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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-502

Filed 5 March 2024

Guilford County, Nos. 19 CRS 078790; 19 CRS 078792

STATE OF NORTH CAROLINA

v.

CHRISTOPHER BRIAN BENNETT, Defendant.

Appeal by Defendant from judgment entered 25 August 2022 by Judge Alyson A. Grine in Guilford County Superior Court. Heard in the Court of Appeals 29 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather Haney, for the State.

Joseph P. Lattimore for Defendant.

GRIFFIN, Judge.

Defendant Christopher Brian Bennett appeals from judgment entered after a jury found him guilty of trafficking cocaine; possession with intent to sell or deliver cocaine; and possession of drug paraphernalia. Defendant contends the trial court committed plain error in: admitting opinion testimony from the State's expert which failed to comply with Rule 702; and instructing the jury on the charge of trafficking

cocaine without instructing on the lesser-included offense of possession of cocaine. Additionally, Defendant contends he was deprived his Sixth Amendment right to effective assistance of counsel. We hold the trial court did not commit plain error nor was Defendant deprived of his right to effective assistance of counsel.

I. Factual and Procedural Background

On 8 July 2019, Corporal Hill of the Greensboro Police Department was conducting surveillance, with other officers, on a motel room in Greensboro. Upon observing activity consistent with the sale of narcotics, the officers decided to perform a consensual encounter at Room 200. As the officers approached the room, the door was open and they could smell marijuana. Defendant was in the room with two females. Another male was in the bathroom taking a shower. Officers ordered everyone outside. While securing the room, officers observed a spoon with white residue, marijuana, and small bags. Corporal Hill obtained Defendant's consent to further search the room. Upon searching Defendant's motel room, officers discovered a firearm, several bags of powdery substance, a scale, and \$1,298 in cash. Detective Bowman placed Defendant under arrest, then searched him. Detective Bowman found a knotted plastic bag containing an off-white, rock-like substance in Defendant's pocket.

On 16 September 2019, Defendant was indicted on several charges, which included trafficking cocaine, possession with intent to sell or deliver cocaine, and possession of drug paraphernalia. On 22 August 2022, the matter came on for jury

trial in Guilford County Superior Court. Defendant entered a plea of not guilty to all charges. On 25 August 2022, the jury returned a verdict finding Defendant guilty on all charges. Defendant then gave notice of appeal in open court.

II. Analysis

Defendant contends the trial court committed plain error in: admitting opinion testimony from the State's expert which failed to comply with Rule 702; and instructing the jury on the charge of trafficking cocaine without instructing on the lesser-included offense of possession of cocaine. Defendant further contends he was deprived his Sixth Amendment right to effective assistance of counsel where defense counsel failed to file a motion to suppress the evidence recovered by police.

A. Admission of Expert Testimony Under Rule 702 and Jury Instruction

Though he did not object at trial, Defendant argues the trial court committed plain error in: admitting opinion testimony from the State's expert which failed to comply with Rule 702; and instructing the jury on the charge of trafficking cocaine without instructing on the lesser-included offense of possession of cocaine.

We review unpreserved issues concerning instructional or evidentiary errors for plain error. *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (“[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error.”). Under such review, the defendant must prove a fundamental error occurred at trial and the error had a probable impact on the jury's finding him guilty. *State v. Miller*, 371 N.C. 266, 269–70, 814 S.E.2d 81, 83 (2018) (citations

omitted). Plain error is to be applied cautiously and found where the error is

so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial.

State v. Lane, 271 N.C. App. 307, 312, 844 S.E.2d 32, 38 (2020) (internal marks and citations omitted). We reverse for plain error only “in the most exceptional cases.”

State v. Garcell, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (internal marks and citation omitted).

1. Admission of expert testimony under Rule 702

Defendant argues the trial court committed plain error in admitting opinion testimony from the State’s expert concerning the cocaine discovered on Defendant’s person, as the testimony failed to lay sufficient foundation for reliability as required by Rule 702.

Under Rule 702 of our North Carolina Rules of Evidence, an expert witness may testify in the form of an opinion, or otherwise, if:

- (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.

