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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-935

No. COA21-496

Filed 29 December 2022

Yancey County, No. 20 CRS 50006, 20 CRS 245

STATE OF NORTH CAROLINA

v.

CHARLES DAVID HALL, Defendant.

Appeal by Defendant from judgment entered 25 March 2021 by Judge Gary M. Gavenus in Yancey County Superior Court. Heard in the Court of Appeals 9 February 2022.

*Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.*

*Blass Law, PLLC, by Danielle Blass, for defendant-appellant.*

MURPHY, Judge.

¶ 1

Where Defendant requested a continuance the morning of trial so he could hire a private attorney—whom he had not yet retained—after preparing for trial with his court-appointed attorney, the trial court did not err in denying Defendant’s motion to continue. The trial court did not plainly err in admitting expert testimony concerning the presence of a controlled substance. Further, Defendant has not established the

trial court plainly erred in admitting additional testimony regarding officers' visual identification of the same substance as methamphetamine.

### **BACKGROUND**

¶ 2

This case arises from a traffic stop for Defendant Charles David Hall's expired registration conducted on 3 January 2020 by Corporal James Duncan of the Yancey County Sheriff's Office. Soon after Corporal Duncan stopped Defendant, Deputy Joe Pate, a K-9 handler for the Yancey County Sheriff's Office, arrived and walked the K-9 around the vehicle as Corporal Duncan wrote Defendant's traffic citation. The K-9 alerted to the vehicle and the officers searched inside. They found a set of scales in the center console, as well as a jacket that had in its pocket "a vacuum sealed piece of plastic with a white crystal substance inside it." Corporal Duncan arrested Defendant on suspicion of methamphetamine possession. On the drive to jail, Defendant produced an additional case containing several "small baggies of white crystal like substance and some marijuana" from his person.

¶ 3

On 17 August 2020, Defendant was indicted for one count of possession with the intent to sell and deliver methamphetamine and one count of marijuana paraphernalia possession, as well as attaining habitual felon status.

¶ 4

On the day of trial, before the jury was brought in, Defendant moved for a continuance, stating he wished to replace his court-appointed counsel with a new, private attorney. Defendant revealed to the trial court he had yet to hire this private

attorney and acknowledged that he and his appointed attorney had received and reviewed all the evidence in preparing for his trial. The trial court denied Defendant's motion to continue, and the case proceeded to trial.

¶ 5

Jeannie Berg, a drug chemistry analyst at the North Carolina State Crime Lab for roughly two years, was assigned to identify the suspected methamphetamine and report the positive result during Defendant's trial. She had successfully completed a six-month drug chemistry training course covering the theories and techniques identifying controlled substances upon being employed at the Crime Lab. Prior to working at the Crime Lab, she worked at a pharmaceutical company and in a clinical laboratory. Ms. Berg has a Bachelor of Science in biology and a Master of Science in forensic DNA and serology. She had testified and been qualified as an expert witness in forensic drug chemistry on two additional occasions prior to Defendant's trial. She was not yet certified by the American Board of Criminalistics because that Board requires an analyst have two years' experience to sit for the exam and Ms. Berg had been working for the Crime Lab for just under two years.

¶ 6

At trial, the State introduced the Laboratory Report Ms. Berg prepared in this case identifying the alleged substance to be methamphetamine. Ms. Berg described the methods and instruments used as follows:

[PROSECUTION:] [C]an you tell us about what methods or instruments you use in testing substances at the [S]tate [C]rime [L]ab?

[MS. BERG:] To identify controlled substances at the [S]tate [C]rime [L]ab we have preliminary tests and confirmatory tests, and one of each is required to make an identification. A preliminary test tells you what might be present but not what is present, and the most common is a color test. For confirmatory tests we either use, or we can use both, infrared spectroscopy or gas chromatograph mass spectrometry.

[PROSECUTION:] And how long has the lab been using these particular methods?

[MS. BERG:] I'm not sure of an exact amount of time. As long as I've been there all of the methods that I've just described are widely accepted in the scientific community in a range of scientific fields. So I would say a very long time.

[PROSECUTION:] Your Honor, the State would tender Ms. Berg as an expert in the field of forensic drug chemistry at this time.

