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NO. COA13-473
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Randolph County
Nos. 10 CRS 16-25

CHUCKY DENNIS SMITH

Appeal by defendant from judgments entered 8 November 2012 by Judge Craig Croom in Randolph County Superior Court. Heard in the Court of Appeals 30 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Roberta A. Ouellette, for the State.

Ryan McKaig for defendant-appellant.

HUNTER, Robert C., Judge.

A jury found defendant guilty of five counts each of possession with intent to sell or deliver cocaine and five counts of sale or delivery of cocaine. The trial court consolidated defendant's offenses into three judgments and sentenced him to three consecutive prison terms totaling 75 to 90 months. Defendant gave notice of appeal in open court.

While working with the Randolph County Sheriff's Office, confidential informant Brian Chriscoe made five controlled purchases of crack cocaine from defendant on 19 and 28 August and 3, 17, and 23 September 2009. Lieutenant David Joyce supervised Chriscoe in these transactions. On each occasion, Lt. Joyce and his fellow officers searched Chriscoe and his vehicle before providing him with $100 to buy the cocaine. After completing a purchase, Chriscoe returned to Lt. Joyce's location to be relieved of the drugs, debriefed, and paid $100 for his services. On 19 August 2009, Lt. Joyce outfitted Chriscoe with a digital audio recorder and monitored his activity through an open telephone line. On the four subsequent occasions, Chriscoe was equipped with the open phone line as well as a wide-angle digital camera mounted in his vehicle.

On appeal, defendant challenges the admission into evidence of copies of the audio and video recordings of Chriscoe's drug purchases. Defendant raised a timely objection to these exhibits on the ground of inadequate foundation. After a voir dire hearing, the trial court overruled the objection and allowed the recordings to be played for the jury. Chriscoe narrated the footage from the witness stand, explaining the

course of each transaction with defendant. The State also introduced still photographs taken from the video.

Initially, we note that defendant has failed to present the contested exhibits to this Court for review. Although the record on appeal states that "[a]ll exhibits tendered or admitted into evidence . . . are made a part of this Record on Appeal and shall be transmitted to the Clerk of the Court of Appeals . . . at the request of either party[,]" we have received no exhibits in this case. Nor is there any indication that defendant requested the transmission of these exhibits to this Court by the clerk of superior court. Therefore, we are unable to examine the evidence to determine its prejudicial impact. *See* N.C. Gen. Stat. § 15A-1443(a) (2011).

"Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements." N.C. Gen. Stat. § 8-97 (2011). To lay a proper foundation for the introduction of videotapes, a party may use:

> (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes);
>
> (2) proper testimony concerning the checking and operation of the video camera and the

> chain of evidence concerning the videotape;
>
> (3) testimony that the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing (substantive purposes); or
>
> (4) testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area photographed.

State v. Lawson, 159 N.C. App. 534, 539-40, 583 S.E.2d 354, 358 (2003) (internal quotation marks omitted). "Thus, there are 'three significant areas of inquiry' for a court 'reviewing the foundation for admissibility of a videotape: (1) whether the camera and taping system in question were properly maintained and were properly operating when the tape was made, (2) whether the videotape accurately presents the events depicted, and (3) whether there is an unbroken chain of custody.'" *State v. Cook*, __ N.C. App. __, __, 721 S.E.2d 741, 746 (quoting *State v. Mason*, 144 N.C. App. 20, 26, 550 S.E.2d 10, 15 (2001)), *appeal dismissed and disc. review denied*, 365 N.C. 563, 724 S.E.2d 917, (2012).

Lt. Joyce testified that he was familiar with the operation of the audio recorder and video camera, and that he checked the equipment on "each occasion that it was used to make sure that it was in working order[.]" He reviewed the original audio and

video recordings the day they were made and found they "fairly and accurately represent[ed]" what he had heard during the transactions via the open phone line and from Chriscoe at his debriefings. Lt. Joyce then turned the equipment over to Detective Jason Hunter or Detective Barney Maness to download the recordings. The audio was downloaded from the recorder on the day of the transaction. Lt. Joyce described the transfer of the audio file to disk as follows: "Just once we get back, it's a USB drive, plug it in the computer and download it to a disk." The camera also recorded onto an internal memory from which files could be downloaded via a USB port. Lt. Joyce explained that "Detective Hunter downloaded some of [the files] there in the office when we got back, but the bigger one[s] . . . our computer would not download[.]" Lt. Joyce gave the camera to Detective Maness to download these larger files onto DVDs. Lt. Joyce did not recall the exact day when the files were downloaded from the camera. However, he reviewed the downloaded files received from Detective Maness and found that they were "the same" as the original recordings. Neither the audio nor the video recordings were "edited in any way" prior to trial.

