IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1337

Filed: 16 October 2018

Buncombe County, Nos. 15 CRS 91447-49; 15 CRS 91451-52; 16 CRS 164-65

STATE OF NORTH CAROLINA

v.

MONROE GORDON PILAND, III, Defendant.

Appeal by Defendant from judgment entered 13 March 2017 by Judge Robert G. Horne in Buncombe County Superior Court. Heard in the Court of Appeals 5 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

MURPHY, Judge.

This case involves three challenges by Monroe Piland ("Defendant") arising from his trial on various drug-related offenses. Defendant first challenges the trial court's denial of his motion to suppress evidence stemming from a search and seizure of his residence. Officers approached Defendant's front door and lingered by his garage before seizing his home to await a search warrant. Defendant moved to suppress the evidence as the fruit of an unconstitutional search and seizure, which

the trial court denied. Defendant appeals this denial, raising constitutional arguments.

Second, Defendant challenges the trial court's denial of his motion to dismiss. At the close of the State's evidence, Defendant argued that the State failed to prove the required elements of each offense. The trial court denied this motion in respect to every charge except one. While Defendant also raises a facial challenge to two indictments containing enhancement provisions, we instead address his alternative argument that the trial court erred in denying his motion to dismiss the two enhancement offenses.

Third, Defendant challenges the trial court's admission of expert testimony. The State's expert testified that she conducted a chemical analysis of the evidence but failed to testify as to the methodology of her chemical analysis. Defendant challenges her testimony as unreliable and alleges that the trial court committed plain error in failing to execute its gatekeeping function under N.C.G.S. § 8C-1, Rule 702.

BACKGROUND

The Buncombe County Anti-Crime Task Force ("BCAT") received a tip from the Buncombe County Department of Social Services that Defendant was growing marijuana in his residence. In response, three BCAT officers, Sergeant Thomas, Detective Austin, and Detective May, drove to Defendant's home on 22 October 2015

to have a "knock and talk" conversation. The officers pulled into the driveway and parked in front of Defendant's car, which was parked at the far end of the driveway beside the home. The garage was located immediately left of the driveway and faced the driveway, such that the front of the home faced the street but the garage faced perpendicular to the street. Sergeant Thomas went to the front door to knock, while Detectives May and Austin remained by the garage. Detective May testified, "There was a very evident odor of marijuana that was coming from the garage area." He also testified that because all three officers could smell marijuana, he knew that they would seize the home in order to obtain a search warrant.

On Defendant's front door was a sign that said "inquiries" with his phone number on it and a second sign stating "warning" with a citation to several statutes.[1] The officers understood the signs to be a "warning" that the officers "did not have the right to be on his residence."

Defendant eventually answered Sergeant Thomas's knocks at the front door, and, as soon as Defendant opened the door, Sergeant Thomas smelled "the pungent

[1] The second sign stated, "!!! WARNING!!! IT IS MY DUTY TO INFORM YOU OF YOUR RIGHT TO WITHDRAW FROM ANY ACTION THAT WILL VIOLATE YOUR SWORN OATH TO UPHOLD THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS WELL AS YOUR STATE CONSTITUTION. ANYONE WHO UNDER COLOR OF LAW OR UNLAWFUL AUTHORITY DEPRIVES ANY CITIZEN OF RIGHTS PRIVILEGES OR IMMUNITIES SECURED TO THEM BY THE US CONSTITUTION IS SUBJECT TO CIVIL AND (OR) CRIMINAL PENALTIES PURSUANT TO TITLE 42 U.S.C. § 1983, § 1985, AND § 1986, AS WELL AS TITLE 18 U.S.C. § 241 AND § 242 WHICH CARRIES A FINE OF UP TO $10,000 AND/OR IMPRISONMENT FOR NOT MORE THAN TEN YEARS OR BOTH. IGNORANCE OF THE LAW IS NO EXCUSE! YOU HAVE BEEN OFFICIALLY NOTICED! ANY UNLAWFUL THING YOU SAY OR DO WILL BE USED AGAINST YOU!" (emphasis in original).

order [sic] of marijuana emanating from the interior of the residence." Sergeant Thomas then made the decision to "maintain the residence pending the issuance of a search warrant." The basis for the search warrant came from the following affidavit:

> On Wednesday October 21, 2015, information was received by agents of the Buncombe County Anti-Crime Task Force (BCAT) regarding [Defendant's] residence . . . .
>
> The information was received from a worker with the Buncombe County Department of Social Services and said that marijuana was being grown at this residence. Specifically, that the marijuana was being grown in the garage of the residence.
>
> On Thursday October 22, 2015, BCAT agents went to the residence to conduct a follow up investigation. Upon their arrival, BCAT agents could detect the odor of marijuana coming from the garage while standing in front of the garage doors.
>
> Contact was made with the homeowner, [Defendant]. While BCAT agents were speaking with [Defendant] on the front porch, the odor of fresh growing Marijuana could be detected.

Authorized by the search warrant, police seized contraband including various types of marijuana, drug paraphernalia, opium poppies, a pill bottle containing 170.5 hydrocodone (dihydrocodeinone) pills, liquid morphine, and hallucinogenic mushrooms (psilocin).

In March 2016, a grand jury indicted Defendant on four drug-related offenses: possession of 28 grams or more of opium, opiates and opium derivatives; possession with intent to sell and deliver (PWISD) opium poppy; maintaining a dwelling for

keeping, manufacturing, delivering, and selling controlled substances; and possession of marijuana paraphernalia.

In September 2016, an Assistant District Attorney and Detective May discovered that Defendant's home was less than 1,000 feet away from a home in which the homeowner ran a child care facility. In October 2016, a grand jury further indicted Defendant for four drug-related enhancement offenses: possession with intent to manufacture, sell, or deliver (PWIMSD) dihydrocodeinone within 1,000 feet of a child care facility; PWISD psilocin within 1,000 feet of a child care facility; manufacturing marijuana within 1,000 feet of a child care facility; and PWIMSD marijuana within 1,000 feet of a child care facility. The indictments cited N.C.G.S. § 90-95(e)(8) as the relevant provision for these offenses. N.C.G.S. § 90-95(e)(8) provides the requirements for sentencing enhancement for crimes committed under N.C.G.S. § 90-95(a)(1):

> Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property used for a child care center . . . or within 1,000 feet of the boundary of real property used for a child care *center* . . . shall be punished as a Class E felon.

N.C.G.S. § 90-95(e)(8) (2017) (emphasis added). Each of the indictments used the word "facility" rather than center. The two indictments regarding marijuana alleged:

> [T]he defendant named above unlawfully, willfully, and feloniously did manufacture marijuana, a controlled substance which is included in schedule VI of the North

> Carolina Controlled Substances Act within 1000 feet of a licensed child care *facility*[.]
>
> [T]he defendant named above unlawfully, willfully and feloniously did possess with the intent to manufacture, sell and deliver, more than 1-1/2 ounces of marijuana . . . within 1000 feet of a licensed child care *facility*[.]

(emphasis added). The enhancement provision raised the offenses of manufacturing marijuana and PWIMSD marijuana from a Class I felony to a Class E felony. N.C.G.S. § 90-95(b)(2), (e)(8).

Before trial, Defendant, proceeding *pro se*, moved to suppress all evidence stemming from the search and seizure of his home. After a hearing, the trial court denied Defendant's motion. The trial court made the following Findings of Fact, *inter alia*, in its written order:

> 7. The affidavit established that BCAT agents had gone to the . . . residence to conduct a follow up investigation. Upon their arrival, agents could detect the odor of marijuana coming from the garage. The agents then made contact with the homeowner [Defendant]. As they spoke with the Defendant on the front porch, the agents detected the odor of fresh growing marijuana;
>
> 8. The BCAT agents went to the property as a follow up on the DSS report and intend to conduct a "knock and talk".

Based on these facts, the trial court concluded that there was a substantial basis to conclude that probable cause existed for the issuance of the search warrant and denied Defendant's motion to suppress.

At trial, Detective May confirmed that the distance from Defendant's home to the child care facility was 452 feet. The State then introduced witness testimony from Iva Jean Herron Metcalf, a childcare licensing consultant with the North Carolina Division of Child Development and Early Education to establish the existence of the child care facility near Defendant's home. She testified, without objection, that the daycare met the definition of a childcare "facility." More specifically, she testified that the child care facility was a child care "home," a distinctive term defined by statute. N.C.G.S. § 110-86(3)(b) (2017).