THE COURT: Any objection?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: All right, let her be so certified.

Ms. Berg was tendered and admitted as an expert in forensic drug chemistry without objection. Ms. Berg testified she tested the sample taken from Defendant's jacket for the presence of controlled substances:

[MS. BERG:] I received a sealed plastic evidence bag that contained one plastic bag that was heat sealed, folded and taped, that contained white crystalline material. Also inside the evidence bag was a Ziploc plastic bag containing white crystalline material.

. . . .

[MS. BERG:] And also in the evidence bag I received a plastic bag that was twisted containing white crystalline material.

[PROSECUTION:] So inside the evidence bag there were three separate bags; is that correct?

[MS. BERG:] Yes.

[PROSECUTION:] And what did you do next?

[MS. BERG:] I then differentiated the three plastic bags based on their appearances. So the plastic bag that was sealed, folded, and taped, I labeled that as my Item 1A. And then the Ziploc plastic bag with Item 1B and the twisted plastic bag I labeled as Item 1C. I then decided to only test my Item 1A and continue with my analysis.

[PROSECUTION:] And why did you decide that?

[MS. BERG:] I took a gross weight of the other two bags, and after my identification of my Item 1A—it's our policy to work to the highest charge. So based on the weight of the other two bags a threshold to reach a trafficking level would not be met and so analyzing those items is unnecessary.

. . . .

[PROSECUTION:] And when you analyzed your labeled Item A, what did you do?

[MS. BERG:] I first took a weight of the material. So I removed it from the plastic bag to only take a weight of the crystalline material. After that I continued with my preliminary test, which was a color test, and my

confirmatory test, which was infrared spectroscopy.

[PROSECUTION:] And in doing those tests, did you follow standard procedures?

[MS. BERG:] Yes, I did.

[PROSECUTION:] And based on those tests, what did you conclude the evidence to be?

[MS. BERG:] I concluded that the evidence in this case was methamphetamine, schedule 2 controlled substance with a net weight of material of 5.35 plus or minus .06 grams.

....

[PROSECUTION:] Okay. And once you had completed your tests, did you generate a report?

[MS. BERG:] I did.

....

[PROSECUTION:] And what does your report say?

[MS. BERG:] The report—well, it lists the information regarding the case, the suspect, the date, the crime lab number. It also lists my description of the evidence that I received and the results of my examination.

[PROSECUTION:] And once again, what were the results of your examination?

[MS. BERG:] Well, for Item 1A, one plastic bag was analyzed and found to contain methamphetamine, a schedule 2 controlled substance, net weight of material 5.35 plus or minus .06 grams, Items 1B and 1C, no chemical analysis.

[PROSECUTION]: No further questions.

Corporal Duncan and Deputy Pate likewise testified that they believed the material to be methamphetamine based on their visual inspections of the substance.

¶ 8 The jury found Defendant guilty of one count of Possession With Intent to Sell and Deliver Methamphetamine and Possession of Marijuana Drug Paraphernalia. Defendant subsequently pleaded guilty to attaining habitual felon status and received an active sentence of 97 to 129 months.

### **ANALYSIS**

#### **A. Counsel of Choice**

¶ 9 Defendant first argues the trial court committed structural error in denying his motion to continue on the day of trial in light of his request to retain private counsel and the fact the State untimely served its notice of expert witness. We find no error.

¶ 10 While we typically only review the denial of a motion to continue for an abuse of discretion, motions to continue based on constitutional questions are fully reviewable *de novo*. *State v. Branch*, 306 N.C. 101, 104 (1982); *State v. McFadden*, 292 N.C. 609, 611 (1977) (“[W]hen a motion to continue is based on a constitutional right, the question presented is a reviewable requestion of law.”). However, “[t]he denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was

erroneous and also that his case was prejudiced as a result of the error.” *Branch*, 306 N.C. at 104. The prejudice requirement, though, functions differently for structural errors:

A structural error is one that should not be deemed harmless beyond a reasonable doubt because it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself. The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to automatic reversal regardless of the error’s actual effect on the outcome.

*State v. Goodwin*, 267 N.C. App. 437, 439 (2019) (marks and citations omitted).

