IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-560

Filed: 7 April 2020

Alamance County, Nos. 17 CRS 52048-49, 18 CRS 610,

STATE OF NORTH CAROLINA

v.

DEVANDA CARLET BOONE, Defendant.

Appeal by defendant from judgments entered 25 May 2018 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Richard Bradford, for the State.

Joseph P. Lattimore for defendant-appellant.

YOUNG, Judge.

Where the State's expert testified as to the foundation of his testimony, the trial court did not err in admitting it. Where defendant cites no evidence that would permit the jury to acquit her of trafficking in heroin and convict her of possession of heroin, the trial court did not commit plain error in declining to instruct the jury on the latter, lesser-included offense. We find no plain error.

I. Factual and Procedural Background

On 25 April 2017, law enforcement officers were engaged in a multi-agency operation designed to combat drug activity in Alamance County. An investigation into the possible sale of drugs revealed the name and phone number of Devanda Carlet Boone (defendant). Officers had an informant contact the drug dealer, believed to be defendant, to place an order for heroin. In a second call, the dealer claimed that she would have to stop at her house to get additional heroin to consummate the transaction. Officers arrived at the meeting place for the transaction, and conducted surveillance of the vehicle believed to be involved. Because the vehicle had incorrect vehicle tags, officers conducted a lawful stop of the vehicle, which was driven by defendant. Defendant kept her mouth closed while speaking to officers, who asked her to exit the vehicle and open her mouth. When defendant was forced to open her mouth, two small bags fell out. Officers' ability to field test the bags was hampered by the fact that they were saturated with defendant's saliva, but defendant eventually conceded that the bags contained "dope." Officers also seized $426 in cash from defendant.

Officers conducted a search of defendant's home, pursuant to warrant, and discovered "a large quantity of what was suspected to be heroin that was bundled up . . . to make like a small brick." Multiple additional "bricks" were also recovered. Officers discovered other bundles of drugs elsewhere in the home, as well as a

quantity of marijuana in the kitchen. A forensic chemist for the North Carolina State Crime Laboratory tested the unknown substances and determined that they contained heroin and fentanyl, and calculated that the total weight of these drugs was 4.3655 grams.

Defendant was indicted for trafficking in opium or heroin, altering or destroying evidence, maintaining a dwelling for using, keeping, or selling controlled substances, possession of marijuana, and possession of heroin with intent to sell or deliver. The State dismissed the charge of maintaining a dwelling. At trial, the jury returned verdicts finding defendant guilty of the remaining four charges. The trial court sentenced defendant to a minimum of 70 and a maximum of 93 months for trafficking in heroin, to be served in the custody of the North Carolina Department of Adult Correction. The trial court further consolidated the charges of possession of heroin with intent to sell or deliver and alteration or destruction of evidence, and imposed a suspended sentence of 24 months of supervised probation, to begin at the conclusion of defendant's sentence on the trafficking charge.

Defendant appeals.

II. Standard of Review

> 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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

III. Opinion Testimony

In her first and second arguments, defendant contends that the trial court committed plain error in its admission of opinion testimony. We disagree.

At trial, the State introduced the testimony of Dr. Nathan Perron (Dr. Perron), a "Forensic Scientist II in the field of drug chemistry" employed by the North Carolina State Crime Laboratory. Dr. Perron testified as to how he tested the unknown substances in the case, how he designated samples to be tested, how he calculated the overall weight of the substances based on his samples, and so forth. Defendant objected to him being admitted as an expert in the field of "hyper geometric sampling plan[,]" but did not otherwise object to him being admitted as an expert. Dr. Perron proceeded to testify as to his use of a GCMS machine to analyze the samples he took,

without objection. On appeal, defendant challenges the foundation of Dr. Perron's testimony with respect to the GCMS machine, as well as Dr. Perron's calculation of the net weight of the substances at issue using a hyper geometric sampling plan. Because defendant failed to raise any objection to this testimony at trial, we review these arguments for plain error.

With regard to the GCMS machine, defendant concedes that Dr. Perron briefly explained how the machine operated, what its purpose was, and that its use was widely accepted in his field. However, defendant contends that Dr. Perron "simply stated" that the machine confirmed the presence of both controlled and non-controlled substances, and that Dr. Perron identified heroin and fentanyl. Defendant contends that "Dr. Perron gave this opinion without providing any details regarding his analysis of the machine's data, and how that analysis determined the identity of the individual components[,]" and that as such, this testimony lacked a proper foundation.

