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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1064

Filed 12 September 2023

Cleveland County, Nos. 20 CRS 50345, 20 CRS 72

STATE OF NORTH CAROLINA

v.

ROBERT LEE PRICE

Appeal by defendant by writ of certiorari from judgment entered 14 April 2022 by Judge Gregory R. Hayes in Cleveland County Superior Court. Heard in the Court of Appeals 8 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Charles G. White, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

Rudolf Widenhouse, by David Rudolf, for Amici Curiae.

ZACHARY, Judge.

Defendant Robert Lee Price appeals from a judgment entered upon a jury's verdict finding him guilty of the sale or delivery of methamphetamine, and upon his guilty plea to having attained habitual felon status. After careful review, we conclude

that Defendant received a fair trial, free from error.

I. Background

At the behest of narcotics investigators with the Cleveland County Sheriff's Office, a confidential informant purchased approximately 3.5 grams of methamphetamine from Defendant on 8 January 2020. As part of a controlled buy, investigators equipped the informant with an audio and video recorder disguised as a cell phone and gave him a \$100.00 bill with which to purchase the methamphetamine from Defendant. The informant then traveled to Defendant's residence while investigators "followed directly behind him." Upon the informant's arrival, investigators "parked at a nearby residence where [they] could conduct some surveillance of the controlled buy." The investigators observed Defendant "walking towards [the informant's] vehicle." The informant testified that Defendant handed him a clear plastic bag containing an "8 ball of methamphetamine" through the car window. The informant then "gave [Defendant] the money, and . . . left and went back and met" with the investigators.

The next day, officers visited Defendant's residence and Defendant consented to a search of his bedroom. During the search, officers discovered the \$100.00 bill used in the controlled buy. Investigators also found paraphernalia for smoking methamphetamine, plastic bags with residual amounts of a white crystal-like substance, and a plastic straw "cut at a 45-degree angle, which is commonly used . . . to scoop narcotics from a bag[.]"

STATE V. PRICE

Opinion of the Court

On 17 February 2020, a Cleveland County grand jury indicted Defendant for possession of methamphetamine with intent to sell or deliver, sale or delivery of methamphetamine, and attaining habitual felon status. On 13 April 2022, this matter came on for trial in Cleveland County Superior Court.

At trial, the State offered the testimony of Miguel Cruz-Quinones, a “forensic scientist and a Special Agent with the North Carolina State Crime Laboratory.” The State tendered Special Agent Cruz-Quinones as “an expert in the field of forensic chemistry for the purposes of determining controlled substances.” Special Agent Cruz-Quinones testified that he was “a substitute witness” for “the analyst of the evidence in this case[,]” so he had to “review the case file completely this morning and her data and all her notes.” Defendant did not object to the trial court’s acceptance of Special Agent Cruz-Quinones as an expert witness or to the admission of his testimony.

After eliciting testimony regarding the two methods used to test the evidence obtained during the controlled buy—“a color test using a Marquis reagent” and an “infrared spectrometer”—the State inquired of Special Agent Cruz-Quinones:

[THE STATE]: After your *independent evaluation* of the color test and the [infrared spectrometer], did you reach a conclusion as to what this controlled substance was?

[SPECIAL AGENT CRUZ-QUINONES]: Yes.

[THE STATE]: And what was your—what conclusion did you reach?

[SPECIAL AGENT CRUZ-QUINONES]: Well, after reviewing the case file and based on the results that—the analysis performed by Mrs. Reagan, I reached the same conclusion, the same opinion that Mrs. Reagan has.

[THE STATE]: Which is?

[SPECIAL AGENT CRUZ-QUINONES]: Which is that the one plastic bag corner that was analyzed . . . was found to contain methamphetamine, which is a Schedule II controlled substance in North Carolina, and the net weight of the material was 3.55 plus/minus 0.06 grams.

[THE STATE]: And in your opinion these drugs—or methamphetamine you said are—agree with Ms. Reagan, but they are *also based on your own independent review of the analysis*; is that correct?

[SPECIAL AGENT CRUZ-QUINONES]: Correct.

(Emphases added).

On 14 April 2022, the jury found Defendant guilty of the sale or delivery of methamphetamine, and Defendant thereafter pleaded guilty to having attained habitual felon status. Defendant did not enter timely notice of appeal; he subsequently petitioned this Court to issue its writ of certiorari.

II. Appellate Jurisdiction and Writ of Certiorari

“Rule 4 of the North Carolina Rules of Appellate Procedure provides that notice of appeal from a criminal action may be taken by: (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment.” *State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019) (cleaned up).

In the case at bar, after the jury returned its verdict finding Defendant guilty of the sale or delivery of methamphetamine, but prior to entry of his guilty plea to having attained habitual felon status, defense counsel informed the trial court that Defendant intended “to enter a notice of appeal to the substantive charges[.]” Defendant concedes that his defense counsel “prematurely entered an oral notice of appeal before entry of the final judgment” in violation of Rule 4. Accordingly, this Court does not have jurisdiction to hear Defendant’s direct appeal.