¶ 11 “[E]rroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.” *Id.* at 440 (marks omitted) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006)). “Therefore, if we determine that the trial court erred in any manner that deprived [a defendant] of his right to choice of counsel, we must order a new trial.” *Id.*

¶ 12 “Both the State and Federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains.” *McFadden*, 292 N.C. at 611; *see also State v. Morris*, 275 N.C. 50, 55 (1969). This right guarantees that, where a defendant seeks to substitute his court-appointed



attorney with private counsel whom he himself wishes to retain, “[t]he [S]tate should keep to a necessary minimum its interference with the individual’s desire to defend himself in whatever manner he deems best[.]” *McFadden*, 292 N.C. at 613-14. However, a defendant’s request to hire private counsel may “be forced to yield [] when it will result in significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.” *Id.* at 614; *see also State v. Gant*, 153 N.C. App. 136, 142 (marks omitted) (“A defendant’s right to be defended by chosen counsel is not absolute.”), *disc. rev. denied*, 356 N.C. 440 (2002).

¶ 13 If the trial court’s denial was not erroneous, our inquiry ends there. *Branch*, 306 N.C. at 104; *see also Goodwin*, 267 N.C. App. at 441 (marks omitted) (“It is within the trial court’s discretion to decide whether allowing a defendant’s request for continuance to hire the counsel of his choice would result in significant prejudice or in a disruption of the orderly process of justice that is unreasonable under the circumstances of the particular case.”). “A judge’s denial of a defendant’s motion for a continuance to retain private counsel does not violate that defendant’s constitutional right to the assistance of counsel if that right is ‘balanced with the need for speedy disposition of the criminal charges and the orderly administration of the judicial process.’” *Gant*, 153 N.C. App. at 142 (quoting *State v. Foster*, 105 N.C. App. 581, 584 (1992)). “Due process is not denied every defendant who is refused the right

to defend himself by means of his chosen retained counsel; other factors, including the speedy disposition of criminal charges, demand recognition, particularly where [the] defendant is inexcusably dilatory in securing legal representation.” *McFadden*, 292 N.C. at 613. “The most common example of a situation where a defendant’s request is properly denied is where he seeks to weaponize his right to chosen counsel for the purpose of obstructing and delaying his trial.” *Goodwin*, 267 N.C. App. at 440 (marks omitted).

¶ 14 Defendant maintains “the trial court committed structural error when it used the ineffective assistance of counsel standard to deny [his] request to exercise his Sixth Amendment right to be represented by counsel of his choice”<sup>1</sup> and that the Record otherwise dispels any finding of an unreasonable delay or Defendant having been dilatory in securing private counsel and, therefore, the trial court should have granted the continuance. The State, meanwhile, responds that any reference to ineffective assistance of counsel was surplusage because “[t]he [R]ecord is clear that the trial court’s primary reason for its denial of the motion to continue was due to Defendant’s delay obtaining private counsel, which he still had not done” the morning of trial, and thus any reference the trial court made to the ineffective assistance of

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<sup>1</sup> The fact that there are doctrinal differences between the right to the effective assistance of counsel and the right to select counsel of one’s choice is well-established. See *Gonzalez-Lopez*, 548 U.S. at 146-48.

counsel standard was surplusage. Defendant contends trial courts can only deny time to retain private counsel where the continuance “would cause significant prejudice or a *disruption* to the orderly process of justice[.]” and thus the State’s reference to a “*delay*” in the process of justice misstates the applicable legal standard under *Goodwin*.

¶ 15 In *Goodwin*, we vacated the defendant’s judgment and ordered a new trial where the trial court denied the defendant’s motion to continue to hire private counsel under the incorrect standard, stating “[t]he Court deems there not to be an absolute impasse in regards to this case so far[.]” which is the standard applicable to claims of ineffective assistance of counsel. *Goodwin*, 267 N.C. App. at 439; *see also State v. Ali*, 329 N.C. 394, 404 (1991) (articulating that, “when counsel and a fully informed criminal defendant client reach an absolute impasse as to [] tactical decisions, the client’s wishes must control” if the issue on appeal is the effective assistance of counsel). We held the sole fact the defendant “expressed doubts about [his appointed counsel’s] competency to the trial court” was “alone [] insufficient to transform his request into an argument regarding effective assistance of counsel[.]” *Goodwin*, 267 N.C. App. at 441. And, as the trial court did not find or otherwise indicate that “the timing or content of [the defendant’s] request may have been improper or insufficient[.]” as required when analyzing the right to counsel of choice, we remanded for a new trial. *Id.*

