IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

SHAMAR TERREK NORRIS, *Appellant*.

No. 1 CA-CR 16-0238
FILED 4-20-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-118478-001
The Honorable Jay R. Adleman, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jana Zinman
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By John Champagne
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Patricia A. Orozco[1] joined.

B R O W N, Chief Judge:

¶1 Shamar Terrek Norris appeals his convictions and sentences for possession of marijuana and drug paraphernalia, class one misdemeanors. Finding no reversible error, we affirm.

BACKGROUND[2]

¶2 Detectives Monnens and Harvey observed Norris commit a traffic violation. During a subsequent consent search, Detective Harvey felt an object in Norris's right front pocket and asked Norris to identify it. Norris admitted it was marijuana. Consistent with this admission, Detective Harvey removed a clear cylinder container filled with a green, leafy substance from the pocket. The substance looked and smelled like marijuana. Detective Harvey also found rolling papers in Norris's pocket, and placed him under arrest.

¶3 Detective Harvey then noticed an additional item in plain view in Norris's car, which he believed was marijuana. He retrieved and opened a hand-rolled "joint" and believed the contents looked and smelled like marijuana.

¶4 Following a bench trial, the trial court found Norris guilty of possession or use of marijuana and possession of drug paraphernalia as charged. The court placed Norris on probation, and this timely appeal followed.

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[1] The Honorable Patricia A. Orozco, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

DISCUSSION

I. Admissibility of Detectives' Testimony

¶5 Norris contends the trial court improperly admitted Detectives Monnens's and Harvey's testimony identifying the seized items as marijuana and paraphernalia. Specifically, Norris argues the court allowed the detectives to render expert opinion testimony without expressly designating the testimony as such, thereby circumventing Arizona Rule of Evidence ("Rule") 702.

¶6 Before trial, in addition to disclosing the names of the detectives and criminalist expected to testify at trial, and their related reports, the State's October 2015 disclosure stated: "Any police officer listed above may be called as an expert witness with respect to an area within the officer's training and experience, including expert knowledge of illegal drugs, their possession or sale, useable amounts, or any other topic." Norris filed a motion in limine to preclude the criminalist from testifying, arguing she lacked the requisite botany training to qualify as an expert in marijuana identification. Norris did not file any pretrial challenge to the detectives' anticipated testimony.

¶7 Following a hearing on Norris's motion, the trial court found the State met its burden under Rule 702. The criminalist, however, was unavailable to testify at trial and the State relied on Detectives Monnens and Harvey to identify the substance seized, together with Norris's admission.

¶8 Before eliciting such testimony, the prosecutor asked each detective to explain his training and experience regarding marijuana identification. Detective Monnens testified he had (1) worked as a police officer for twelve years; (2) participated in basic academy training, scheduled yearly, quarterly, and monthly training, as well as drug identification training; (3) handled "hundreds" of cases involving marijuana; and (4) identified marijuana by visual inspection and smell in more than one hundred cases in which forensic tests later confirmed the identity of the substance as marijuana. Detective Harvey testified that he had (1) worked as a police officer for twenty-one years prior to retiring; (2) participated in basic training as well as numerous trainings related to drug recognition, with particular emphasis on marijuana; (3) handled more than four hundred cases involving marijuana; and (4) visually identified marijuana in more than four hundred cases in which forensic tests later confirmed the identity of the substance as marijuana.

¶9 When the prosecutor asked the detectives to identify the substance seized in this case, based on their training and experience, defense counsel objected, citing a lack of foundation, speculation, and improper expert testimony. The trial court overruled the objections, and each detective testified that the substance seized appeared to be, or had the consistency of, marijuana, based on both visual appearance and smell. On cross-examination, the detectives both acknowledged they were not criminalists and had never previously testified as expert witnesses in identifying marijuana.

¶10 Following the detectives' testimony, the State rested and defense counsel moved for a judgment of acquittal, arguing the State was unable to meet its burden of proof absent the identification testimony of a criminalist. Relying primarily on *State v. Ampey*, the State countered that no scientific or chemical analysis of the substances was required, and the detectives' identification testimony provided sufficient evidence of the substance's nature. 125 Ariz. 281 (App. 1980). The prosecutor further noted that Norris had admitted the substance was marijuana at the scene, and defense counsel had presented no contravening evidence. Defense counsel responded that Norris was not an expert qualified to render substance identification testimony.

