IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-607

No. COA20-591

Filed 2 November 2021

New Hanover County, No. 18 CRS 56870

STATE OF NORTH CAROLINA,

v.

MONTEZ GIBBS, Defendant.

Appeal by Defendant from judgment entered 24 September 2019 by Judge Joshua W. Willey, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Appellant Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Montez Gibbs ("Defendant") appeals from convictions of possession with intent to sell or deliver fentanyl; trafficking by possession of an opiate; possession of drug paraphernalia; and resisting, obstructing, and delaying a public officer. On appeal, Defendant contends the trial court erred in allowing an expert to testify that fentanyl was an opiate and in denying his motion to dismiss the charge

of resisting, delaying, or obstructing a public officer. After careful review, we find no error in part and reverse the judgment of the trial court in part.

I. Factual and Procedural History

¶ 2 On April 7, 2018, Officer Carlton Wells ("Officer Wells") of the Wilmington Police Department and Deputy Brandon Gueiss ("Deputy Gueiss") (collectively, the "Officers") of the New Hanover County Sherriff's Department were patrolling a known high crime neighborhood when they observed Defendant carrying a backpack and walking quickly through the neighborhood at approximately 11:26 p.m. Defendant walked up to a house and knocked on the door, but no one answered. The Officers "had a hunch that illegal activity may be occurring."

¶ 3 Deputy Gueiss approached Defendant and asked for his identification. Defendant did not offer his identification, but stated his name was "Kevin Mosely." Deputy Gueiss radioed the name given by Defendant and Defendant's description to Officer Wells. Officer Wells "attempted to search the in-car computer for a subject of that name and date of birth," but not find anyone with the name "Kevin Mosely" matching the description given by Deputy Gueiss.[1] As a result, Officer Wells believed Defendant had given a false name.

¶ 4 Officer Wells approached Deputy Gueiss and Defendant. Defendant told the

[1] Officer Wells testified he searched for "Kevin Mosely" in the Wilmington Police Department's local record database and limited his search to Wilmington, North Carolina.

Officers that he was "[t]rying to go to his girl's house." Defendant placed his backpack on the ground, pulled out a cellphone, and began talking to someone. Defendant purportedly told someone over the phone, "I'm at your front door, back door, one of the two," and asked the person to open the door.

¶ 5 Officer Wells testified he "had reasonable suspicion to believe that something – a crime was either being committed or about to be committed." Officer Wells explained his suspicion arose because Defendant "was in a high crime area late at night knocking on a door and not gaining access to the door." Deputy Gueiss asked Defendant for his identification a second time. Without responding, Defendant began walking away from the officers, threw his hands in the air and said, "I got my hands up." Defendant then ran when Deputy Gueiss attempted to detain him.

¶ 6 The Officers gave chase but quickly lost sight of Defendant. The Officers returned to Defendant's backpack, and Deputy Gueiss "noticed what appeared to be a controlled substance." At trial, Officer Wells testified, "it was a white powdery substance . . . . [Officers] were speculating it might have been cocaine." The Officers took the backpack to the police station, where they found identification cards and pieces of mail with Defendant's name inside. The Officers requested the substance in Defendant's backpack be tested for the presence of a controlled substance.

¶ 7 Jennifer West ("West"), a forensic chemist at the State Crime Lab, tested the substance recovered from Defendant's backpack. The analysis identified the

substance as fentanyl, a Schedule II controlled substance, with a measured weight of 11.96 grams. On January 14, 2019, Defendant was indicted for two counts of resisting, obstructing, or delaying a public officer; one count of trafficking opiates by possession; one count of possession with intent to sell or distribute a Schedule II controlled substance; and one count of possession of drug paraphernalia.

¶ 8 During discovery, the State tendered West's lab report detailing the testing performed on the white powdery substance found in Defendant's backpack. The lab report concluded that the substance found was fentanyl, without classifying fentanyl as either an opioid or opiate. The State also provided notice that West may be called to testify at trial and a copy of West's statement of qualifications to opposing counsel. West held a master's degree in chemistry, had passed the American Board of Criminalistics Certification exam, and had worked for the State Crime Lab for fifteen years.

¶ 9 On September 18, 2019, Defendant's trial began. Before conducting jury selection, the State sought an "advisory ruling" on an issue "that could affect . . . whether the case goes to trial." The prosecutor specifically sought clarification as to whether fentanyl was an opioid or whether fentanyl would qualify as an opiate. At the time, N.C. Gen. Stat. § 90-95(h)(4) (2018) criminalized trafficking in "opium or opiates," as well as their derivatives. The statute did not mention "opioids." Thus, the State sought clarification on whether trafficking in fentanyl was criminalized

under Section 90-95(h)(4). The trial court declined to give an advisory ruling at the time. Agreeing with defense counsel's argument, the trial court decided that whether trafficking in fentanyl was prohibited at the time would be determined by the expert's testimony.