¶ 16 However, we reached a different result in *State v. Chavis*, where the defendant made a motion to continue the morning his trial was set to begin, stating he wanted to hire private counsel:

The private counsel Defendant indicated he wanted to employ was not in the courtroom at the time the motion was made and there was no evidence [the defendant] had made financial arrangements with this or any other private attorney. The record show[ed] all the State's witnesses were in the courtroom and [the defendant] did not point to any conflict he had with his appointed attorney. Finally, [the] case had been rescheduled twice due to various conflicts.

*State v. Chavis*, 141 N.C. App. 553, 562 (2000). We concluded that, under these facts, the trial court did not err in denying the continuance. *Id.* at 562; *see also Goodwin*, 267 N.C. App. at 440 (stating that, in *Chavis*, “[w]e upheld the trial court’s ruling, citing the timing of the request as the primary reason for our decision”).

¶ 17 Here, the relevant exchange between the trial court and Defendant was as follows:

THE COURT: All right, anything we need to address before we start bringing this jury in?

[DEFENSE COUNSEL]: Good morning, Your Honor, thank you. [Defendant] would like to, if it would please the Court, address the Court on the a matter of counsel please, Your Honor.

THE COURT: All right, Mr. Hall, I’ll be happy to hear you, sir.

[DEFENDANT]: Me and my family have been in contact with other counsel, and I would like to ask the Court for a continuance.

THE COURT: Have you hired this other counsel?

[DEFENDANT]: Yeah.

THE COURT: You've hired them?

[DEFENDANT]: No, I haven't hired them already.

THE COURT: Here we are, sir, the day of your trial, and now you are telling me that you're going to hire an attorney?

[DEFENDANT]: Yes, sir.

THE COURT: But you haven't made those arrangements?

[DEFENDANT]: I mean, we have contacted them and talked to them, but there has been no retainer or anything.

THE COURT: Well, then, I'm not going to continue your case. You've had—this case has been pending, well, it's been pending in Superior Court since at least August, and—have you been able to consult with [your appointed counsel] about the facts as you see them in your case? Have you been able to talk to her?

[DEFENDANT]: I mean, we have consulted a few times. I just don't feel that we have talked in enough extent to start a trial.

THE COURT: Well, have you [] relayed to her—and I don't want to know what you've told her, I just want to know whether you've been able to tell her everything you know about the incident that allegedly occurred on [3 January] 2020.

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*Opinion of the Court*

[DEFENDANT]: No, sir. I have been more preparing for the first set of charges.

THE COURT: Well, do you have a clear recollection of what took place on that day?

[DEFENDANT]: Yes, sir.

THE COURT: And why haven't you told your attorney what your recollection is?

[DEFENDANT]: Like I said, I had been preparing more so for the first set of charges. I had—to me, I thought that that—we would take care of the first set before we moved onto the second set.

THE COURT: And when did you become aware that you were going to be tried on the [3 January 2020] incident?

[DEFENDANT]: It was mentioned to me ten days ago that that—and they said it was a slim chance.

THE COURT: Uh-huh. And when that was mentioned to you, did you then relate to your attorney what your recollection of those events were, or did you keep them to yourself?

[DEFENDANT]: I mean, we had talked about a little bit of it.

THE COURT: All right. Well, how much more do you need to tell her?

[DEFENDANT]: I mean, I just feel like we should have went over it a little more.

THE COURT: Well, that's not an answer to my question. How much more do you need to tell her about that incident,

a lot?

[DEFENDANT]: I mean, there is some.

THE COURT: Some that you haven't told her yet?

[DEFENDANT]: Yeah.

THE COURT: And why is that?

[DEFENDANT]: Because I was preparing for the first set.

THE COURT: All right.

[DEFENDANT]: I wasn't expecting—

THE COURT: She has gone over the discovery with you in this case?