¶11 In denying Norris's motion, the trial court concluded "that a duly trained officer is capable of reaching a conclusion as to the nature of the marijuana substance," and expert witness "considerations are entirely unnecessary because you don't need any scientific testing or any kind of corroboration from the scientific community to render a determination regarding a substance's identification as marijuana." When pressed by defense counsel to clarify whether the detectives' testimony qualified as "lay or expert," the court stated that such a distinction was unnecessary because "expert scientific testimony" was not required. Defense counsel again urged the court to determine whether the detectives' testimony constituted an expert opinion and the court reiterated that the detectives' testimony was admissible and consistent with *Ampey*.

¶12 In *Ampey*, an officer conducting a traffic stop "smelled freshly burned marijuana" and observed "partially smoked marijuana cigarettes in the ash tray." 125 Ariz. at 282. After speaking with the driver, who admitted he had marijuana in his glove compartment and volunteered "that he grew it himself for his own consumption," the officer seized a "plastic bag containing a green leafy substance which appeared to be marijuana" from the glove compartment. *Id.* Ampey appealed his subsequent conviction for possession of marijuana, arguing, among other things, that

the State presented insufficient evidence to sustain his conviction because "there was no chemist's report" identifying the seized substance. *Id*. This court concluded that, in addition to the substance identification set forth in the officer's report, which "possibly had sufficient foundation to qualify [the officer] as an expert in marijuana identification," Ampey had "admitted the substance was marijuana," and therefore sufficient evidence supported the conviction. *Id*.

¶13 *Ampey*, however, did not address admissibility of the officer's testimony under Rule 702, and thus does not resolve the issue raised by Norris—whether the detectives' testimony included improper expert opinions and whether the trial court improperly abdicated its gatekeeper responsibility under Rule 702.

¶14 Rule 702 "allows an expert witness to testify if, among other things, the witness is qualified and the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence." *State v. Romero*, 239 Ariz. 6, 9, ¶ 12 (2016) (internal quotation omitted). Trial courts are the "gatekeepers" of admissibility for expert testimony, to ensure such testimony is reliable and helpful to the trier of fact. *Id*. When Rule 702 is implicated, the proponent of the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence. *State v. Bernstein*, 237 Ariz. 226, 229, ¶ 9 (2015). In addition, the proponent must properly adhere to its disclosure obligations. *See generally* Ariz. R. Crim. P. 15.1. We review the trial court's admissibility determinations for an abuse of discretion. *Bernstein*, 237 Ariz. at 229, ¶ 9. We will affirm a trial court's ruling on admissibility if legally correct for any reason. *State v. Herrera*, 232 Ariz. 536, 543, ¶ 14 (App. 2013); *see also State v. Williams*, 209 Ariz. 228, 234, ¶ 25 (App. 2004) (noting "[e]vidence inadmissible for one purpose may be admitted if admissible for another purpose").

¶15 Assuming, without deciding, that an officer's opinion that a substance has characteristics consistent with marijuana may only be admitted if the officer testifies as an expert, we do not agree that the trial court improperly abdicated its gatekeeper duty under Rule 702.[3] The court

[3] Although the better practice here would have been for the trial court to explicitly determine whether the detectives were qualified under Rule 702 to testify as experts, Norris does not show how he was prejudiced by the court's approach because he does not challenge the relevance, reliability, or helpfulness of the detectives' testimony. *See Bernstein*, 237

found the detectives' testimony, including their observations regarding the substance's odor and physical characteristics, relevant and admissible. The court properly considered the foundation for the testimony offered, including the detectives' training and experience, in light of the testimony's relevance and helpfulness. The detectives' testimony was relevant to demonstrate that their observations were consistent with Norris's admission that the substance was marijuana. And in its dual role as gatekeeper and factfinder, the court deemed the testimony admissible.

¶16 Further, in light of the State's timely disclosure to Norris that the detectives could be called to testify as experts in the area of illegal substances, the evidence presented satisfied Rule 702's requirement that an expert's opinion "have a reliable basis in . . . knowledge and experience[.]" *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (explaining the essential inquiry under Rule 702 is "whether particular expert testimony is reliable"); *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, 357, ¶ 14 (App. 2014) (citing the advisory committee note to Federal Rule 702: "Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony."). Norris does not cite, nor has our research revealed, any authority supporting the proposition that the detectives' experience and training was insufficient to qualify them as expert witnesses in marijuana identification.

