NO. COA12-558
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 11CRS206822, 206826

AKEEM BAILEY

Appeal by Defendant from judgment entered 10 November 2011 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Teresa L. Townsend, for the State.*

*M. Alexander Charns, for Defendant.*

BEASLEY, Judge.

Akeem Bailey (Defendant) appeals from his convictions of possession with intent to sell or deliver a controlled substance and sale of a controlled substance in violation of N.C. Gen. Stat. § 90-95(a)(1). For the following reasons, we find no error

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On 28 December 2010, Detective S.J. Lackey was working undercover for the Charlotte-Mecklenburg Police Department. Detective Lackey signaled from his vehicle to Defendant that he would like to buy drugs. Before proceeding to the spot indicated by Defendant, Detective Lackey provided his close-cover unit with a specific description of Defendant. Detective Lackey described Defendant as a slim, black male in his early twenties, with dreadlocks, wearing a red hat, red and black jacket, and gold teeth. Detective Lackey was not familiar with Defendant prior to this instance. Defendant approached Detective Lackey's car window, and Defendant sold Detective Lackey two crack cocaine rocks.

Detective Brad Tisdale provided surveillance during the undercover operation. He witnessed Defendant sell drugs to Detective Lackey and continued to observe Defendant until a patrol unit arrived to identify Defendant. Officer Steven Schuster arrived approximately one minute after Detective Lackey purchased drugs. Officer Schuster spotted the suspect matching the description given by Detective Lackey and identified the suspect as Defendant.

After Officer Schuster identified Defendant, he met with Detective Lackey. Officer Schuster showed Detective Lackey a

single photo of Defendant from his personal thumb drive that he uses to keep track of names and faces while on patrol. Detective Lackey positively identified Defendant as the suspect that sold him drugs. The photos Officer Schuster showed Detective Lackey were admitted into evidence.

Through Detective David LaFranque's testimony, and without objection, the State moved the laboratory report from the Charlotte-Mecklenburg Crime Laboratory into evidence. The report stated that the substance sold by Defendant was cocaine weighing 0.22 grams.

On 21 February 2011, Defendant was indicted on charges of possession with intent to sell or deliver a controlled substance and sale of a controlled substance. Defense counsel filed discovery and *Brady* motions on 9 November 2011. Defendant's *Brady* motion sought information from the officers regarding prior contact they may have had with Defendant. Defendant's motions were denied in open court. Defendant was convicted of both charges and gave oral notice of appeal.

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Defendant argues that the trial court committed plain error on several grounds in admitting the lab report identifying the substance sold by Defendant as cocaine. We disagree.

Since Defendant did not object to the report's admission, we review this issue for plain error.

> 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 that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citations omitted).

Defendant claims that the lab report was not properly certified because the State used a copy and the analyst's signature is typed rather than handwritten. We disagree.

N.C. Gen. Stat. § 90-95(g) (2011) provides that the report of an analyst from the Charlotte-Mecklenburg Crime Laboratory, among others, shall be admissible without the authentication or testimony of the analyst if the State provides notice and a copy of the report to the defendant at least fifteen business days before introducing the report and defendant fails to file a written objection at least five business days before trial. This "notice-and-demand" statute allows the State to use this

procedure when the report is "certified to upon a form approved by the Attorney General by the person performing the analysis." *Id.* Our Rules of Evidence provide that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." N.C. Gen. Stat. § 8C-1, Rule 1003 (2011). This Court has held that it is not plain error to admit a copy when the defendant fails to present evidence that the duplicate is not authentic and the State could have laid the proper foundation had the defendant objected. *State v. Jones*, 176 N.C. App. 678, 683-84, 627 S.E.2d 265, 268-69 (2006).

Here, the report states that it is on a form approved by the Attorney General and that it is certified by the analyst. Defendant failed to raise any question about the authenticity of the copy used by the State; thus, the copy is admissible to the same extent as the original. Had Defendant objected to the copy and preserved that issue for appeal, the State could have laid the appropriate foundation. There was no plain error.

Defendant next argues that the notice under Section 90-95(g) was defective because the assistant district attorney's

signature is illegible and it failed to say who was served or in what manner. For this argument, Defendant cites Rule 26(d) of the North Carolina Rules of Appellate Procedure and Rule 5 of the North Carolina Rules of Civil Procedure. Quite plainly, these rules are inapplicable to a criminal trial. While N.C. Gen. Stat. § 15A-951 (2011) requires a certificate of service for motions in a criminal case, the notice-and-demand procedure in Section 90-95(g) is not a motion. In this case, the State gave notice to Defendant on 29 June 2011,[1] more than four months prior to trial, in compliance with Section 90-95. Notice to Defendant was proper, and we find no plain error.