[DEFENDANT]: Yeah, we did.

THE COURT: All right, and you have had a chance to review that, right—

[DEFENDANT]: Yes, sir.

THE COURT: —with her? Huh?

[DEFENDANT]: Yes, sir.

THE COURT: Okay. The motion is denied. I will note that this matter has been on the trial calendar before. That the defendant actually appeared in court in front of me on [10 February] 2021. And at that time, not only was this case on the calendar, but all his other cases were on the calendar. That a plea offer had been extended to the defendant. The defendant in open court, freely, voluntarily, and knowingly rejected the plea offer. That he was arraigned on these charges on that date. And on that

date this Court set this matter for trial at this particular term of Superior Court. That at that term he advised the Court that he had gone over the plea offer with his attorney, fully understand the terms and conditions of the plea offer, and would have been well aware that this matter was set for trial during this week.

He appears in front of me today and indicates that his family has consulted with an attorney but he has not retained an attorney to represent him. And that he, he does not relay to this Court any impasse he has had with his current attorney. And there is no just cause for the continuation of this case. So that motion is denied.

¶ 18

As in *Chavis*, “[t]he [R]ecord shows all the State’s witnesses were in the courtroom and Defendant did not point to any conflict he had with his appointed attorney.” *Chavis*, 141 N.C. App. at 562. Moreover, Defendant was indicted in August 2020 and allowed his case to pend for seven months until the morning of trial—during which time his court-appointed attorney was preparing for his case—before he raised any request for time to hire a private attorney. *Cf. McFadden*, 292 N.C. at 615 (emphasis added) (“In the instant case [the] defendant timely exercised his right to select counsel of his choice *long before* the case was called for trial.”). Although the trial court made passing reference to the lack of an “impasse,” the majority of the above exchange and ruling was focused on the disruption and delay hiring new counsel would cause and Defendant having already prepared for the trial with his appointed counsel. The trial court’s single reference to an “impasse” does not detract from the extensive discussion immediately preceding regarding



Defendant's delay in attempting to hire another attorney and his appointed attorney's and witnesses' ready availability in the courtroom that day. *Cf. Foster*, 105 N.C. App. at 584 (concluding the trial court did not err in denying the defendant's motion for a continuance to hire private counsel where the defendant's appointed counsel on the day before trial "learned that [the] defendant's father had supposedly retained a private attorney for him" but where appointed counsel "appeared for [the] defendant the following day ready to proceed with the trial").

¶ 19 Defendant also briefly contends the trial court plainly erred by denying the continuance due to a violation of N.C.G.S. § 15A-903(a)(2), which requires reasonable notice of expert testimony, in that the State provided notice to Defendant's appointed counsel of Ms. Berg's identity only 17 hours before trial. However, as the State responds, this was not the basis of Defendant's requested continuance; and, in fact, Defendant's counsel represented she was ready to proceed to trial that day. Moreover, the only case Defendant cites in support of this argument is *State v. Cook*, which is distinguishable as a motion to continue was specifically made in that case on the basis of the delayed disclosure of an expert witness. *See State v. Cook*, 362 N.C. 285, 286-89 (2008). The circumstances in this case and the above discussion do not reveal the trial court erred by denying Defendant's motion for a continuance to hire new counsel. *See, e.g., Gant*, 153 N.C. App. 136, 142-43 (affirming trial court's denial of the defendant's motion for a continuance, concluding that, while the

defendant signified he attempted to fire his appointed counsel “on the date of [the] defendant’s [motion to continue], [the] defendant offered no evidence that he had made any arrangements whatsoever to obtain private counsel”; and, thus, the “defendant failed to timely act on his right to obtain private counsel”); *State v. Little*, 56 N.C. App. 765, 768 (holding the defendant “was dilatory in securing the privately retained counsel” where the defendant’s mother retained private counsel “on the day of the trial”), *appeal dismissed*, 306 N.C. 390 (1982). Defendant’s constitutional rights were not denied, and he is not entitled to a new trial on these grounds.

### **B. Expert Qualification and Reliability**

¶ 20 Defendant next argues the trial court committed plain error by not disqualifying Ms. Berg from testifying as an expert in forensic drug chemistry and in allowing her to testify to the identity of the controlled substances as methamphetamine without first laying a proper foundation.