Special Agent Elizabeth Reagan testified as an expert witness to the identification of controlled substances seized from Defendant's home. She testified as to her education, qualifications, and work duties and that she accordingly chemically tested one pill from the bottle seized from Defendant's home. Based on her chemical analysis, she concluded that the pills were hydrocodone. However, she did not describe the methodology employed in her analysis and stated only that she "performed a chemical analysis[.]" Defendant did not object to the admission of her expert opinion.

At the close of the State's evidence, Defendant moved to dismiss the charges, arguing that the State failed to prove each element of the offenses. The trial court dismissed one charge of PWISD opium poppy because there was no chemical analysis performed on that substance but denied the motion as to all other charges. The jury

ultimately convicted Defendant of seven drug-related offenses.[2] The trial court sentenced Defendant to an active term of 225 to 282 months for trafficking opium, as well as a $500,000.00 fine. The trial court consolidated the remaining convictions and sentenced Defendant to an active sentence of 25 to 42 months for the Class E manufacturing marijuana within 1,000 feet of a child care center conviction.

ANALYSIS

A. Motion to Suppress

On appeal, Defendant argues that the trial court committed plain error by allowing the State to introduce evidence resulting from an unconstitutional search and seizure of his home. Specifically, Defendant argues that the search warrant application was tainted because the officers had no right to linger in the curtilage outside of the garage or to ignore Defendant's revocation of an implied license to approach the front door.

Defendant does not challenge the trial court's Findings of Fact, but instead challenges the denial of the motion to suppress on the basis that the evidence is the result of a "tainted" search and seizure. Normally, "[t]he standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's

[2] Trafficking opium, opiates, or opium derivative by possessing 28 grams or more; manufacturing marijuana within 1,000 feet of a licensed child care center; maintaining a dwelling for keeping or selling of a controlled substance; possession of marijuana with intent to manufacture, sell, or deliver (PWIMSD) within 1,000 feet of a licensed child care center; possession of dihydrocodeinone; possession of psilocin; and possession of marijuana drug paraphernalia

findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (quoting *State v. Logner*, 148 N.C. App. 135, 137, 557 S.E.2d 191, 193 (2001)).

However, Defendant did not preserve the issue of the admissibility of the evidence at trial by objecting to its admission. Therefore, our standard of review is plain error:

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action 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). "[T]o 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—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted).

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315 (2015) (alteration in original) (quoting U.S. Const. amend. IV). "The touchstone of the Fourth Amendment is

reasonableness." *Id.* (citation omitted). "Generally, a warrant supported by probable cause is required before a search is considered reasonable." *State v. Phillips*, 151 N.C. App. 185, 191, 565 S.E.2d 697, 702 (2002) (citation omitted). "What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *State v. Battle*, 202 N.C. App. 376, 383, 688 S.E.2d 805, 812 (2010) (citation and quotation marks omitted).

Defendant does not challenge the search warrant application as facially invalid, but rather challenges that the search warrant application was tainted as a result of an unlawful search and seizure. However, we decline to supplement the four corners of the warrant with the transcript in our review. "Our Supreme Court has stated it was error for a reviewing court to rely upon facts . . . that [go] beyond the four corners of [the] warrant." *State v. Parson*, ____ N.C. App. ____, ____, 791 S.E.2d 528, 536 (2016) (citation and quotation marks omitted). Therefore, our review is limited to determining whether the following facts contained in the warrant were obtained in violation of Defendant's Fourth Amendment rights:

> On Thursday October 22, 2015, BCAT agents went to the residence to conduct a follow up investigation. Upon their arrival, BCAT agents could detect the odor of marijuana coming from the garage while standing in front of the garage doors.
>
> Contact was made with the homeowner, [Defendant]. While BCAT agents were speaking with [Defendant] on the front porch, the odor of fresh growing Marijuana could be detected.

Based on these facts, we conclude that the trial court did not err in denying Defendant's motion to suppress because the search and seizure was not an unconstitutional violation amounting to plain error.

1. Garage

Defendant claims that the officers unconstitutionally searched and seized his home by "parking in [Defendant]'s driveway, blocking his car, and lingering in the curtilage near his garage instead of parking on the street . . . ."