¶ 10 During trial, the State offered the testimony of the Officers and West. During West's testimony, the prosecutor inquired about West's credentials, job title, and job responsibilities. The prosecutor then asked, "Is fentanyl an opiate?" Defense counsel objected, arguing a lack of notice that West would testify that fentanyl was an opiate. The jury was excused, and the trial court heard arguments of counsel. Defense counsel conceded he received West's curriculum vitae and lab report. However, defense counsel asserted he lacked the underlying basis for West's opinion that fentanyl was an opiate and that he was unaware West's testimony would be "getting into neuropharmacology mechanisms of the brain, things like that." Defense counsel further argued that the disclosure of West's curriculum vitae is "not a disclosure of the scope of her testimony." Thereafter, the parties conducted *voir dire*.

¶ 11 During *voir dire*, West discussed the differences between opium, opioids, and opiates. Specifically, West testified, "directly out of the opium poppy, you can get five substances . . . . [T]here's morphine, codeine, thebaine, papaverine, and noscapine." West further testified, "[O]pium derivatives were things that could be produced from the substances that came from the opium poppy; example, heroin is made from

morphine."

¶ 12 With respect to opiates, West stated, "Opiate originally was supposed to be defined as substances that mimic the effects; i.e. Addiction, hit the same receptors, things such as that . . . . [T]hat was your fentanyl, and that was your meperidine." According to West, "[these] substances hit the same receptors but did not have the same structure as the opium or opium derivatives." However, when asked whether "fentanyl is . . . an opiate derivative," West stated, "It's not a derivative. . . . [Fentanyl is] not an opiate derivative," and "[i]ts not an opium derivative." West further testified that she would classify fentanyl as an opiate. Specifically, West testified, "I don't think it's incorrect to classify it as an opiate."

¶ 13 The prosecutor then read the definition of "opiate" under N.C. Gen. Stat. § 90-87(18) as "[a]ny substance having addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability." Although West testified, "[She] didn't have specifics about" the addictive properties or the receptor sites that opiates or certain compounds are shown to attack, and she had "a general overview of that type of thing," the trial court ultimately ruled that Defendant received adequate notice of West's testimony and that West was qualified to offer such testimony. The trial court specifically stated, "[T]he court's ruling [is] that this notice was adequate to give notice the proposed witness would testify. As to the results of her testing, it was

fentanyl, Schedule II controlled substance, and her opinion as to whether or not the substance was an opiate." West subsequently testified that fentanyl was both an opioid and opiate, but "[i]n this particular instance, fentanyl is considered an opiate."

¶ 14 At the close of the State's evidence, Defendant made "a general motion" to dismiss the action, before arguing the State failed to present sufficient evidence of possession; failed to "present[] evidence that [fentanyl is] an opiate"; and failed to demonstrate Defendant resisted, obstructed, or delayed a public officer because "this was not a lawful arrest." The trial court granted Defendant's motion with respect to one charge of resisting, obstructing, or delaying a public officer for Defendant's act of "flee[ing] from the officer by foot after being ordered to stop"; and denied Defendant's motion to dismiss the remaining charges. Thereafter, Defendant presented his evidence and subsequently renewed his motion to dismiss. Defendant's motion to dismiss was denied. Defendant was convicted of resisting, delaying, or obstructing a public officer; trafficking by possession in opiates; possession with intent to sell or deliver fentanyl; and possession of drug paraphernalia. The trial court consolidated the judgments and sentenced Defendant to a minimum of seventy months, maximum of ninety-three months incarceration. Defendant timely appealed.

II. Discussion

¶ 15 Defendant raises several arguments on appeal. Each will be addressed in turn.

A. Expert Testimony

¶ 16 Defendant raises three arguments with respect to West's testimony. Specifically, Defendant contends the trial court abused its discretion by ruling West was qualified to testify fentanyl was an opiate; the trial court erred in "ruling the State did not violate the discovery statutes by failing to disclose that [West] would testify fentanyl was an opiate"; and the trial court plainly erred by allowing West to testify fentanyl was an opiate "where her opinion was unreliable."

¶ 17 Generally, "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005) (citation omitted). A "trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citation omitted).