N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(3) (2021); *see also State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016) (holding our State’s Rule 702 “incorporates the

standard from the *Daubert* line of cases”). “The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony.” *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9; *but see State v. Figueroa*, ___ N.C. App. ___, ___, 896 S.E.2d 188, 191 (2023) (stating expert testimony offered to prove the identity of a controlled substance is only admissible when “based on a scientifically valid chemical analysis and not [the expert’s] mere visual inspection” (internal marks and citation omitted)). While the trial court has broad discretion in determining how to address the three prongs of this reliability test, its “primary focus should be ‘the reliability of the witness’s principles and methodology, not . . . the conclusions that they generate[.]’” *State v. McPhaul*, 256 N.C. App. 303, 313, 808 S.E.2d 294, 303 (2017) (quoting *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9); *see also State v. Piland*, 263 N.C. App. 323, 338, 822 S.E.2d 876, 888 (2018). The trial court is not required to admit the opinion testimony of an expert where it determines there is too great an analytical gap between the data and the opinion proffered. *McPhaul*, 256 N.C. App. at 314, 808 S.E.2d at 303–04 (“[T]he court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” (internal marks and citation omitted)).

In *State v. Piland*, the defendant was charged with several drug-related offenses after police recovered certain tablets from his residence. 263 N.C. App. at 326–27, 822 S.E.2d at 881. At trial, the State’s expert testified she performed a chemical analysis on one of the tablets and determined the tablets contained

hydrocodone, but failed to identify and describe the chemical analysis she performed. *Id.* at 338–39, 822 S.E.2d at 888. On appeal, our Court held “it was error for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify to the methodology of her chemical analysis.” *Id.* at 339–40, 822 S.E.2d at 888. However, our Court noted the error did not amount to plain error as the expert testified to the performance of a chemical analysis and its result, and therefore, the testimony was not baseless speculation and was “not so prejudicial that justice could not have been done.” *Id.* at 340, 822 S.E.2d at 888.

Similarly, in *State v. Figueroa*, the defendant was charged with several drug-related offenses after law enforcement found a bag containing “clear white crystalline substance” in the defendant’s vehicle. ___ N.C. App. at ___, 896 S.E.2d at 190. At trial, the State’s expert testified she performed both a color test and a confirmatory infrared spectrophotometer test which led her to identify the substance as methamphetamine. *Id.* at ___, 896 S.E.2d at 191. On appeal, our Court held the trial court erred despite having testified as to the tests she performed because she failed to explain the methodology of her analysis. *Id.* at ___, 896 S.E.2d at 191–92. Nonetheless, our Court again held this error did not amount to plain error because the expert identified the tests performed and their result and therefore her testimony was not baseless. *Id.* at ___, 896 S.E.2d at 192.

Here, the State’s expert, Meyers, testified:

Q: All right. And, Ms. Meyers, if you could just tell the

jury—I know you’ve talked about what you generally do, but could you tell the jury what you did with this particular piece of evidence?

A: Once I receive the evidence, the first thing I do is document the packaging that I received. I then take the material out of the plastic bag that it came in and obtain a weight of just the material itself, none of the packaging. After that I performed a preliminary test known as a microcrystalline test, and then I did a confirmatory test using an instrument known as an infrared spectrophotometer.

Q: Okay. And I would ask you this. Has that—is that bag that you have up there in substantially the same condition it was in when you were finished with your testing?

A: Yes.

Q: And what was the result of your analysis of that substance?

A: One plastic bag was analyzed and found to contain cocaine base, a Schedule 2 controlled substance, with a net weight of material of 39.07 plus or minus 0.06 grams.

Although Meyers identified the tests she performed, her testimony failed to explain the methodology behind each test. Just as our Court held in *Piland* and *Figueroa*, we hold the trial court erred in admitting Meyers’s testimony, but the error did not amount to plain error. Meyers’s testimony was not baseless speculation where she identified the tests and their result. *See Piland*, 263 N.C. App. at 340, 822 S.E.2d at 888; *Figueroa*, ___ N.C. App. at ___, 896 S.E.2d at 192. Accordingly, the admission of such testimony was not so prejudicial that justice could not have been done.

2. Jury Instruction

Defendant argues the trial court committed plain error in instructing the jury on the charge of trafficking cocaine without instructing on the lesser-included offense of possession of cocaine because the jury had evidence to conclude Defendant possessed an amount of cocaine less than the amount required for a conviction of trafficking cocaine.