¶ 21 “Unpreserved error in criminal cases[] . . . is reviewed only for plain error.” *State v. Lawrence*, 365 N.C. 506, 512 (2012). To show plain error, “a defendant must demonstrate that a fundamental error occurred at trial.” *Id.* at 518. This requires a defendant to establish prejudice, i.e., that the error “had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* “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.* (marks and citations omitted).

¶ 22

“[T]he burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution.” *State v. Ward*, 364 N.C. 133, 147 (2010). We have held that, “[i]n a criminal prosecution for possession of a controlled substance, when an expert in forensic chemistry provides testimony that establishes a proper foundation under Rule 702(a) of the Rules of Evidence[] [and] the expert’s opinion is otherwise admissible, [] any unpreserved assignments of error related to the trial court’s ‘gatekeeping’ function [are] only reviewed for plain error.” *State v. Gray*, 259 N.C. App. 351 (2018). Rule 702 provides:

(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.G.S. § 8C-1, Rule 702(a) (2021). “This three-step framework—namely, evaluating qualifications, relevance, and reliability—”grants trial courts the

discretion to consider any relevant factors “that are reasonable measures of whether the expert’s testimony is based on sufficient facts or data, whether the testimony is the product of reliable principles and methods, and whether the expert has reliably applied those principles and methods in that case.” *State v. McGrady*, 368 N.C. 880, 892 (2016).

¶ 23 In arguing the trial court plainly erred in qualifying Ms. Berg as an expert witness, Defendant focuses primarily on the fact she was not yet certified by the American Board of Criminalistics. We disagree and hold Defendant has failed to show plain error.

¶ 24 “Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court.” *State v. Borders*, 236 N.C. App. 149, 175-76 (2014) (emphases omitted), *disc. rev. denied*, 368 N.C. 272 (2015).

[T]rial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Given such latitude, it follows that a trial court’s ruling on the qualifications of an expert or the admissibility of an expert’s opinion will not be reversed on appeal absent a showing of abuse of discretion. Opinion testimony given by an expert witness is competent when evidence is presented showing that, through study or experience, or both, the witness has acquired such skill that [she] is better qualified than the jury to form an opinion on the particular subject of [her] testimony.

*In re A.N.B.*, 232 N.C. App. 406, 414 (2014) (marks and citations omitted). In other words, “[i]n order to assist the trier of fact, expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience.” *McGrady*, 368 N.C. at 889 (marks and citations omitted).

Expertise can come from practical experience as much as from academic training. Whatever the source of the witness’s knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject? *[Rule 702] does not mandate that the witness always have a particular degree or certification, or practice a particular profession.*

*Id.* at 889-90 (citations omitted) (emphasis added).

¶ 25 While trial courts may “screen the evidence based on the expert’s qualifications[,]” which in some cases may include the lack of a particular certification, ultimately “the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.” *Id.* at 890. “[V]igorous 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.” *Gray*, 259 N.C. App. at 355 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 461 (2004)).

¶ 26 In *State v. Jenkins*, an earlier case discussing expert qualifications, we noted the expert witness who tested the controlled substances at issue

testified that she was a chemist with the State Bureau of Investigation, whose duties consisted of the analysis of substances for the presence of controlled substances, including marijuana; that she had been so employed for almost two years; and that she had had special training in the analysis of controlled substances.

*State v. Jenkins*, 74 N.C. App. 295, 299 (1985). We held “[t]he foregoing evidence was sufficient to support the trial court’s acceptance of the witness as an expert. Her opinion, therefore, was properly admitted.” *Id.*; see *McGrady*, 368 N.C. at 888 (“Our previous cases are still good law if they do not conflict with the *Daubert* standard.”).

¶ 27 More recently, in *State v. Gray*, we explained that the expert’s testimony itself may be relevant in determining whether she is qualified to testify on the subject. There, the witness

was tendered as an expert in the field of forensic chemistry and testified that she had a degree in Chemistry with over 20 years of experience in the field of drug identification. She also testified about the type of testing conducted on the substance seized from [the defendant] and the methods used by the CMPD Crime Lab to identify controlled substances. [The expert witness] then testified that she was the analyst who tested the substance seized from [the defendant], that she used a properly functioning GCMS, and that the results from that test provided the basis for her opinion. Furthermore, her testimony indicate[d] that she complied with CMPD Crime Lab procedures and the methods she used were “standard practice in forensic chemistry.”