Defendant additionally claims that the report was improperly admitted because it was testimonial hearsay. Again, we disagree.

In *State v. Jones*, ___ N.C. App. ___, ___, 725 S.E.2d 910, 912-13 (2012), we recently held that a lab report was properly admitted without the analyst's testimony because the State complied with Section 90-95 and the defendant did not object to the report. The defendant waives his right of confrontation when he fails to object to a lab report as provided by Section

[1] The Assistant District Attorney who signed the notice made a scrivener's error by dating it 29 July 2011. The file stamp shows that the date was 29 June 2011.

90-95 or at trial. *State v. Steele*, 201 N.C. App. 689, 696, 689 S.E.2d 155, 161 (2010). In the instant case, the lab report is admissible without the analyst's testimony per our holding in *Jones*, and we hold that Defendant waived his Sixth Amendment confrontation right under *Steele*. The trial court did not commit plain error.

Defendant further argues that the trial court committed plain error in allowing hearsay references to the substance as cocaine. We hold that these references are not hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2011). Since the references to the substance as cocaine were made "while testifying at the trial," these references, by definition, cannot be hearsay.

Defendant next argues that the notice-and-demand statute as applied is unconstitutional under Due Process and the Sixth Amendment. He argues that both his right of confrontation and right to a jury trial were impaired. We disagree.

As to his due process argument, Defendant makes only a conclusory reference to this constitutional provision without providing authority for his argument. This argument is deemed

abandoned for failure to provide an argument and citations for this issue. N.C. R. App. P. 28(b)(6). Even so, we have not found any authority in North Carolina or elsewhere finding that notice-and-demand statutes violate Due Process.

Under *Steele*, Defendant waived his Sixth Amendment right of confrontation; thus, we reject this argument. We also hold that Defendant's right to a jury trial was not impaired by admitting the lab report. While Defendant is correct that the North Carolina Constitution guarantees a trial by jury on every essential element of the charged crime, *State v. Lewis,* 274 N.C. 438, 442, 164 S.E.2d 177, 180 (1968), Defendant failed to object to the admission of the lab report despite ample opportunity. To the extent that the lab report admitted an element of the offense, any impairment of Defendant's right to a jury trial is of his own doing.

Defendant asserts that the trial court committed plain error in admitting the out-of-court identification and in-court identification of Defendant by Detective Lackey. Defendant bases his argument in part on the Eyewitness Identification Reform Act (EIRA). We disagree.

The EIRA is inapplicable to this case. The definitions of "lineup" and "photo lineup" in N.C. Gen. Stat. § 15A-284.52(a)

(2011) contemplate that multiple individuals or multiple photos are shown to the eyewitness. In *State v. Rawls*, 207 N.C. App. 415, 421, 700 S.E.2d 112, 116-17 (2010), this Court held that the EIRA does not apply to show-ups. Here, Detective Lackey was shown a single photograph. This set of facts is not covered by the EIRA's definitions and is more akin to a show-up, to which the EIRA does not apply.

We thus turn to our case law regarding eyewitness identifications.

> In determining the admissibility of pre-trial identifications, the court first must determine whether the identification procedures were unnecessarily suggestive. If the identification procedures were unnecessarily suggestive, the court then considers whether they have created a likelihood of irreparable misidentification. This depends upon whether under the totality of circumstances surrounding the crime itself the identification possesses sufficient aspects of reliability.

*State v. Richardson*, 328 N.C. 505, 510, 402 S.E.2d 401, 404 (1991)(internal quotation marks and citations omitted). The court considers several factors in determining reliability: "1) The opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description; 4) the level of certainty demonstrated at the confrontation; and 5) the time

between the crime and the confrontation." *Id.* at 510-11, 402 S.E.2d at 404 (internal quotation marks omitted). Showing a single suspect to an eyewitness is often considered suggestive. *See State v. Watkins*, ___ N.C. App. ___, ___, 720 S.E.2d 844, 851 (2012).