We find *State v. Grice* instructive here. *Grice*, 367 N.C. 753, 767 S.E.2d 312. In *Grice*, the police responded to a tip that the defendant was growing marijuana at his home and conducted a "knock and talk investigation." *Id.* at 754, 767 S.E.2d at 314. The officers drove into the driveway and parked behind the defendant's car. *Id.* One of the officers knocked at the door while the other remained in the driveway. *Id.* at 754-55, 767 S.E.2d at 314-15. From the driveway, the officer spotted marijuana growing in buckets about fifteen yards away. *Id.* at 755, 767 S.E.2d at 315. Both officers approached the buckets and seized the plants before they obtained a search warrant. *Id.* Our Supreme Court held that the knock and talk investigation brought the officers lawfully onto the property and that "[t]he presence of the clearly identifiable contraband justified walking further into the curtilage." *Id.* at 758, 767 S.E.2d at 317.

In order to determine whether the officers could linger by the garage, it is necessary to first determine whether the officers had a lawful right to be in Defendant's driveway. The officers went to Defendant's home to conduct a knock and talk investigation:

> A "knock and talk" is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant. This Court and the North Carolina Supreme Court have recognized the right of police officers to conduct knock and talk investigations, so long as they do not rise to the level of Fourth Amendment searches.

State v. Marrero, ____ N.C. App. ____, ____, 789 S.E.2d 560, 564 (2016) (citations omitted). Thus, officers conducting a knock and talk investigation can lawfully approach a home so long as the officers remain within the permissible scope afforded by the knock and talk. *See id.* The United States Supreme Court explained the permissible scope in *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013):

> [T]he knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.

Id. at 8, 133 S. Ct. at 1415-16 (citations, footnote, and internal quotation marks omitted). We note that "law enforcement may not use a knock and talk as a pretext to search the home's curtilage." *State v. Huddy*, ____ N.C. App. ____, ____, 799 S.E.2d 650, 654 (2017) (citation omitted). "Put another way, law enforcement may do what occupants of a home implicitly permit anyone to do, which is 'approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.'" *Id.* (quoting *Jardines*, 569 U.S. at 8, 133 S. Ct. at 1415). "This limitation is necessary to prevent the knock and talk doctrine from swallowing the core Fourth Amendment protection of a home's curtilage." *Id.*

We conclude that the officers had a lawful presence in the portion of Defendant's driveway where they parked to perform the knock and talk. In light of *Grice* and *Jardines*, we next examine the officers' conduct. Defendant's driveway was directly next to the garage door. While there is a path before the garage which allows a visitor to walk to the front door, this path attaches to the driveway and is only a few feet from the garage. Thus, we find that any private citizen wishing to knock on Defendant's front door would be entitled to drive into the driveway, get out, walk between the car and the path so as to stand next to the garage, and continue on the path to the front porch. Therefore, we conclude that the officers' conduct here, as in *Grice*, was permitted when they pulled into the driveway by the garage, got out of

their car, and stood between the car and the garage. *See Grice*, 367 N.C. at 757-58, 767 S.E.2d at 316.

Grice is sufficiently analogous to Defendant's case with respect to the officers' presence in Defendant's curtilage to allow the officers' lingering by the garage.[3] Just as in *Grice*, law enforcement went to the residence lawfully to conduct a knock and talk. The officers in *Grice* could see the marijuana from the driveway, and here, the officers could smell the marijuana from their location in the driveway. Moreover, our Supreme Court has held that when the contraband is in plain view, there is no search under the Fourth Amendment. *Grice,* 367 N.C. at 756, 767 S.E.2d at 316.

We therefore find that the officers' lingering by the garage was justified and did not constitute a search under the Fourth Amendment.

2. Front Door

Defendant argues that he revoked the officers' implied license when they remained at his front door after he told them to leave through the placement of signage. Defendant further argues that by ignoring this written revocation, the officers violated his constitutional rights under the Fourth Amendment. However, because Defendant did not make this argument before the trial court, the issue is not preserved for appeal. "Our Supreme Court has long held that where a theory argued

[3] On 1 June 2018, Defendant submitted a memorandum of additional authority citing to the United States Supreme Court's opinion in *Collins v. Virginia*, ____ U.S. ____, ____, 138 S. Ct. 1663, 1669-73 (2018). However, while factually similar, we find that the officers' conduct here did not exceed the scope of reasonable behavior as did the officer's conduct in *Collins*.