¶ 18 Rule 702(a) of the North Carolina Rules of Evidence provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion." N.C. R. Evid. 702. To qualify as an expert witness, "a witness

need only be found 'better qualified than the jury as to the subject at hand, with the testimony being 'helpful' to the jury.' " *State v. Hall*, 186 N.C. App. 267, 272, 650 S.E.2d 666, 669 (2007) (quoting *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992) (citations omitted)).

¶ 19 In the present appeal, West held a master's degree in chemistry; passed the American Board of Criminalistics Certification exam; and worked for the State Crime Lab for approximately fifteen years. During *voir dire*, the trial court heard West testify that she attended at least three recent trainings on opiates, that "were specific to opioid deaths and opioid addictions and things such as that." West further testified that her training included conferences and classes "that talk about addiction[] and medical use." In West's opinion, fentanyl met the definition of opiate[2] in N.C. Gen. Stat. § 90-87(18), as "any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability."

¶ 20 However, West conceded "a lot of the training is not specific to certain

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[2] This Court recently addressed whether it was unlawful to possess or traffic in fentanyl in 2018. *See State v. Garrett*, ___ N.C. App. ___, 2021-NCCOA-214. Although *Garrett* held "[f]entanyl does indeed qualify as an opiate within the meaning of" N.C. Gen. Stat. § 90-95(h)(4), the dispositive issue in *Garrett* was whether the indictment for trafficking in fentanyl was fatally defective where fentanyl was not included within the plain language of the statute. Here, we address not whether the possession or trafficking of fentanyl was unlawful in 2018, but whether West was qualified to opine fentanyl is classified as an opiate.

compounds. It is more of a totality of various controlled substances." West's testimony further revealed fentanyl is neither an opiate derivative nor an opium derivative. When asked, "[Does] opioid mean[] any synthetic narcotic drug having opiate like activities but not derived from opium," West responded, "I would hate to say I know that." West "[didn't] think [it was] incorrect to classify [fentanyl] as an opiate." West further testified she only received a "general overview" of addiction-forming properties of opiates, opioids, and opium; "[didn't] have specifics about" the receptor sites that opiates are shown to attack; she was "not a doctor or anything like that . . . ."; and her training did not include anything "specifically that talks about addiction-forming or sustaining liability in those words." The trial court issued a preliminary ruling that West would be permitted to testify as to "whether fentanyl was an opiate or opioid or opium derivative." The following day during trial, West was accepted by the trial court as an expert "in the field of forensic chemistry specializing in chemical analysis of controlled substances to determine the presence of controlled substances."

¶ 21 Under N.C. Gen. Stat. § 90-87(18), an opiate is "any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability." N.C. Gen. Stat. § 90-87(18). Here, in light of West's testimony that she "didn't think it was incorrect" to classify fentanyl as an opiate; she only possessed a

"general overview," and had no "specifics" about the addiction-forming or addiction-sustaining liabilities of fentanyl; and that her training did not include "addicting-forming or sustaining liability," we hold the trial court abused its discretion in finding West was qualified to render an opinion on whether fentanyl was an opiate. Without attending training or having knowledge of the characteristics of an opiate, West was not qualified to opine fentanyl satisfied the statutory definition of an opiate. Because we conclude the trial court abused its discretion in permitting West to testify as an expert as to whether fentanyl is an opioid or opiate, we need not address whether West's opinion was unreliable or whether the State violated our discovery statutes.

B. Motion to Dismiss

¶ 22 Next, Defendant argues the trial court erred in denying his motion to dismiss the charge of resisting, delaying, or obstructing a public officer. We disagree.

¶ 23 The denial of a motion to dismiss is reviewed *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007); *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Peters*, 255 N.C. App. 382, 386, 804 S.E.2d 811, 814 (2017) (quoting *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890,

121 S. Ct. 213, 148 L. Ed. 2d 150 (2000)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted)).

¶ 24 "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995). Where the defendant's evidence "explains or makes clear the evidence of the State," it must also be considered. *State v. Bruton*, 264 N.C. 488, 499, 142 S.E.2d 169, 176 (1965). If the evidence is sufficient only to raise a suspicion or conjecture as to the commission of the offense, a motion to dismiss should be allowed. *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967) (citations omitted); *State v. Allen*, 79 N.C. App. 280, 282, 339 S.E.2d 76, 77 (1986) (citations omitted); *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted).