To support her position, defendant relies on this Court's decision in *State v. McPhaul*, ___ N.C. App. ___, 808 S.E.2d 294 (2017). In *McPhaul*, the State presented the testimony of an expert regarding latent fingerprints which matched the defendant's. The expert explained her background and the nature of fingerprint identification, and while the defendant did not object to her as an expert witness, the

defendant did challenge the foundation of her testimony, and renewed those challenges on appeal. Specifically, this Court noted that the expert

> testified that she uses the same examination technique as is commonly used in the field of latent print identification, and she employed this procedure while conducting her examination in this case. However, when [the expert] testified to her ultimate conclusions, she was unable to establish that she reliably applied the procedure to the facts of this case[.]

Id. at ___, 808 S.E.2d at 304. We held that "[t]o satisfy Rule 702's three-pronged reliability test, an expert witness must be able to explain not only the abstract methodology underlying the witness' opinion, but also that the witness reliably applied that methodology to the facts of the case." *Id*. at ___, 808 S.E.2d at 305. We held that, although the expert testified as to her usual methods, she did not explicitly state whether she used them *in that case*, and as such the jury was forced to simply take her word as to the fingerprint identification. We therefore held that the trial court "abused its discretion by admitting this testimony." *Id*.

The instant case, however, is distinguishable from *McPhaul*. First of all, unlike the defendant in *McPhaul*, defendant in the instant case did not preserve this issue via timely objection, so our standard of review differs from that used in *McPhaul*. Second, unlike the expert in *McPhaul*, Dr. Perron testified as to the specific methodology he applied *in this case*. In response to the State's inquiry as to what he does typically, Dr. Perron responded:

> Okay. So I take them out individually. Remove the material from the bag itself. Put it on my scale. Weigh it and then record that net weight. At that point, I start my chemical analysis, which includes color tests. Sometimes includes an infrared spectrum.
>
> *And then in this case*, the majority of the samples went on an instrument called the GCMS, which is an instrument that separates out components of a mixture into their individual components and can identify them as they come off the instrument individually.

(Emphasis added.) His testimony continued:

> Q. Did you perform the GCMS machine test with all of the bindles that you analyzed *in this case*?
>
> A. Yes.

(Emphasis added.) The State later asked again:

> Q. Did the GCMS machine appear to be operative in its normal capacity when you were analyzing the substances *in this case*?
>
> A. Yes.

It is therefore clear, notwithstanding defendant's argument, that not only did Dr. Perron explain the function of the GCMS machine, he further testified that he properly employed it *in this case*. This is distinguishable from *McPhaul*, in which this Court held that the failure to show that the expert applied accepted principles *in that case* was an abuse of discretion. As such, we hold that the State properly established the foundation for Dr. Perron's testimony concerning the GCMS machine, and it was not plain error for the trial court to admit that testimony.

With regard to Dr. Perron's calculation of weight via hyper geometric sampling plan, Dr. Perron testified that, rather than sampling and weighing every bag found by officers, he took a representative sample, established the weight of controlled substances in that sample, and then extrapolated that the total weight of controlled substances amounted to 4.3655 grams. Defendant contends that the State did not meet its burden of demonstrating the reliability of Dr. Perron's methodology for reaching that number.

In support of her position, defendant cites *State v. Meadows*, 201 N.C. App. 707, 687 S.E.2d 305 (2010). In *Meadows*, an officer testified, over objection, that he used the "NarTest" machine to analyze controlled substances. On appeal, this Court noted that the officer "did not testify as to the reliability of the NarTest machine beyond his own experience with it; in other words, [the officer] did not testify about the methodology used by the NarTest machine to perform its analysis, but only about how it is used." *Id.* at 709, 687 S.E.2d at 307. We further noted that we were

> not aware of any cases in which the NarTest machine has been recognized as an accepted method of analysis or identification of controlled substances in North Carolina or in any other jurisdiction in the United States. We therefore cannot base any conclusions as to reliability of the NarTest machine upon [the officer]'s testimony or judicial notice.

Id. We also noted that the State did not present evidence of the reliability of the machine, or describe how it worked, and therefore concluded that the testimony failed to establish a sufficiently reliable method of proof. *Id.* at 712, 687 S.E.2d at 309.

Once again, however, the instant case is easily distinguished. *Meadows* concerned the use of a machine, the reliability of which was unproven and the mechanics of which were unexplained. In the instant case, Dr. Perron explained the mathematical basis for his sampling method. He explained the number of bags tested, the calculations he made based on those tests, how he determined how many bags he would test based on his calculations, and how he extrapolated the values he found to cover the untested bags. Moreover, Dr. Perron was specifically asked about the reliability of his method:

> Q. Okay. And do you use -- you aware of whether the hyper geometric sampling plan that you use, whether that method is used throughout the forensic science industry?
>
> A. Yes, it is. It's been adopted globally actually by the United Nations office on drugs and crime, the European -- forget what the acronym is here. If you give me just a second I can find it
>
> The European Network of Forensic Science Institutes, so that would be the ENFSI and the United Nations Office on Drugs and Crimes, UNODC. Also adopted at a federal level as well as by the DEA. And it's become our official policy and procedure at the North Carolina State Crime Lab as well.
>
> Q. How long has it been the policy of the North Carolina State Crime Lab to use hyper geometric sampling plans for certain analyses?
>
> A. I'm not sure of the exact time frame but as long as I've been at the lab that's been the official policy.