on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Shelly*, 181 N.C. App. 196, 206-07, 638 S.E.2d 516, 524 (2007) (citations and internal quotation marks omitted). "[T]his Court routinely dismisses arguments advanced by defendants in criminal cases when the defendants attempt to mount and ride a stronger or better, and possibly prevailing steed not run before the trial court." *State v. Hester*, ____ N.C. App. ____, ____, 803 S.E.2d 8, 16 (2017). Therefore, "[w]hen a party changes theories between the trial court and an appellate court, the assignment of error is not properly preserved and is considered waived." *Shelly*, 181 N.C. App. at 207, 638 S.E.2d at 524 (citation omitted).

After careful review of the transcript from the suppression hearing, we find that Defendant did not argue that the signs on his door revoked the officers' implied license, or even that the signs expressed a specific intent that the officers leave the residence. Rather, Defendant argued that the officers "intruded upon his dwelling" by "coming to the garage door." Consequently, we will not allow Defendant to "swap horses" to prevail at the appellate level with this new argument. *Shelly*, 181 N.C. App. at 206, 638 S.E.2d at 524.

Because Defendant did not argue that the signs acted as a revocation of the officers' implied license at the suppression hearing, he cannot present this argument on appeal. We therefore decline to consider the merits of this argument.

3. Facts Supporting the Search Warrant Were Lawfully Obtained

Because the officers lawfully lingered by the garage prior to the discovery of the facts in the search warrant affidavit, we find that there is no error in the trial court's denial of Defendant's motion to suppress.

B. Enhancement of Offense for PWIMSD Marijuana Within 1,000 Feet of a Child Care Facility and for Manufacturing Marijuana within 1,000 Feet of a Child Care Facility

Defendant challenges as facially invalid the indictment for manufacturing marijuana within 1,000 feet of a child care "facility" and the indictment for PWIMSD marijuana within 1,000 feet of a child care "facility." A defendant can challenge the facial validity of an indictment at any time, even if he or she did not raise it at trial, because a facially invalid indictment "depriv[es] the trial court of its jurisdiction." *State v. Williams*, 368 N.C. 620, 622, 781 S.E.2d 268, 270 (2016) (citation omitted). Defendant argues, in the alternative, that we should find that the trial court erred in denying his motion to dismiss regarding the enhancement of the offenses because the evidence "was insufficient to prove that the facility was, in fact, a 'child care center.'" Because we conclude that the evidence does not support a conviction based on the enhancement offenses, we find it unnecessary to address Defendant's argument that the indictments are facially invalid.

While Defendant moved to dismiss at the end of the State's case, he did not renew his motion to dismiss at the close of all evidence, and has therefore failed to preserve the issue on appeal:

> A defendant may make a motion to dismiss the action . . . at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action . . . at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(a)(3). "Nevertheless, this Court's imperative to correct fundamental error . . . may necessitate appellate review of the merits despite the occurrence of default." *State v. Davis*, 198 N.C. App. 146, 149, 678 S.E.2d 709, 712 (2009) (alteration in original) (citation and internal quotation marks omitted).

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2. We find that justice requires us to invoke Rule 2, and we therefore examine Defendant's motion to dismiss in light of evidence presented at trial.

We first note the discrepancies between the language in the indictments and the language in the statute. Defendant was convicted of offenses within 1,000 feet of

a child care "facility." However, the statute provides that this sentencing enhancement only applies within 1,000 feet of a child care "center:"

> Any person 21 years of age or older who commits an offense under [this statute] on property used for a child care center, or for an elementary or secondary school or within 1,000 feet of the boundary of real property used for a child care center, or for an elementary or secondary school shall be punished as a Class E felon . . . . For purposes of this subdivision, a child care center is as defined in G.S. 110-86(3)[a], *and* that is licensed by the Secretary of the Department of Health and Human Services.

N.C.G.S. § 90-95(e)(8) (emphasis added). N.C.G.S. § 110-86(3) explicitly defines:

> (3) Child care facility. --Includes child care centers, family child care homes, and any other child care arrangement not excluded by G.S. 110-86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.
>
> a. A child care *center* is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.
>
> b. A family child care *home* is a child care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

N.C.G.S. § 110-86(3)(a)-(b) (2017) (emphasis added).

