An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-362

Filed: 1 November 2016

Randolph County, Nos. 13 CRS 50415-18

STATE OF NORTH CAROLINA

v.

EDWARD ROY FRYE

Appeal by defendant from judgments entered 17 September 2015 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 8 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Terence D. Friedman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

McCULLOUGH, Judge.

Edward Roy Frye ("defendant") appeals from judgments entered upon his convictions of trafficking by selling 14 grams or more but less than 28 grams of Vicodin, an opium derivative, trafficking by possessing 14 grams or more but less than 28 grams of Vicodin, an opium derivative, trafficking by selling 28 grams or more of hydrocodone, an opium derivative, and trafficking by possessing 28 grams or more of hydrocodone, an opium derivative. On appeal, defendant argues that the

trial court erred by failing to give a requested jury instruction on a lesser-included offense and by admitting certain testimony from the State's expert witness. Defendant also contends that he is entitled to a new sentencing hearing. Based on the reasons stated herein, we hold no error in part and vacate and remand in part.

I. Background

On 8 September 2014, defendant was indicted for the following four counts in violation of N.C. Gen. Stat. § 90-95(h): (1) trafficking by selling 14 grams or more but less than 28 grams of Vicodin, an opium derivative; (2) trafficking by possessing 14 grams or more but less than 28 grams of Vicodin, an opium derivative; (3) trafficking by selling 28 grams or more of hydrocodone, an opium derivative; and (4) trafficking by possessing 28 grams or more of hydrocodone, an opium derivative.

Defendant's trial commenced at the 14 September 2015 criminal session of Randolph County Superior Court, the Honorable Vance Bradford Long presiding. The evidence at trial tended to show as follows: Detective Tony Cugino ("Detective Cugino") of the Archdale City Police Department testified that he arranged for a confidential informant, David Cue ("Mr. Cue"), to purchase pills from defendant. Mr. Cue had negotiated the sale and delivery of thirty-four Vicodin pills prior to the meeting. On 13 June 2012, Mr. Cue purchased thirty-four pills from defendant for $102.00 at a bank in Archdale, North Carolina. Detective Cugino observed defendant and took photographs of him during the transaction. Detective Cugino testified that

the thirty-four pills appeared to be pharmaceutically manufactured, white tablets with the inscription of "M360."

Detective Derek Bostic ("Detective Bostic") with the High Point Police Department testified that Detective Cugino contacted him regarding conducting an undercover officer purchase of narcotics from defendant. The plan was for Detective Bostic and Mr. Cue to meet with defendant on 3 August 2012 in order to purchase Vicodin. On 3 August 2012, Detective Bostic and Mr. Cue met defendant in the parking lot of a Rite Aid and Detective Bostic purchased sixty pills from defendant in exchange for $180.00. Defendant told Detective Bostic to call him again because he would get about one hundred pills a month. The sixty pills were white and inscribed with "Watson 387."

The State tendered, without objection from defendant, Meredith Lisle ("Ms. Lisle") as an expert in the field of forensic drug chemistry. Both batches of pills were submitted to Ms. Lisle for testing. Ms. Lisle testified that the first batch containing thirty-four tablets were white, marked with the letter "M" and the number "360." Based upon a visual examination, they were uniform in shape, size, color, and markings. Ms. Lisle looked up the tablet markings in a database called "Micromedex." The database revealed that the marking "M360" corresponded to a tablet comprised of 7.5 milligrams of hydrocodone and 750 milligrams of acetaminophen. Next, Ms. Lisle randomly selected one tablet and performed a

chemical analysis on it to confirm that the tablet marking matched the chemical composition of the tablet. Ms. Lisle performed two different types of instrumental analysis: infrared spectroscopy and gas chromatography mass spectrometry. Ms. Lisle opined that the tablet contained hydrocodone and that it weighed 0.96 grams. The remaining tablets that were visually inspected had a total weight of 31.61 grams.