A trial court must instruct on a lesser-included offense only where “the evidence would permit the jury rationally to find [the] defendant guilty of the lesser offense and to acquit him of the greater.” *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). Submission of a lesser-included offense is not required where “the State’s evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element.” *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988). In making its determination as to an instruction on a lesser-included offense, the trial court “must consider the evidence in the light most favorable to the defendant.” *State v. Allbrooks*, 256 N.C. App. 505, 509, 808 S.E.2d 168, 172 (2017).

The sole distinction between the charge of trafficking cocaine and the lesser-included offense of possession of cocaine is the amount of cocaine. *State v. Valladares*, 165 N.C. App. 598, 608, 599 S.E.2d 79, 87 (2004). A person may be convicted of trafficking cocaine where he “sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine[.]” N.C. Gen. Stat. § 90-95(h)(3) (2021). Conversely, a

person may be convicted of possession of cocaine where he is in possession of any amount of cocaine. N.C. Gen. Stat. § 90-95(a)(3) (2021).

Here, officers testified they found three separate bags containing a substance upon conducting their search—one on Defendant’s person and two in the hotel room. Corporal Hill testified the three bags were placed in a larger bag and taken to the police department:

Q: Okay. So you took that big bag with those three smaller bags of powder into that evidence room at a later time?

A: Yeah. All the evidence was taken to the PD and actually packaged later, yes.

Q: Okay. And you processed all of it, so you put it into different bags and—and wrote on those—?

A: No, we don’t take it—we don’t take it out of the bag it’s in. We will put it in our evidence bags[.]

Q: Okay. So your testimony is that you didn’t take out any of the powders out of their original packaging?

A: No, we didn’t—I didn’t take any powder out of any original packaging. We didn’t—we don’t even want to touch it, so—

Further, the testimony of Corporal Hill and Meyers, together, confirmed the bag pulled from Defendant’s pocket, which was introduced as the State’s Exhibit 5, was the only bag of which Meyers tested the contents:

Q: And what was the result of your analysis of that substance?

A: One plastic bag was analyzed and found to contain

cocaine base, a Schedule 2 controlled substance,
with a net weight of material of 39.07 plus or minus
0.06 grams.

Because Meyers only tested one bag of substance—the bag which was recovered from Defendant’s person—and because that bag contained more than 28 grams of cocaine, there is no conflicting evidence relating to any element of trafficking cocaine which would have required the trial court to instruct on the lesser-included offense of possession of cocaine. Therefore, the trial court did not err, let alone commit plain error, in instructing the jury on the sole offense of trafficking cocaine.

B. Sixth Amendment Right to Effective Assistance of Counsel

Defendant contends he was deprived his Sixth Amendment right to effective assistance of counsel where defense counsel failed to file a motion to suppress the evidence recovered by police.

We review issues concerning ineffective assistance of counsel de novo. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014); *see also State v. Crump*, 273 N.C. App. 336, 342, 848 S.E.2d 501, 505 (2020) (“The standard of review for alleged violations of constitutional rights is de novo.” (internal marks and citation omitted)).

Where a defendant makes an ineffective assistance of counsel claim, he must satisfy a two-part test established by the United States Supreme Court in *Strickland v. Washington*. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *see also State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985) (“[W]e expressly

adopt the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution.”). Under *Strickland*, in order to succeed on a claim for ineffective assistance of counsel, a defendant must show (1) his counsel’s performance was deficient, and (2) the deficient performance prejudiced his defense. *See Strickland*, 466 U.S. at 687–88; *see also State v. McNeill*, 371 N.C. 198, 218, 813 S.E.2d 797, 812 (2018). Generally, a defendant establishes prejudice where he can show “there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (internal marks and citation omitted).

Generally, “claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal.” *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citation omitted). However, ineffective assistance of counsel claims

brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.

State v. Canty, 224 N.C. App. 514, 516–17, 736 S.E.2d 532, 535 (2012) (internal marks and citation omitted). Where this Court is able to determine solely from the record on appeal “there is no reasonable probability that in the absence of counsel’s alleged errors the result of the proceeding would have been different,” we need not consider

whether the defense counsel's performance was deficient. *State v. Jones*, 221 N.C. App. 236, 239, 725 S.E.2d 910, 913 (2012) (internal marks and citation omitted).