Assuming *arguendo* that Officer Schuster's presentation of one photo to Detective Lackey was unnecessarily suggestive, the out-of-court identification is reliable considering the totality of the circumstances. Detective Lackey had a few minutes of face-to-face contact with Defendant. He was very attentive since he intended to arrest the seller of the drugs at a later date. Detective Lackey gave a detailed description that was communicated to patrol officers before the buy, and he confirmed the description after the buy. Shortly after the buy, he positively identified Defendant. "Since the out-of-court identification was admissible, there is no danger it impermissibly tainted the in-court identification." *State v. Lawson*, 159 N.C. App. 534, 539, 583 S.E.2d 354, 358 (2003). We hold that the trial court did not commit plain error in admitting the identifications.

Defendant contends that his constitutional rights were violated by the trial court's denial of his *Brady* motion and

subsequent admission of arrest photos and alleged testimony by an officer that he knew Defendant from "the neighborhood." We disagree. Because Defendant fails to present a legal argument regarding the alleged testimony that an officer knew Defendant from "the neighborhood" beyond noting it in an issue heading, we deem it abandoned. N.C. R. App. P. 28(b)(6).

We review the denial of a *Brady* motion *de novo*. *United States v. Caro*, 597 F.3d 608, 616 (4th Cir. 2010). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985). The defendant carries the burden of demonstrating the materiality of the undisclosed evidence and its probable effect on the verdict. *State v. Tirado*, 358 N.C. 551, 589-90, 599 S.E.2d 515, 541 (2004).

Here, the officers did not testify about prior dealings with Defendant, nor did the State try to offer any such evidence. Defendant has not demonstrated that the evidence sought was material or that it affected the outcome of the trial. The trial court properly denied the *Brady* motion.

Since Defendant argues that admitting his arrest photo arises out of the denial of the *Brady* motion and we have found no *Brady* violation, we need not consider this issue.

Defendant lastly argues that he was denied effective assistance of counsel by trial counsel's failure to object to the lab report, failure to suppress the identification, and stipulation that he was ready for trial when he was not, as evidenced by filing the *Brady* motion on the morning of trial. Defendant also argues that trial counsel committed a *Harbison* violation in that the failure to object to the lab report did not require the State to prove an essential element of the offense, and Defendant did not explicitly waive this right. We disagree.

> It is well established that 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. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004)(quoting *State v. Fair*, 354 N.C. 131, 166, 577 S.E.2d 500, 524 (2001)). The "cold record" in this case is sufficient to review Defendant's ineffective assistance of counsel claim.

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)(internal quotation marks and citations omitted).

We first consider Defendant's argument regarding the purported *Harbison* violation. In *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), the Supreme Court held that "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." Admission of one

element of the offense is not a *Harbison* violation. *State v. Fisher*, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986).

Here, to the extent failing to object to the lab report admitted an element of the offense, it is not a *Harbison* violation since, at most, only one element of each offense was admitted—that the substance possessed and sold was a controlled substance.

We now consider Defendant's other arguments regarding ineffective assistance of counsel. "Where the strategy of trial counsel is 'well within the range of professionally reasonable judgments,' the action of counsel is not constitutionally ineffective." *State v. Campbell*, 142 N.C. App. 145, 152, 541 S.E.2d 803, 807 (2001)(quoting *Strickland v. Washington*, 466 U.S. 668, 699, 80 L. Ed. 2d 674, 701 (1984)). The United States Supreme Court has noted that it is often a trial strategy *not* to object to a lab report identifying a substance as illegal drugs since there is little benefit to be gained. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328, 174 L. Ed. 2d 314 (2009). With regard to failure to suppress an eyewitness identification, an ineffective assistance of counsel claim cannot be maintained when the identification is admissible. *State v. Jones*, ___ N.C. App. ___, ___, 715 S.E.2d 896, 904 (2011).

Here, the failure to object to the lab report can be attributed to trial strategy, and we will not question trial counsel's judgment. The identifications by Detective Lackey were admissible; thus, it was proper for trial counsel not to object and not to file a motion to suppress. Defendant has failed to show that but for the agreement to proceed to trial or but for the last minute *Brady* motion in November that the result would be different. As noted above, the trial court properly denied Defendant's *Brady* motion and would have done so earlier had the motion been filed earlier. We hold that Defendant was not denied the effective assistance of counsel.

In summary, we find no error in the admission of the lab report and Detective Lackey's identifications. We find no constitutional error in the application of Section 90-95 to Defendant. We affirm the denial of the *Brady* motion. We also hold that Defendant was not denied the effective assistance of counsel.

No Error.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).