trial court's decision is one without reason, that appears arbitrary. *State v. Turbyfill*, 243 N.C. App. 183, 185-86, 776 S.E.2d 249, 252-53 (2015) (citation omitted); *see McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. The trial court is given the same kind of latitude in "deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether or not* that expert's relevant testimony is

[1] The issue before the Court in *Jackson* was not whether Dr. Chartier's testimony was properly excluded, but rather, whether the trial court erred in permitting the State to introduce a rebuttal witness.

reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 1176, 143 L. Ed. 2d 238, 252-53 (1999).

¶ 28 Here, the trial court considered both the article by Dr. Nuwer and Dr. Chartier's testimony before finding that the use of qEEG was not generally accepted in the scientific community and, from this evidence, concluded that a strong dispute exists in the scientific community concerning the use of qEEG for judicial proceedings and forensic settings. *But see State v. Pennington*, 327 N.C. 89, 101, 393 S.E.2d 847, 854 (1990) (holding no error where the trial court allowed expert testimony because it was founded upon reliable principles and methods generally accepted in the community).

¶ 29 After weighing the evidence of the strong dispute in the scientific community regarding the use of qEEG's, the trial court determined the evidence affected the reliability of Dr. Chartier's testimony. After balancing the weight and credibility of the evidence, the trial court excluded Dr. Chartier's testimony because the evidence was insufficient to show that qEEG has achieved general acceptance within the relevant scientific community. *See Turbyfill*, 243 N.C. App. at 185-86, 776 S.E.2d at 252-53.

¶ 30 Next, Defendant contends the trial court's conclusion that Dr. Chartier failed to follow proper methodology and procedures before and during the qEEG examination was erroneous and an abuse of discretion. We disagree.

¶ 31 Under the *Daubert* analysis of Rule 702, the court expressed concerns about whether Dr. Chartier followed the methodology and principles that occur before or during a qEEG examination. During *voir dire*, Dr. Chartier was questioned at length about the administration of the qEEG test on Defendant at the Wake County Detention Center. The State specifically questioned Dr. Chartier about his report, as his report did not make notations about the room in which the qEEG was administered and the stimuli in the surroundings which could affect the examination. Dr. Chartier also testified that during the interview portion of the qEEG examination, Defendant was asked several questions from a "head injury checklist, a neurological symptoms checklist, and learning disabilities" but not all of Defendant's responses to the questions asked were contained in the report. Dr. Chartier further testified that he had not reviewed Defendant's medical records, mental health records, or criminal history, and that he had not looked over any police reports, spoken to witnesses, or watched any of the evidence videos in the case to confirm or corroborate Defendant's answers to the questions. When questioned by the State, Dr. Chartier conceded that he took Defendant at his "word for everything that he told [him]."

¶ 32 Dr. Chartier acknowledged that the International qEEG Certification Board, has recommended procedures to follow to prepare an individual for the qEEG examination, including factors relating to the person's sleep patterns, food intake,

and whether alcohol use occurred in the last 24 hours, to determine whether "the routine of the person has been . . . disrupted from their usual routine for some number of days or weeks." Such factors can affect the brain activity of an individual, yet Dr. Chartier's report did not note whether Defendant had been asked these questions or what Defendant's responses were when questioned. According to Dr. Chartier, "there was nothing unusual about what he reported because I would have reported unusual behavior."

¶ 33 The trial court's findings concerning Dr. Chartier's failure to follow standardized procedures and methodologies surrounding qEEG examinations directly relate to the sufficiency of the facts and data that Dr. Chartier relied upon and whether he applied his own methodology reliably in this case. *See McGrady,* 368 N.C. at 899, 787 S.E.2d at 14-15. It was not manifestly without reason for the trial court to find Dr. Chartier's testimony unpersuasive when the evidence presented during *voir dire* tended to show his failure to make notations or inquire about factors that could have impacted the results of the Defendant's qEEG assessment.

¶ 34 Finally, the trial court did not abuse its discretion to exclude Dr. Chartier's proffered testimony when finding that he rendered an opinion as to Defendant's state of mind at the time of the offenses in question. During *voir dire*, Dr. Chartier agreed that he was being asked to evaluate whether Defendant's brain was functioning appropriately when he committed the crimes in 2015. However, Dr. Chartier

administered the qEEG exam in 2018, three years after the crimes charged occurred, and did not try to determine whether Defendant experienced any intervening head injury or trauma. Further, Dr. Chartier testified he had read news articles about the crimes but had not reviewed any information or evidence about Defendant's thought process at the time of the offenses. The trial court properly fulfilled its gatekeeping role to ensure that expert testimony is reliable and permissibly exercised its discretion to exclude Dr. Chartier's proffered testimony in its entirety. *Id.,* 368 N.C. at 899, 787 S.E.2d at 15. We hold that the trial court did not abuse its discretion in excluding the testimony of Dr. Chartier under N.C. Rule of Evidence 702 considering the evidence presented.