Our Court has previously held "failure to file a motion to suppress is not ineffective assistance of counsel where the search or stop that led to the discovery of the evidence was lawful." *Canty*, 224 N.C. App. at 517, 736 S.E.2d at 535 (citing *Jones*, 221 N.C. App. at 241, 725 S.E.2d at 914 and *State v. Brown*, 213 N.C. App. 617, 620, 713 S.E.2d 246, 249 (2011)). While searches conducted without a warrant are usually considered unreasonable under the Fourth Amendment, there are exceptions. *Jones*, 221 N.C. App. at 240, 725 S.E.2d at 913 (citation omitted). "One such exception is a search incident to lawful arrest." *Id.*; see also *State v. Nesmith*, 40 N.C. App. 748, 749, 253 S.E.2d 594, 595 (1979) (stating a police officer may also lawfully search "the person of one whom he has lawfully arrested as an incident of such arrest" (internal marks and citation omitted)). Likewise, consent "has long been recognized as a special situation excepted from the warrant requirement." *State v. Hall*, 268 N.C. App. 425, 429, 836 S.E.2d 670, 673 (2019) (internal marks and citation omitted); see also *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) ("[A] search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given."). Where a defendant gives officers consent to search, the search is only lawful where the consent is freely and voluntarily given. See N.C. Gen. Stat. § 15A-221(a) (2019); and see N.C. Gen. Stat. § 15A-221(b) (2019) ("'[C]onsent' means a statement to the officer, made voluntarily and in accordance

with the requirements of [N.C. Gen. Stat. § 15A-222], giving the officer permission to make a search.”). “Consent is not voluntary if it is the product of duress or coercion, express or implied.” *State v. Romano*, 369 N.C. 678, 691, 800 S.E.2d 644, 653 (2017) (citation and internal marks omitted). “As a general rule, it is not duress to threaten to do what one has a legal right to do. Nor is it duress to threaten to take any measure authorized by law and the circumstances of the case.” *State v. Paschal*, 35 N.C. App. 239, 241, 241 S.E.2d 92, 94 (1978) (internal marks and citation omitted).

Here, at trial, the State introduced footage obtained by Corporal Hill’s body camera which depicted officers entering an open motel room which belonged to Defendant. Defendant and three other individuals were in the room at the time. Corporal Hill asked everyone to step outside. Corporal Hill, along with other officers, began securing the premises and in so doing observed contraband throughout the room. Corporal Hill went outside and asked each individual if the room belonged to them. In speaking with Defendant, Corporal Hill stated:

Everyone don’t have to go downtown, okay. . . . Do you want to be honest [Defendant]? Because I’ll tell you this, if I go the hard way and I do a search warrant, everybody’s going to get charged. Your girl is going to get charged; the other girl is going to get charged; you going to get charged, okay? . . . How are we going to do this? You want to tell me what’s in there? . . . Is it alright if we search and make sure there’s no weapons or any other drugs other than what we saw?

Defendant replied to Corporal Hill: “Go ahead.” While officers began searching the room, Defendant was placed under arrest. Upon searching Defendant’s person,

Detective Bowman found cocaine. Further, officers recovered additional contraband in their search of Defendant's motel room.

Defendant argues defense counsel should have made a motion to suppress the evidence recovered by police because Defendant did not voluntarily consent to the search of his motel room as his consent was induced by Corporal Hill's threat to charge everyone in the room. Regardless of whether Corporal Hill's statement constituted a threat, the alleged threat was to charge everyone who had been in the room—a measure authorized by law. Thus, Defendant's consent and the subsequent search of his motel room were lawful as his consent was not induced by threat or given under duress. *See Paschal*, 35 N.C. App. at 241, 241 S.E.2d at 94. Further, the search of Defendant's person was lawful as a search incident to his arrest. Because the search of both Defendant's person and his motel room were lawful, the evidence discovered during the searches was admissible at trial.

Had Defendant's counsel made a motion to suppress, it would have been denied and the result of the proceedings would not have been different. Therefore, defense counsel's choice not to file a motion to suppress was not ineffective assistance of counsel.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not commit plain error, nor was Defendant deprived effective assistance of counsel.

NO PLAIN ERROR.

STATE V. BENNETT

Opinion of the Court

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).