Defendant has petitioned this Court to issue its writ of certiorari to review the judgment at bar. “The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action” N.C.R. App. P. 21(a)(1). Here, where defense counsel gave premature notice of appeal, in our discretion, we allow Defendant’s petition for writ of certiorari in order to reach the merits of his appeal.

III. Analysis

A. Standard of Review

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4). Defendant acknowledges that his trial counsel did not lodge an objection to the admission of Special Agent Cruz-Quinones's testimony, which he now "specifically and distinctly" contends amounts to plain error, and of which he seeks review on appeal. *Id.*

Our Supreme Court has explained that unpreserved evidentiary or instructional error in criminal cases is reviewed only for plain error, and "requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—"not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). "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." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and marks omitted).

B. Confrontation Clause

On appeal, Defendant argues that the trial court "committed plain error and violated [Defendant]'s state and federal rights to confrontation by allowing . . . [Special Agent] Cruz-Quinones to identify the substance [Defendant] possessed as methamphetamine because . . . [Special Agent] Cruz-Quinones did not form an

independent opinion about the identity of the substance.” We disagree.

“The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant.” *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304, *clarification denied*, 363 N.C. 660, 684 S.E.2d 439 (2009).

The North Carolina Rules of Evidence allow for the admission of expert testimony “in the form of an opinion, or otherwise, if the expert’s scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” so long as “(1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods and (3) The witness has applied the principles and methods reliably to the facts of the case.” *State v. Ortiz-Zape*, 367 N.C. 1, 5, 743 S.E.2d 156, 159 (2013) (cleaned up), *cert. denied*, 572 U.S. 1134, 189 L. Ed. 2d 208 (2014); *see* N.C.R. Evid. 702(a). The expert may base the opinion on facts or data “made known to him at or before the hearing.” If the facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” N.C.R. Evid. 703.

In *Ortiz-Zape*, the defendant argued that “because [the expert witness] did not test the substance at issue herself or personally observe any testing, she could form no independent opinion regarding the identity of the substance, and thus admission

of her opinion identifying the substance . . . violated [the] defendant's rights under the Confrontation Clause." 367 N.C. at 5, 743 S.E.2d at 159. Our Supreme Court disagreed, concluding that a qualified expert may provide an "independent opinion based on otherwise inadmissible out-of-court statements in certain contexts" without any constitutional offense:

[W]hen an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert.

Id. at 8–9, 743 S.E.2d at 161 (cleaned up).

In fact,

[o]ur courts have consistently held that an expert witness may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinions; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusion in [the] case.

State v. Crumitie, 266 N.C. App. 373, 379, 831 S.E.2d 592, 596 (2019), *disc. review denied*, 374 N.C. 269, 839 S.E.2d 851 (2020). However, "the expert must present an independent opinion obtained through his or her own analysis and not merely

‘surrogate testimony’ parroting otherwise inadmissible statements.” *Ortiz-Zape*, 367 N.C. at 9, 743 S.E.2d at 162.

In the present case, Special Agent Cruz-Quinones identified himself as a “forensic scientist and a Special Agent with the North Carolina State Crime Laboratory” whose “primary responsibility is to analyze evidence for the presence or absence of controlled substances[.]” Special Agent Cruz-Quinones testified that he had “worked at least 5,500 cases” during his eleven years of employment with the North Carolina State Crime Lab. After establishing Special Agent Cruz-Quinones’s experience and credentials, the State tendered Special Agent Cruz-Quinones “as an expert in the field of forensic chemistry for the purposes of determining controlled substances[.]” and the trial court accepted him as an expert without objection from Defendant.

Special Agent Cruz-Quinones testified that the non-testifying forensic analyst “performed a color test using a Marquis reagent[.]” and then “took another sample and performed analysis using the infrared spectrometer.” He explained that to conduct the “preliminary . . . color test[.]” the analysts “take a small sample from the evidence material and add it to the reagent. And then we observe if there’s any reaction.” Special Agent Cruz-Quinones also explained that the infrared spectrometer “is a reliable scientific instrumental technique that shines very specific wavelengths of infrared light directly to the sample and will generate a spectrum, or a graph.”

The State then asked whether Special Agent Cruz-Quinones, “[a]fter [his]

independent evaluation of the color test and the [infrared spectrometer],” identified the controlled substance, to which he responded: “[A]fter reviewing the case file and based on the results [of]—the analysis performed by [the non-testifying witness Mrs. Reagan], I reached the same conclusion, the same opinion that [Mrs. Reagan] has[.]” that the plastic bag was “found to contain methamphetamine[.]” Special Agent Cruz-Quinones further confirmed that his testimony was “based on [his] own independent review of the analysis[.]”

