NO. COA10-1307
NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2011

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 07CRS222314

MARIO EDUARDO ORTIZ-ZAPE,
Defendant.

Appeal by defendant from judgment entered on 19 February 2010 by Judge Jerry Cash Martin in Superior Court, Mecklenburg County. Heard in the Court of Appeals 12 April 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tenisha S. Jacobs, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction for felony possession of cocaine. For the foregoing reasons, we reverse in part and vacate.

I. Background

The State's evidence tended to show that on 16 March 2007

Charlotte Mecklenburg Police Officer Craig Vollman "was assigned to marked patrol car" duty; that night, while in the parking lot of a gas station, Officer Vollman observed defendant driving a car with a temporary paper tag. Officer Vollman asked defendant whether he had the requisite registration paperwork. In response, defendant began to go through the contents of the glove box. Officer Vollman shined his flashlight inside the car to look for weapons and noticed a sandwich bag containing a white substance in the door compartment. Officer Vollman then placed defendant under arrest and called for a backup police officer.

Charlotte Mecklenburg Police Officer Darryl Soto took defendant to jail. Officer Soto weighed the white substance, and then "placed it in [an] envelope with clear tape and put [his] initials on it." Defendant was indicted for possession with intent to sell or deliver a controlled substance.

At trial, the State introduced the expert testimony of criminalist Tracey Ray of the Charlotte Mecklenburg Police Department crime lab. Ms. Ray testified, over defendant's objection, that the white substance was cocaine. Ms. Ray had not tested the white substance herself, nor had she been present during the tests; instead, Ms. Ray based her opinion on her "peer review" of the testing analysis prepared by the testing

analyst, Ms. Jennifer Mills. The "peer-review" consisted of the following:

> [Ms. Ray] reviewed the drug chemistry worksheet or the lab notes that the analyst wrote her notes on and the data that came from the instrument that was in the case file and then [she] also reviewed the data that was still on the instrument and made sure that was all there too.

The jury found defendant guilty of possession of cocaine, and the trial court entered judgment. Defendant appeals.

II. Chemical Analysis

Defendant argues that Ms. Ray's testimony regarding the identity of the white substance violated his Sixth Amendment right to confrontation. We agree. "This Court reviews alleged violations of constitutional rights *de novo*. Under the *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Williams*, ___ N.C. App. ___, ___, 702 S.E.2d 233, 236 (2010) (citation, quotation marks, and brackets omitted).

> The Sixth Amendment to the United States Constitution provides that, in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. Our Court in *State v. Brewington*, ___ N.C. App. ___, 693 S.E.2d 182 (2010), recently traced the lineage of the Confrontation Clause as it applies to situations where a chemist testifies to a "peer review" of tests done by other

> chemists. After discussing the development of this line of cases, the *Brewington* Court noted that:
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> > . . . .
> > to allow a testifying expert to reiterate the conclusions of a non-testifying expert would eviscerate the protection of the Confrontation Clause.
>
> The Court then went on to describe a four-pronged test which applies in these cases:
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> > (1) determine whether the document at issue is testimonial; (2) if the document is testimonial, ascertain whether the declarant was unavailable at trial and defendant was given a prior opportunity to cross-examine the declarant; (3) if the defendant was not afforded the opportunity to cross-examine the unavailable declarant, decide whether the testifying expert was offering an independent opinion or merely summarizing another non-testifying expert's report or analysis; and (4) if the testifying expert summarized another non-testifying expert's report or analysis, determine whether the admission of the document through another testifying expert is reversible error.

Id. at ___, 702 S.E.2d at 236 (citations, quotation marks, ellipses, and brackets omitted).

While here no actual document, such as a laboratory report, was admitted at trial, we find the *Williams* analysis to still be applicable and dispositive as the constitutional issues raised

are the same. *See id.* Ms. Ray's statements regarding Ms. Mills's findings were certainly testimonial. *See id.* at ___, 702 S.E.2d at 236 ("Turning now to the present case, it is clear that the report detailing the tests done by [the testing chemist] and then "peer reviewed" and testified about by [the testifying chemist] is testimonial. *See Melendez-Diaz v. Mass.*, ___ U.S. ___, ___, 129 S.Ct. 2527, 2531, 174 L.Ed.2d 314, 321 (2009) (noting that testimonial evidence includes "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'") (quoting *Crawford v. Washington*, 541 U.S. 36, 52, 124 S.Ct. 1354, 1364, 158 L.Ed.2d 177, 193 (2004)).."). Also, as in *Williams*, there is no evidence that defendant was given an opportunity to cross-examine Ms. Mills. *See id.* at ___, 702 S.E.2d at 236-37.

Although the State contends that Ms. Ray offered an independent analysis of the lab results, the "peer review" conducted by Ms. Ray was more akin to the "peer review" conducted in *Williams* where the testifying chemist "did not conduct any tests on the substance, nor was she present when [the testing chemist] did." *Id.* at ___, 702 S.E.2d at 237. Just as in *Williams*, "[w]e think that these facts are decisive and show that [Ms. Ray] could not have provided her own

admissible analysis of the relevant underlying substance." *Id.* Accordingly, it was error for Ms. Ray to testify as to Ms. Mills's findings. *See id.* at ___, 702 S.E.2d at 237-38.

We must now consider whether Ms. Ray's erroneously allowed testimony constitutes reversible error. *See id.* at ___, 702 S.E.2d at 736. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2007).

Defendant was convicted of felony possession of cocaine, in violation of North Carolina General Statute § 90-95 (2007). An essential element of felony possession of cocaine is evidence that the substance in defendant's possession was actually cocaine. *See id.* Cocaine can only be identified through chemical analysis. *See Williams*, ___ N.C. App. at ___ , 702 S.E.2d at 238. The State did not properly present any chemical analysis which identified the white substance as cocaine. We therefore conclude that it was reversible error for the trial court to allow Ms. Ray's testimony. Furthermore, as the State failed to prove all of the elements of the crime charged, *see* N.C. Gen. Stat. § 90-95, defendant's motion to dismiss should

have been granted just as defendant also argues on appeal. *See State v. Martin*, 195 N.C. App. 43, 50, 671 S.E.2d 53, 59 (2009) ("The proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged[.]" (citation omitted)); *see generally State v. Hunt*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (May 3, 2011) (No. COA10-666) ("As there was insufficient evidence of both of the charges against defendant and the trial court erred in not granting defendant's motion to dismiss, we reverse and vacate defendant's convictions[.]")

III. Conclusion

We reverse the ruling of the trial court allowing the testimony of Ms. Ray regarding the white substance found in the car with defendant. We also reverse the denial of defendant's motion to dismiss as the State failed to properly present an essential element of the crime charged. As we are reversing the trial court's ruling regarding defendant's motion to dismiss the judgment must be vacated. Thus, we vacate the judgment, and we therefore need not address defendant's other issue on appeal.

REVERSED IN PART; VACATED.

Judges MCGEE and BEASLEY concur.

Report per Rule 30(e).