*Gray*, 259 N.C. App. at 356. We held the expert’s “testimony demonstrated that she was an experienced forensic chemist who competently performed a chemical analysis

...” *Id.* at 356, 357 (concluding “a proper Rule 702(a) foundation was established at the time [the witness] provided her opinion because her testimony demonstrated that she was a qualified expert and that her opinion was the product of reliable principles and methods which she reliably applied to the facts of the case”).

¶ 28 Moreover, in *State v. Piland*, the expert witness testified only that she had conducted a “chemical analysis[,]” but did not mention what chemical test it was, how she performed it, or otherwise explain why the positive result was reliable. *State v. Piland*, 263 N.C. App. 323, 338 (2018). Although we concluded the trial court abused its discretion by not requiring the witness to provide a more in-depth explanation of the methodology used, we did not order a new trial because the defendant could not establish plain error:

[T]he 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 does not amount to “baseless speculation,” and therefore her testimony was not so prejudicial that justice could not have been done.

*Id.* at 340.

¶ 29 We are guided by the above cases. Ms. Berg provided more information than that in *Piland* in that she at least identified the type of chemical analyses conducted—a color test and an infrared spectroscopy test—and that she performed them pursuant to standard procedures followed and taught by the Crime Lab. From

her testimony, it is apparent Ms. Berg was well-prepared to explain specifically how she performed each step, had anyone asked her. She then stated the results of her application of those tests was positive for methamphetamine. Defendant attempts to distinguish *Piland* by referring to the imprint and pill information included there as the reason the Court did not consider the expert's testimony baseless speculation. But *Piland* referenced the additional testimony concerning the witness's chemical analysis and result. *Piland*, 263 N.C. App. at 340. As with the expert in *Gray*, Ms. Berg testified about the methods the Crime Lab uses to identify controlled substances, which tests she used in this case, that she conducted the testing in accordance with standard Crime Lab procedures, and that those results were positive for the presence of methamphetamine, thus laying a proper foundation. The trial court therefore did not plainly err in admitting Ms. Berg's testimony identifying the controlled substances in this case.

### **C. Identity Based on Visual Inspection**

¶ 30 Finally, Defendant contends the trial court committed plain error when it permitted Corporal Duncan and Deputy Pate to testify to the identity of the substance found in Defendant's jacket based on their visual inspection of it. However, we agree with the State that Defendant, who did not object to this testimony, cannot establish plain error in light of Ms. Berg's expert testimony as well as other circumstances tending to support the same.



¶ 31 “Testimony identifying a controlled substance based on visual inspection—whether presented as expert or lay opinion—is inadmissible.” *State v. Carter*, 255 N.C. App 104, 107, *disc. review denied*, 370 N.C. 282 (2017). In *Carter*, we held the defendant was unable to establish plain error where, “[g]iven the expert testimony in [that] case [was] based upon a scientifically reliable method, we [could not] conclude [the officer’s] testimony that he identified the substance on sight as crack cocaine had a probable impact on the jury’s verdict of guilt.” *Id.* at 108.

¶ 32 As in *Carter*, in this case there was expert opinion testimony as to the identity of the substance at issue. This testimony was further bolstered by evidence that the substance was found hidden in Defendant’s underwear, and with vacuum-sealed bags and a scale located inside his vehicle. This evidence persuades us that Corporal Duncan and Deputy Pate’s testimony regarding their visual identification of the substance did not have a probable impact on the jury’s verdict. Accordingly, Defendant cannot establish plain error.

### CONCLUSION

¶ 33 Defendant has not established that the trial court erred in denying Defendant’s motion for a continuance, that the trial court committed plain error in admitting the expert opinion testimony identifying the presence of methamphetamine, or that the trial court committed plain error in the admission of visual identification testimony.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

STATE V. HALL

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*Opinion of the Court*

Judges DIETZ and JACKSON concur.

Report per Rule 30(e).