At trial, the child care licensing consultant for the State of North Carolina Division of Child Development and Early Education testified that the daycare was a child care "facility" and, specifically, a child care "home," but never testified that it was a child care "center."

> *The State*: Now, are you aware of a child care facility located at [daycare owner's residence]?
>
> *Witness*: Yes.
>
> *The State*: Could you give us a description of who owns that and what their licensing is?
>
> *Witness*: [The owner] has her basement converted to a child care *facility*. She cares for, being a family child care *home* she can care for five pre-schoolers and three school-agers, a maximum of eight children in that facility. I've been monitoring her for ten years.
>
> . . . .
>
> *The State*: Now, is that a child care *facility* as defined under General Statute 110-86?
>
> *Witness*: Yes, family child care *home*.
>
> *The State*: Now, there are a number of exclusions listed in Section (2) of 110-86. Does this child care *facility* fit any of those exclusions?
>
> *Witness*: No.

(emphasis added). The witness's express testimony was that the child care facility was, specifically, a child care *home*. At no point in her testimony did the witness testify that the facility met the definition of a child care center or present evidence that it could be classified as such. The witness's description of the facility was that the owner "*can* care for five pre-schoolers and three school-agers." (emphasis added). In order to meet the definition of a child care center under N.C.G.S. § 110-86(3)(a), it must be shown that "at any one time, *there are* three or more preschool-age children

or nine or more school-age children receiving child care." N.C.G.S. § 110-86(3)(a) (2017) (emphasis added). There was no evidence elicited from the licensing consultant or any other witness about how many children there actually were in the facility at any given time – only the potential capacity of the facility. Thus, there was no evidence that this facility met the definition of a child care center under N.C.G.S. § 110-86(3)(a).

N.C.G.S. § 90-95(e)(8) explicitly states that the enhancement provision applies only to child care "centers." The statute does not provide the enhancement for "homes" or "facilities." "A statute that is clear and unambiguous must be given its plain and definite meaning." *State ex. rel. Utilities Commission v. North Carolina Sustainable Energy Ass'n*, ____ N.C. App. ____, ____, 803 S.E.2d 430, 432 (2017) (internal quotation marks and citation omitted). "If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997) (internal quotation marks and citation omitted). "Furthermore, this Court cannot delete words or insert words not used in a statute." *North Carolina Sustainable Energy Ass'n*, ____ N.C. App. at ____, 803 S.E.2d at 433 (internal quotation marks and citation omitted). We therefore conclude that the Legislature intended that N.C.G.S. § 90-95(e)(8) apply only to child care "centers."

Even in the light most favorable to the State, the evidence at trial was that the child care facility in question was a "facility" and "home," but not a child care "center" as defined by our General Assembly. Consequently, it was error for the trial court to deny Defendant's motion to dismiss the statutory enhancement. The judgment for manufacturing marijuana within 1,000 feet of a child care *center* and the judgement for PWIMSD marijuana within 1,000 feet of a child care *center* are therefore vacated and this case is remanded for resentencing on the lesser included offenses of manufacturing marijuana and possession with intent to manufacture, sell, or deliver marijuana. *See State v. Gooch*, 307 N.C. 253, 257-58, 297 S.E.2d 599, 601-02 (1982) (vacating a verdict of possession of more than one ounce of marijuana and remanding for resentencing of the lesser included offense of simple possession of marijuana because the jury necessarily found the defendant guilty on all other essential elements of the offense). Further, because six of Defendant's convictions were consolidated into the same judgment, the trial court must conduct a new sentencing hearing on the consolidated charges. *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015) ("When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing . . . ." (citation omitted)).