¶ 25 Pursuant to N.C. Gen. Stat. § 14-223, it is a misdemeanor to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office." N.C. Gen. Stat. § 14-223 (2020). Here, Defendant contends the State "failed to show the officers had reasonable suspicion to detain

[Defendant] where they merely 'had a hunch that illegal activity may be occurring.' " Defendant argues if the Officers lacked reasonable suspicion, then the State "failed to prove either officer 'was discharging or attempting to discharge a duty of his office.'"

¶ 26 "[A]n individual's 'flight from a consensual encounter or from an unlawful investigatory stop [lacking reasonable suspicion] cannot be used to justify his arrest for resisting, delaying, or obstructing a public officer.' " *State v. Holley*, 267 N.C. App. 333, 338, 833 S.E.2d 63, 70 (2019) (quoting *State v. White*, 214 N.C. App. 471, 479, 712 S.E.2d 921, 927-28 (2011)) (second alteration in original). "An officer has the reasonable suspicion necessary to effectuate an investigatory stop 'if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts.' " *Id.* at 339, 833 S.E.2d at 70 (quoting *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012)). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *Williams*, 366 N.C. at 116, 726 S.E.2d at 167 (citation and internal quotation marks omitted).

¶ 27 Reasonable suspicion requires "something more than a mere hunch." *Id.* (citation omitted). Relevant factors "in determining whether a police officer had

reasonable suspicion include: (1) nervousness of an individual; (2) presence in a high crime area; and (3) unprovoked flight." *In re I.R.T.*, 184 N.C. App. 579, 585, 647 S.E.2d 129, 134-35 (2007) (citations omitted). "None of these factors, standing alone, are sufficient to justify a finding of reasonable suspicion, but must be considered in context." *Id.* at 585, 647 S.E.2d at 135 (citing *State v. Roberts*, 142 N.C. App. 424, 429, 542 S.E.2d 703, 707-08 (2001)).

¶ 28 Here, the Officers observed Defendant walking in a high crime neighborhood where he approached a house, walk around it, then knock at its door, without gaining entrance to the residence. Defendant gave the Officers a false name, threw his backpack on the ground, and raised his hands up. Then, he fled when Officers attempted to detain him. The Officers also believed Defendant acted erratically before taking flight. This Court previously has held law enforcement's knowledge, experience, and training; a defendant's presence in a high crime area; erratic behavior; unprovoked flight; and giving a false name to be a sufficient basis for reasonable suspicion. *See id.* (high crime area and law enforcement's experience and training); *State v. Mello*, 200 N.C. App. 437, 446-47, 684 S.E.2d 483, 490 (2009), *aff'd per curiam*, 364 N.C. 421, 421, 700 S.E.2d 224, 225 (2010); *State v. Williams*, 255 N.C. App. 168, 176-77, 804 S.E.2d 570, 575-76 (2017) (giving a false name is a factor to support a finding of reasonable suspicion). Taking the evidence in the light most favorable to the State, we hold the officers had reasonable suspicion to conclude

"criminal activity was afoot." *See In re I.R.T.*, 184 N.C. App. at 585, 647 S.E.2d at 134-35. Thus, the trial court did not err in denying Defendant's motion to dismiss.

III. Conclusion

¶ 29 After careful review of the record and applicable law, we hold the trial court erred in allowing West to testify that fentanyl was an opiate. Accordingly, we reverse Defendant's conviction for trafficking by possession of an opiate. We further hold the trial court did not err in denying Defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer. Because the trial court consolidated Defendant's convictions for trafficking by possession of an opiate; possession with intent to sell or deliver fentanyl; and possession of drug paraphernalia with his conviction for resisting, delaying, or obstructing an officer, we remand to the trial court for a new sentencing hearing on the charge of resisting, delaying, or obstructing an officer charge. Defendant's convictions for possession with intent to sell or deliver fentanyl and possession of drug paraphernalia should be included within the resentencing remand. Accordingly, we reverse the judgment of the trial court and remand for further proceedings not inconsistent with this opinion.

NO ERROR IN PART; REVERSED IN PART; AND REMANDED.

Judge ARROWOOD concurs.

Chief Judge STROUD dissents by separate opinion.

Report per Rule 30(e).

STROUD, Chief Judge, dissenting.

¶ 30 The Majority's opinion addresses two issues. First, it concludes the trial court abused its discretion in ruling West was an expert qualified to testify fentanyl is an opiate. The Majority's opinion also rejects Defendant's argument that the trial court should have dismissed the resisting, delaying, or obstructing a public officer charge. I concur on the second issue. However, I believe review for an abuse of discretion standard leads to the conclusion the judge did not err in finding the expert qualified, so I dissent. Further, I write separately to address arguments presented in the briefs. First, I write separately on an alleged discovery issue the Majority's opinion does not reach. I do not believe this case involves a discovery issue at all, so I would find no error in this case. Further, I write separately to expand upon the Majority opinion's footnote regarding a case in which this Court recently concluded fentanyl is an opiate under a similar, older version of our statutes.