2. N.C. Rule of Evidence 403

¶ 35 Next, Defendant contends the trial court erred when it determined any probative value in Dr. Chartier's testimony would be substantially outweighed by prejudice and should therefore be excluded under N.C. Rule of Evidence 403. Defendant argues that because the trial court erred by excluding Dr. Chartier's testimony under Rule 702, the probative value of his testimony was discounted so that it substantially affected the court's application of Rule 403's balancing test. We disagree.

¶ 36 Rule 403 provides that relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, R. 403 (2019). Evidence that is unfairly prejudicial is evidence with "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (quoting cmt. N.C. R. Evid. 403). Where evidence is not pertinent to guilt of the crime alleged and is prejudicial, it should be excluded. *See State v. Lopez*, 188 N.C. App. 553, 557, 655 S.E.2d 895, 898 (2008), *aff'd*, 363 N.C. 535, 681 S.E.2d 271 (2009); *State v. West*, 255 N.C. App. 162, 167, 804 S.E.2d 225, 227-28 (2017).

¶ 37 Here, the key issue at trial on the charge of first-degree murder was whether the Defendant killed his mother and Hylton in a deliberate and premeditated fashion. *See State v. Melvin*, 364 N.C. 589, 591-92, 707 S.E.2d 629, 631 (2010). Dr. Chartier testified that based on the results of the qEEG test, Defendant possessed abnormal brain functioning, with his reduced executive function and decision-making capacity causing him to have "poor cognitive and behavioral inhibition in the form of emotionally driven responses without rational consideration of potential consequences." However, the Defense offered no testimony as to how the "abnormalities" that Dr. Chartier notated were relevant to an individual's inability to form the intent for first degree murder. As the trial court explained in its exclusion of Dr. Chartier's testimony: "there is no testimony that there are any scientific studies

that can say how they would have -- whether, based off this, an individual would not be able to form the intent or premeditate or deliberate." We agree.

¶ 38 Dr. Chartier's proffered testimony of Defendant's abnormal brain functioning, based solely upon the results of the qEEG assessment and his reading of news stories, would have confused the jury. Indeed, expert testimony " 'can be both powerful and quite misleading' to a jury 'because of the difficulty in evaluating it.' " *McGrady*, 368 N.C. at 892, 787 S.E.2d at 10 (quoting *Daubert*, 509 U.S. at 595, 113 S. Ct. at 2798, 125 L. Ed. 2d at 484).

¶ 39 We also note that the Defendant presented other evidence of his mental capacity and psychological condition at the time of the offenses. Defense's expert witness Dr. Artigues, a psychiatrist, examined Defendant in 2018 and 2019 and testified in his defense. Based on her examinations, Dr. Artigues diagnosed Defendant as having disrupted effects of brain development, suffering from several mental disorders including severe alcohol use disorder and having either Major Depressive Disorder or Alcohol Use Related Depression. Dr. Artigues stated she believed Defendant was suffering from these conditions in December 2015, so that Defendant was acting under an emotional and mental disturbance that affected his impulsivity and ability to make rational decisions at the time he allegedly committed the offenses. Through Dr. Artigues' expert testimony, Defendant had another psychiatrist testify as to his mental disorders and ability to act rationally.

¶ 40 Accordingly, we hold Defendant was not prejudiced by the exclusion of Dr. Chartier's testimony and that the trial court's decision to exclude Dr. Chartier's testimony under Rule 403 was not "manifestly unsupported by reason." *State v. Enoch*, 261 N.C. App. 474, 487, 820 S.E.2d 543, 553 (2018), *disc. review denied*, 372 N.C. 105, 824 S.E.2d 422 (2019).

C. Right to Put on a Defense

¶ 41 Next, Defendant argues that the trial court's exclusion of Dr. Chartier's testimony was a violation of his right to put forth a defense as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. This argument is without merit. While the United States Constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense," "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Nevada v. Jackson*, 569 U.S. 505, 509, 133 S. Ct. 1990, 1992, 186 L. Ed. 2d 62, 66 (2013) (cleaned up). Therefore, a criminal defendant's right to present a defense is not violated when in its discretion, a trial court finds certain evidence to be inadmissible under the Rules of Evidence. *See State v. McGrady*, 232 N.C. App. 95, 106, 753 S.E.2d 361, 370 (2014). The trial court did not abuse its discretion when it performed its gatekeeping role and excluded Dr. Chartier's testimony for failing to meet the reliability requirements of Rule 702. *See McGrady,* 368 N.C. at 899, 787 S.E.2d at 15. Because the trial court excluded Dr.

Chartier's testimony under our state's rules of evidence, we find that "Defendant's constitutional right to present a defense was not violated." *McGrady*, 232 N.C. App. at 106, 753 S.E.2d at 370.

III. Conclusion

¶ 42 For the foregoing reasons, we hold that Defendant has failed to show the trial court abused its discretion in excluding Dr. Chartier's expert testimony under North Carolina Rules of Evidence Rules 702 and 403. Therefore, we hold that Defendant received a fair trial, free from error.

NO ERROR.

Judges DILLON and JACKSON concur.

Report per Rule 30(e).