It is therefore clear not only that the State presented evidence that the method applied was a reliable one, but that Dr. Perron explained how he applied the method to reach his conclusion. Notwithstanding defendant's arguments, the State clearly met its evidentiary burden in establishing the reliability, and by extension the foundation, of Dr. Perron's testimony concerning his calculation of the weight of the controlled substances at issue. Accordingly, we hold that the trial court did not commit plain error in admitting this evidence.

IV. Lesser-Included Offense

In her third argument, defendant contends that the trial court committed plain error in failing to instruct the jury on the lesser offense of possession of heroin. We disagree.

Defendant was charged with trafficking in heroin. A lesser-included offense of trafficking in heroin is possession of heroin. Defendant concedes that she did not object to the jury instruction at trial, but nonetheless contends that it was plain error for the trial court to decline to instruct the jury on the lesser offense of possession of heroin.

As a minor quibble, it is worth noting that the trial court *did* instruct the jury on the lesser offense of possession of heroin, but not as a lesser offense of trafficking in heroin. Rather, the trial court instructed the jury on possession of heroin as a lesser-included offense of possession of heroin with intent to sell or deliver. The jury

explicitly declined to find defendant guilty of possession of heroin, instead convicting her of the greater charge of possession with intent to sell or deliver. However, this concern is relatively minor, as compared to the true problem confronted by defendant's argument.

During the charge conference, the trial court asked counsel for both sides about the charge of trafficking in heroin. The court specifically asked both sides for suggestions as to how to modify the pattern instruction. Defense counsel, when prompted, suggested that, in reference to the amount of heroin, the trial court should reference the minimum threshold of four grams, but not reference any maximum threshold. The court assented to the suggestion. Defense counsel also challenged an instruction on constructive possession, which the court agreed to omit.

This is not merely an instance of a defendant failing to object to an instruction. In this case, defendant was actively engaged in shaping the instruction on the charge of trafficking in heroin. Our Supreme Court has consistently held that, where a defendant was no mere observer, but actively involved in the drafting of jury instructions, any objection to those instructions was waived, as any error was invited error. *See State v. Thompson*, 359 N.C. 77, 104, 604 S.E.2d 850, 870 (2004) (where defendant amended proposed instructions, he invited any error in the court's refusal to give those instructions, and his argument was overruled); *State v. Wilkinson*, 344 N.C. 198, 214, 474 S.E.2d 375, 383 (1996) (where defendant requested an instruction,

his argument as to the specific wording thereof was invited error, and his argument was overruled); *State v. McPhail*, 329 N.C. 636, 643-44, 406 S.E.2d 591, 596 (1991) (where defendant requested an instruction, any error resulting from that instruction was invited error, and his argument was overruled). In the instant case, defendant was actively involved in constructing the jury instruction on the charge of trafficking in heroin; at any point, she could have requested the lesser-included instruction she now contends was erroneously omitted, but she declined to do so. This was therefore invited error, and defendant's argument is overruled.

Even assuming *arguendo* that this was not invited error, defendant fails to show there was an evidentiary basis for a lesser-included instruction. "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). Thus, defendant must show, not that the evidence did not support the instruction given, but that it would have supported an instruction on a lesser offense.

Defendant contends that the difference between the trafficking charge and the possession charge was the quantity of heroin, and that Dr. Perron's testimony was such as to raise a question as to precisely how much heroin defendant possessed. Accordingly, defendant contends, given that the quantity was in dispute, a lesser-included offense was supported by the evidence.

Notwithstanding defendant's contentions, however, the quantity of heroin is not actually in dispute. Or rather, there is no dispute between multiple possible quantities. Instead, defendant's argument merely raises the question of whether Dr. Perron's testimony was reliable. Defendant does not, for example, suggest that there was evidence that defendant possessed merely one gram, as opposed to more than four, of heroin.

The only evidence of the quantity of heroin in this case was Dr. Perron's testimony that it exceeded four grams. If the jury did not believe this testimony, it would not be permitted to convict defendant of possession of a lesser amount; the proper outcome would be to find defendant not guilty of trafficking, due to the State's failure to prove defendant's possession of more than four grams. As defendant cannot cite any affirmative evidence that defendant possessed fewer than four grams, defendant has failed to demonstrate that "the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit [her] of the greater." Accordingly, we hold that the trial court did not commit plain error in declining to instruct the jury on the lesser included offense of possession of heroin.

NO PLAIN ERROR.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).