C. Expert Witness Testimony

Finally, Defendant challenges the expert witness testimony that the pills contained in the bottle were hydrocodone because the expert did not testify as to the methods employed in her chemical analysis. If a defendant challenges the trial court's allowance of expert testimony based on the requirements of Rule 702(a), the appellate court will not reverse "absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citation omitted). However, "an 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 in North Carolina state courts." *State v. Hunt*, ____ N.C. App. ____, ____, 792 S.E.2d 552, 559 (2016). As is the case here, when a defendant does not challenge the admission of the expert testimony at trial, we only review for plain error. *Id.*

"Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a)."[4] *McGrady*, 368 N.C. at 892, 787 S.E.2d at 10 (citations omitted). To be reliable, the testimony must satisfy a three-part test: "(1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case." *Id.* at 890, 787 S.E.2d at 9 (alteration in original) (citation omitted); *see* N.C.G.S. § 8C-1, Rule 702(a). "[T]he trial court has discretion in determining how to

[4] "Preliminary questions concerning the qualification of a person to be a witness, . . . or the admissibility of evidence shall be determined by the court . . . ." N.C.G.S. § 8C-1, Rule 104(a) (2017).

address the three prongs of the reliability test." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (citation omitted).

The expert testimony here stated:

> *The State*: Okay. Once you received [the pill bottle], how did you begin your analysis of it?
>
> *Expert Witness*: [T]he first thing I did was examine all the tablets for consistency . . . . I then performed a chemical analysis on a single tablet to confirm that they did in fact contain what the manufacturer had reported.
>
> . . . .
>
> *The State*: And what did you find those pills to contain?
>
> *Expert Witness*: Based on the results of my analysis, . . . hydrocodone, which is a Schedule III preparation of an opium derivative.

Defendant argues that the testimony contains a serious defect as the expert witness "did not identify, describe, or justify the procedure she employed to determine whether the pills contained a controlled substance." Specifically, "[s]he did not identify the test she performed, describe how she performed it, or explain[] why she considered it reliable." Thus, Defendant asserts that the trial court did not properly exercise its gatekeeping functions which amounts to plain error. We agree that the failure to consider the methods of analysis employed was an abuse of discretion, but this does not amount to plain error in this case.

Defendant relies on *State v. Brunson*, 204 N.C. App. 357, 693 S.E.2d 390 (2010), for the proposition that "the admission of her testimony identifying the pills as hydrocodone amounted to plain error." In *Brunson*, an expert witness testified that certain pills contained hydrocodone based on "markings, color, and shape," but not based on a chemical analysis. *Id.* at 358-60, 693 S.E.2d at 391. On appeal, we held that the trial court's allowance of her testimony was plain error because her "visual identification lacked sufficient indices of reliability to determine the actual substance of the pills." *Id.* at 361, 693 S.E.2d at 393. As a result, "her testimony, although supported by experience and education, was tantamount to baseless speculation and equivalent to testimony of a layperson." *Id.* at 360, 693 S.E.2d at 392.

Because the expert in *Brunson* did not perform a chemical analysis, we held that there was a "significant probability that, had the lower court properly excluded [the expert's] testimony, the jury would have found defendant not guilty." *Id.* at 361, 693 S.E.2d at 393. Here, however, the expert did perform a chemical analysis. The evidence merely lacks any discussion of that analysis. We therefore find *Brunson* distinguishable from Defendant's case.

Since our review is limited to plain error review, we ask whether the trial court committed an error "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Bush*, 164 N.C. App. 254, 257-58, 595 S.E.2d 715,

717-18 (2004) (citations and internal quotations omitted). The standard is so high "in part at least because the defendant could have prevented any error by making a timely objection." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986) (citation omitted). Here, it was error for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify as to the methodology of her chemical analysis. However, the error does not amount to plain error because the 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. *See Brunson*, 204 N.C. App. at 360, 693 S.E.2d at 392.

CONCLUSION

We hold that the officers had a lawful presence in Defendant's driveway, justified by the knock and talk investigation. Furthermore, the officers here, as in *Grice*, were permitted to get out of their cars and stand by the garage. Defendant's argument that the signs on the front door revoked the officers' implied license to approach is unpreserved for appeal, and we therefore decline to consider the merits of this argument.

We also hold that the trial court erred in denying Defendant's motion to dismiss because the State failed to prove that the child care facility was a child care

"center" as defined by our General Assembly. Because we conclude that the resulting judgments based on the enhancement provision must be vacated and remanded for resentencing of the lesser included offenses, we do not decide whether the indictments for those judgments are facially invalid.

Lastly, we hold that the trial court's admission of expert testimony regarding a chemical analysis of the evidence, while lacking in testimony regarding the specific methods involved in that analysis, does not rise to the level of plain error.

NO ERROR IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING; AND NO PLAIN ERROR IN PART.

Judges CALABRIA and ARROWOOD concur.