On *voir dire*, Ms. Lisle testified that she was familiar with the Administrative Procedure for Sampling ("APS") used by the Drug Chemistry Section of the North Carolina State Crime Laboratory. In accordance with the APS, Ms. Lisle utilized the procedure that applies to pharmaceutical tablets, the administrative sample selection, to both batches of pills. The version of the APS in effect at the time of Ms. Lisle's testing was submitted into evidence as Court's Exhibit 1. The definition of "Administrative Sample Selection" in the APS is "[a] practice for pharmaceutical preparations and for items when a statutory threshold does not apply. No inferences about unanalyzed material are made." The administrative sample selection provided that "[t]he complete analysis of one indiscriminately selected unit is required." Ms. Lisle testified that she indiscriminately selected one tablet from each batch. In addition, the administrative sample selection provided that if an opiate is confirmed, the analyzed portion:

> shall be identified in the "Results of Examination" section of the Laboratory Report with the statements "One tablet was analyzed and found to contain" followed by the results of the analysis and the statement "Net weight of tablet (or

> other description) – (insert weight of the analyzed portion with applicable measurement assurance).

If an opiate was confirmed, the unanalyzed portion of the population:

> shall be identified in the "Results of Examination" section of the Laboratory Report with the statement "(insert number of packages, units or tablets) (was/were) visually examined; however, no chemical analysis was performed." Followed by the statement "Net weight of tablets (or other description) – (insert weight of that portion, with applicable measurement assurance)." The statement "The physical characteristics, including shape, color and manufacturer's markings of all units were visually examined and found to be consistent with a pharmaceutical preparation containing (insert substance(s) indicated). There were no visual indications of tampering." shall be included in the "Results of Examination" section of the Laboratory Report[.]

Following *voir dire*, Ms. Lisle testified that the tablets that were visually inspected were consistent in terms of size, shape, color, and markings with the one tablet that was chemically analyzed. She believed that if she were to randomly select another tablet, she "would get the same results."

Next, Ms. Lisle testified that the batch of sixty tablets were also visually inspected. They were uniform in size, shape, and color and appeared to be pharmaceutical grade pills containing the marking "Watson 387." She utilized the Micromedex database and preliminarily determined that they were hydrocodone tablets mixed with acetaminophen. Ms. Lisle then randomly selected one tablet and performed a chemical analysis to confirm that the tablet markings were consistent

with the actual composition of the tablet. In this case, she employed the infrared spectroscopy. Ms. Lisle determined that the tablet was hydrocodone and that it weighed 0.90 grams. The fifty-nine remaining tablets weighed 53.76 grams. Ms. Lisle testified that the fifty-nine tablets that were visually inspected were consistent with the one tablet of hydrocodone. Furthermore, Ms. Lisle testified that she believed that she proceeded according to the administrative sample selection protocol.

On 17 September 2015, a jury found defendant guilty on all charges. Defendant was sentenced as a prior record level III to two terms of 90 to 120 months and two terms of 225 to 282 months, to run concurrently.

Defendant appeals.

II. Discussion

First, defendant argues that the trial court erred by failing to instruct the jury on the lesser-included offenses of possession and sale of opium where there was a conflict in the evidence as to the weight of the controlled substances at issue. Specifically, defendant argues that because Ms. Lisle testified that she only chemically analyzed one tablet containing hydrocodone from the first batch, weighing 0.96 grams, and one tablet containing hydrocodone from the second batch, weighing 0.90 grams, the statutory threshold for his trafficking charges were not met. In addition, defendant maintains that because the APS notes in its definition of the

administrative sample selection that "[n]o inferences about unanalyzed material are made[,]" there is a prohibition of inferences about chemically unanalyzed material.

In his second issue on appeal, defendant argues that the trial court erred by admitting testimony from Ms. Lisle which required inferences of pills that were not chemically analyzed. Defendant challenges the testimony from Ms. Lisle that she believed if she were to randomly select another tablet that was visually inspected, and have it chemically analyzed, she "would get the same results." Defendant contends that this testimony was in contravention of the APS and therefore, amounted to a violation of Rule 702 of the North Carolina Rules of Evidence.

Our holding on these two issues is controlled by this Court's recent opinion in *State v. Hunt*, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2016) (No. 16-143). In *Hunt*, the defendant was found guilty of trafficking by possessing more than 4 but less than 14 grams of opium in violation of N.C. Gen. Stat. § 90-95(h)(4)(a). At trial, the State's expert witness in forensic drug chemistry testified that pursuant to the APS, he elected to use the administrative sample selection on pills found on the defendant's person. *Id.* at __, __ S.E.2d at __. He testified that he visually inspected the shape, color, texture, and manufacturer's markings on all the pills and compared them to the Micromedex database. *Id.* at __, __ S.E.2d at __. The expert witness then divided the pills into four separate categories based on their physical characteristics and chemically analyzed one pill from each group. Each chemically analyzed pill tested

positive for oxycodone. *Id.* at __, __ S.E.2d at __. The expert witness testified that the combined weight of all the pills seized from the defendant exceeded 4 grams. *Id.* at __, __ S.E.2d at __. As to the non-chemically analyzed pills, the expert witness testified that they were visually examined and found to be consistent with the pharmaceutical preparation containing oxycodone. *Id.* at __, __ S.E.2d at __.