It is well settled that the results of both an infrared spectrometer and a Marquis reagent color test, on which Special Agent Cruz-Quinones based his independent expert opinion, are “reasonably relied on by experts in the field in forming their opinions[.]” *Crumitie*, 266 N.C. App. at 379, 831 S.E.2d at 596; *see also Ortiz-Zape*, 367 N.C. at 3, 12, 743 S.E.2d at 158, 163 (noting, in review of Confrontation Clause challenge, that the analyst utilized an “infrared spectrometer” and a “color test,” both of which produce “data of a type reasonably relied upon by experts in the particular field” (quotation omitted)). Thus, the State established that Special Agent Cruz-Quinones’s “opinion was [his] own, independently reasoned opinion—not ‘surrogate testimony’ parroting the testing analyst’s opinion.” *Ortiz-Zape*, 367 N.C. at 12, 743 S.E.2d at 163.

Because Special Agent Cruz-Quinones expressed his independent opinion, he “is the witness whom [Defendant] ha[d] the right to confront.” *Id.* at 9, 743 S.E.2d at 161. Indeed, “Defendant was able to conduct a vigorous and searching cross-

examination” which could have “exposed the basis of, and any weaknesses in, [Special Agent Cruz-Quinones’s] opinion.” *State v. Brewington*, 367 N.C. 29, 32, 743 S.E.2d 626, 628 (2013), *cert. denied*, 572 U.S. 1134, 189 L. Ed. 2d 208 (2014). Accordingly, we conclude that the trial court did not err in admitting Special Agent Cruz-Quinones’s expert opinion.

Moreover, assuming *arguendo* that the trial court erred by “improperly admitt[ing] surrogate testimony about the identity of the substance at issue in this case[.]” Defendant has failed to meet his burden of showing “that absent the error, the jury probably would have reached a different result.” *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (citation omitted), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003).

Here, the State produced ample evidence beyond Special Agent Cruz-Quinones’s opinion testimony that the white crystal-like substance that Defendant sold to the informant in the controlled buy was methamphetamine. This evidence included the testimony of the two investigators who found “methamphetamine smoking devices” in Defendant’s residence; the testimony of one of the investigators identifying a cut-off plastic straw “commonly used . . . to scoop narcotics from a bag into the devices” and describing plastic bags with “residual amounts of a white crystal-like substance” which were discovered in Defendant’s home; and the testimony of the informant, who identified the substance as methamphetamine three times.

Thus, we conclude that Defendant has failed to demonstrate “that absent the error, the jury probably would have reached a different result.” *Id.*

C. Evidence Rule 702

Alternatively, Defendant argues that the trial court plainly erred and “violated Evidence Rule 702 by admitting . . . [Special Agent] Cruz-Quinones’s opinion that the substance in this case was methamphetamine because his opinion was not based upon sufficient facts or data, and the evidence did not establish that he applied principles and methods reliably to the facts of the case.” We disagree.

Defendant concedes that he failed to object at trial to the admission of Special Agent Cruz-Quinones’s opinion testimony, but now “specifically and distinctly” contends that its admission amounts to plain error, of which he seeks review on appeal. N.C.R. App. P. 10. “[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” *State v. Piland*, 263 N.C. App. 323, 338, 822 S.E.2d 876, 887 (2018) (citation omitted). Therefore, in the instant case, Defendant must show “not only that there was error, but that absent the error, the jury probably would have reached a different result.” *Haselden*, 357 N.C. at 13, 577 S.E.2d at 602.

Whether expert witness testimony is admissible under Rule 702 is a preliminary question that a trial judge decides in the performance of the trial court’s gatekeeping function. *See Piland*, 263 N.C. App. at 338, 822 S.E.2d at 887. Rule 702 of the North Carolina Rules of Evidence provides the circumstances under which

expert witness testimony is admissible:

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.R. Evid. 702(a).

North Carolina Rule of Evidence 703 delineates the acceptable bases for expert opinion testimony:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C.R. Evid. 703.

As discussed in the Confrontation Clause analysis above, Special Agent Cruz-Quinones's testimony was based on chemical analysis of the evidence using a Marquis reagent color test and an infrared spectrometer test, both of which are tests "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]" *Id.* Additionally, Special Agent Cruz-Quinones

described the specific methods employed to identify the white crystal-like substance as methamphetamine. *See Piland*, 263 N.C. App. at 339–40, 822 S.E.2d at 888. Thus, we conclude that the trial court did not err in admitting Special Agent Cruz-Quinones’s expert opinion.

However, assuming *arguendo* that the trial court erred in admitting the testimony, we cannot conclude that the trial court committed “an error so basic, so prejudicial, so lacking in its elements that justice cannot have been done.” *Id.* at 339, 822 S.E.2d at 888 (cleaned up). Special Agent Cruz-Quinones testified to the specific, reliable tests to which the white crystal-like substance was subjected as well as the results that were the basis of his expert opinion, and therefore, his opinion was not “baseless speculation.” *Id.* at 340, 822 S.E.2d at 888 (citation omitted). Moreover, as explained in the preceding section, the State introduced ample other evidence at trial that the white crystal-like substance was methamphetamine. Accordingly, Defendant has not shown that absent the alleged error, “the jury probably would have reached a different result.” *Haselden*, 357 N.C. at 13, 577 S.E.2d at 602.

IV. Conclusion

For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges COLLINS and RIGGS concur.

Report per Rule 30(e).