¶17 Moreover, Norris's assertion that the trial court's failure to designate the detectives' testimony as expert opinion "muddied any challenges" he could raise at trial is not borne out by the record. Instead, the record reflects that Norris received proper disclosure and had an unhindered opportunity to question the reliability of the detectives' testimony through cross-examination. *Romero*, 239 Ariz. at 12, ¶ 27 (explaining post-*Daubert* amendments to Rule 702 have not altered the appropriate method for attacking "disputed expert testimony," namely, effective cross-examination and the presentation of contrary evidence). Norris has not shown that the court committed reversible error by

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Ariz. at 229, 230, ¶¶ 11, 18 (Rule 702 "recognizes that trial courts should serve as gatekeepers in assuring . . . expert testimony is reliable and thus helpful to the . . . determination of facts at issue" but the court should also utilize "its fact-finding function" in assessing the weight and credibility of the evidence. (internal quotation omitted)).

permitting the detectives to testify regarding the nature of the substance seized.

II. Chain of Custody

¶18 Norris argues the trial court erred by admitting as an exhibit the substance seized, which was contained in a sealed evidence bag. Specifically, because the substance had been tested by a criminalist, and she was unavailable at trial, Norris argues the State failed to demonstrate a proper chain of custody for the evidence.

¶19 During direct examination, Detective Monnens testified that he placed the seized substance in the police department's "standard issue" evidence bag, wrote the item number on the bag, and then heat-sealed it and added his initials. When presented with the bag, Detective Monnens testified, without objection, that it was in substantially the same condition as when he impounded it and showed no signs of tampering. He also explained, without objection, that he accessed the bag to deliver it to court for trial, but avowed that the contents were not disturbed in transit.

¶20 When the State sought to introduce the bag as an exhibit, however, defense counsel objected, asserting the State failed to establish proper authentication and chain of custody. Defense counsel then asked Detective Monnens whether the criminalist had opened the evidence bag, and the detective acknowledged that she had done so, but testified that she had then initialed the bag and heat-sealed it again. After that exchange, the trial court overruled the objection and admitted the evidence bag as an exhibit.

¶21 Before an item may be admitted into evidence, the proponent must demonstrate "that the item is what the proponent claims it is." Ariz. R. Evid. 901(a). One of the accepted methods of authentication is the testimony of a witness with knowledge. Ariz. R. Evid. 901(b)(1).

¶22 To authenticate an item and establish a chain of custody, "the state must show continuity of possession, but it need not disprove every remote possibility of tampering." *State v. Spears*, 184 Ariz. 277, 287 (1996) (internal quotation omitted); *see also State v. Davis*, 110 Ariz. 51, 54 (1973). Stated differently, evidence is admissible, "notwithstanding the inability of the state to show a continuous chain of custody . . . unless a defendant can offer proof of actual change in the evidence, or show that the evidence, has, indeed, been tampered with." *State v. Ritchey*, 107 Ariz. 552, 557 (1971). We review evidentiary rulings for an abuse of discretion. *State v. Armstrong*, 218 Ariz. 451, 458, ¶ 20 (2008).

¶23 Applying these principles here, Norris offered no evidence to suggest, much less demonstrate, that the seized substance may have been tampered with before trial. Indeed, on this record, the only evidence regarding chain of custody and the condition of the evidence was introduced through Detective Monnens, who testified that he impounded and heat-sealed the evidence bag, the criminalist later opened and resealed the bag, and the evidence appeared to be in substantially the same condition as when he impounded it. "[T]he markings made by the investigating personnel" and Detective Monnens's testimony regarding the condition of the evidence provided sufficient foundation to admit the evidence as an exhibit, "notwithstanding the inability of the State to show a continuous chain of custody." *Ritchey*, 107 Ariz. at 557. Therefore, the trial court did not abuse its discretion by concluding the State laid sufficient foundation to admit the evidence log as an exhibit.

CONCLUSION

¶24 Based on the foregoing, Norris's convictions and sentences are affirmed.

AMY M. WOOD • Clerk of the Court
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