On appeal, the defendant first challenged the testimony of the expert witness that the tablets contained over 4 grams of opium. The defendant contended that because the APS prevented inferences about unanalyzed material, and because the expert witness only performed a chemical analysis of three pills, the jury should have received the instruction on the lesser-included offense of possession of opium. *Id.* at __, __ S.E.2d at __. Our Court held that the expert witness was not required to chemically analyze each individual tablet and that his sample was "sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *Id.* at __, __ S.E.2d at __ (citing *State v. Lewis*, __ N.C. App. __, 779 S.E.2d 147 (2015), *disc rev. denied*, 368 N.C. 688, 781 S.E.2d 480 (2016)). "Because he confirmed that he visually analyzed the remaining pills and determined that they were similar to the chemically analyzed pills, [the expert witness] satisfied the State's evidentiary burden of establishing the quantity of opium in the pills." *Id.* at __, __ S.E.2d at __. Our Court further held that any deviation that the expert witness might have taken from the administrative sample selection went to the weight of his

testimony and not its admissibility. *Id.* at __, __ S.E.2d at __. Accordingly, the defendant's argument that the trial court erred by failing to instruct the jury on the lesser-included offense was overruled.

In an alternative argument, the defendant maintained that the trial court erred by admitting the expert witness' testimony which required inferences expressly prohibited under the APS, contravening Rule 702(a) of the North Carolina Rules of Evidence. *Id.* at __, __ S.E.2d at __. Applying the General Assembly's amendment to Rule 702, adopting the federal standard for the admission of expert witness testimony articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), our Court held that the expert witness' testimony was based upon sufficient facts or data, the expert witness' testimony was the product of reliable principles and methods, and that the expert witness applied the principles and methods reliably to the facts of the case. *Id.* at __, __ S.E.2d at __. As such, the trial court did not abuse its discretion in admitting the challenged testimony.

The circumstances and issues of the case *sub judice* are essentially identical to those found in *Hunt*. This Court is bound by our prior decision. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Accordingly, we hold that the trial court did not err by failing to instruct the

jury on the lesser-included offense of possession of a controlled substance and that the trial court did not abuse its discretion in admitting the challenged testimony of Ms. Lisle.

In his last issue on appeal, defendant argues, and the State concedes, that he is entitled to a new sentencing hearing. Defendant was charged with trafficking by possession and sale of 14 grams or more but less than 28 grams of Vicodin, an opium derivative, with offense dates of 13 June 2012. At that time N.C. Gen. Stat. § 90-95(h)(4)(b) (2011) provided that a defendant convicted of this offense "shall be sentenced to a minimum term of 90 months and a maximum term of 117 months[.]" Defendant was also charged with trafficking by possession and sale of 28 grams or more of hydrocodone, an opium derivative, with offense dates of 3 August 2012. At that time, N.C. Gen. Stat. § 90-95(h)(4)(c) (2011) provided that a defendant convicted of this offense "shall be sentenced to a minimum term of 225 months and a maximum term of 279 months."

On 17 September 2015, the trial court sentenced defendant to two concurrent terms of 90 to 120 months and two concurrent terms of 225 to 282 months. At the time of sentencing, N.C. Gen. Stat. §§ 90-95(h)(4)(b) and (c) had been amended and provided for maximum terms of 120 months and 282 months, respectively. However, these amendments only applied to offenses that were committed on or after 1 December 2012. *See* 2012 N.C. Sess. Laws 188, §§ 5, 8.

Because "[t]rial courts are required to enter criminal judgments in compliance with the sentencing provisions in effect at the time of the offense[,]" we vacate defendant's judgments and remand for resentencing. *State v. Whitehead*, 365 N.C. 444, 447, 722 S.E.2d 492, 495 (2012) (citation omitted).

III. Conclusion

NO ERROR IN PART; VACATE AND REMAND IN PART.

Judges HUNTER, JR. and DIETZ concur.

Report per Rule 30(e).