We hold that the State laid a proper foundation for the audio and video recordings. Lt. Joyce confirmed the equipment

was tested and found to be in working order prior to each recording. He also attested to the recordings' accuracy in depicting the events recorded, the identical nature of the original recordings and the downloaded copies, and the lack of edits made to the recordings. *See State v. Collins*, __ N.C. App. __, __, 716 S.E.2d 255, 259 (2011); *State v. Mewborn*, 131 N.C. App. 495, 498-99, 507 S.E.2d 906, 909 (1998). Although Lt. Joyce did not provide a detailed chain of custody, it sufficed to show the recordings remained in the control of a small number of persons within the sheriff's office. *See generally State v. Fleming*, 350 N.C. 109, 131, 512 S.E.2d 720, 736 (1999) ("A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. Any weak links in the chain of custody pertain only to the weight to be given to the evidence and not to its admissibility.") (citation and quotation marks omitted).

Defendant also claims the admission of the recordings violated his Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), because he was denied the opportunity to cross-examine

Detectives Hunter[1] and Maness about the downloading process. Likening the two detectives to the non-testifying forensic analysts in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 174 L. Ed. 2d 314 (2009), and *Bullcoming v. New Mexico*, __ U.S. __, 180 L. Ed. 2d 610 (2011), defendant argues that "[Lt.] Joyce was incapable of testifying to the techniques and procedures used by Detectives Maness and Hunter when they downloaded, converted, and prepared the audio and video for presentation at trial." *See generally State v. Ortiz-Zape*, __ N.C. __, __, 743 S.E.2d 156, 159-62 (2013) (summarizing case law on the admissibility of "testimonial certification[s]" and reports prepared by non-testifying experts).

Because he failed to raise this constitutional issue at trial, defendant argues that the trial court committed plain error. *See* N.C.R. App. P. 10(a)(4). However, although his brief to this Court quotes the plain error standard of review, defendant suggests that the *Crawford* violation requires us to reverse his convictions unless the State demonstrates that it was harmless beyond a reasonable doubt. We disagree. "[D]efendant's failure to object at trial and properly preserve the constitutional issue for appeal requires us to review this

[1]We note that Detective Hunter did testify and submit to cross-examination at trial.

potential constitutional error under the plain error standard of review, *not the constitutional error standard . . . .*" *State v. Lemons*, 352 N.C. 87, 95, 530 S.E.2d 542, 547 (2000) (emphasis added). To establish plain error, defendant must show a "fundamental" error having "a probable impact on the jury's finding that [he] was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted).

We find no merit to defendant's *Crawford* claim and thus no plain error by the trial court. Unlike the non-testifying analysts in *Melendez-Diaz* and *Bullcoming*, Detectives Hunter and Maness did not in any manner evaluate or certify the downloaded recordings. *See Bullcoming*, __ U.S. at __, 180 L. Ed. 2d at 616-17; *Melendez-Diaz*, 557 U.S. at 311, 174 L. Ed. 2d at 321-22. They thus proffered no information that could be deemed "testimonial" under *Crawford*. *See generally State v. Lawson*, 173 N.C. App. 270, 275-76, 619 S.E.2d 410, 413-14 (2005) (concluding that non-testimonial statements do not implicate *Crawford* or the Confrontation Clause). Moreover, Lt. Joyce presented not "surrogate testimony" for the detectives, *Bullcoming*, __ U.S. at __, 180 L. Ed. 2d at 616, but his own independent assessment of the recordings and the downloaded

copies. Inasmuch as the mere act of downloading a digital file was not a testimonial statement, neither *Crawford* nor defendant's Sixth Amendment right to confrontation was implicated.

No error.

Judges BRYANT and McCULLOUGH concur.

Report per Rule 30(e).