I. Expert's Qualifications

¶ 31 The Majority's opinion rules the trial court abused its discretion by letting the State's expert, West, testify as to whether fentanyl is an opiate. I would hold the trial court did not abuse its discretion in finding West was qualified as an expert to testify about whether fentanyl is an opiate because the trial court reviewed ample evidence of West's qualifications, thereby demonstrating it made a reasoned decision. While I agree with the Majority's opinion's recitation of the applicable law as to both the standard of review and the underlying substantive law, I disagree with the Majority's

opinion's conclusion.

¶ 32 A defendant must meet a high bar to demonstrate an abuse of discretion. As the Majority's opinion notes, "[a] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (alteration in original)). On top of that, as the Majority's opinion again indicates, the bar an expert witness must meet to be qualified is relatively low, requiring only that the expert witness be "better qualified than the jury as to the subject at hand." *State v. Hall*, 186 N.C. App. 267, 272, 650 S.E.2d 666, 669 (2007) (quotations and citations omitted); *see also McGrady*, 368 N.C. at 889, 787 S.E.2d at 9 (phrasing the question of whether an expert is qualified as, "Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?"). For example, in *State v. Hargrave*, this Court held the trial court did not abuse its discretion in ruling a witness was qualified as an expert in chemical analysis based on a bachelor's degree in chemistry, "basic law enforcement training" and "in-house training to be a forensic drug chemist," and previous testimony in about forty cases. 198 N.C. App. 579, 584–85, 680 S.E.2d 254, 258–59 (2009). Given the low bar the trial court must initially decide an expert meets and then the high bar to our intervention on appeal, it is a rare case where we can find a trial court abused its

discretion as to an expert witness's qualifications.

¶ 33 This case is not one of those rare cases; the trial court had significant evidence to support its conclusion West was a qualified expert and, thus, made a reasoned decision in so ruling. As the Majority's opinion indicates, West has a master's degree in chemistry, passed the American Board of Criminalistics Certification exam, and worked for almost sixteen years in the State Crime Lab. West also completed both basic state law enforcement training and drug chemistry in-house training. Further, West has been qualified as an expert in forensic drug chemistry almost one hundred times and assisted in thousands of cases. That information alone provides enough basis for the trial court to make a reasoned decision. In *Hargrave*, this Court held the trial court did not abuse its discretion in allowing an expert with less extensive qualifications to testify on similar subject matter. 198 N.C. App. at 584–85, 680 S.E.2d at 258–59.

¶ 34 Even if those qualifications alone were not enough, the Majority's opinion also highlights that West had specific training about opiates, including fentanyl, and about addiction. This evidence demonstrates the trial court's decision that West had better knowledge than the jury about forensic drug chemistry, including opiates, was a reasoned decision, which is all we must find to rule the trial court did not abuse its discretion.

¶ 35 The Majority's opinion claims this background was not enough by pointing to

parts of West's testimony where she indicates her training was more generalized and not as specific as a medical doctor's training on these drug categories would be.[3] This reweighing of the evidence underlying the trial court's ruling is antithetical to the abuse of discretion standard. *McGrady*, 368 N.C. at 899, 787 S.E.2d at 15. "Under the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, but instead to decide whether the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (internal citations and quotations omitted). As laid out above, the trial court made a reasoned ruling, and therefore did not abuse its discretion. I therefore dissent from the Majority's opinion on this ground.

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[3] In recounting these facts, the Majority's opinion leaves out crucial context. At one point, the Majority's opinion indicates West responded, "I would hate to say I know that" when asked if opioid means "any synthetic narcotic drug having opiate like activities but not derived from opium." The full context reveals that West was indicating she did not know if that was the new definition for opioids adopted by the North Carolina General Assembly in December 2018, not that she did not know if that was an appropriate definition for opioid. In fact, West's full response indicates she believed that definition was accurate: "I would hate to say I know that, but I will take your word for it, *yes, that sounds correct*." (Emphasis added.)

Similarly, the Majority's opinion at one point indicates West merely "[didn't] think [it was] incorrect to classify [fentanyl] as an opiate." (Alterations in original.) However, in the very same answer, West had already unequivocally stated it was "[c]orrect" to say that she classified fentanyl as an opiate. Thus, the Majority's opinion overstates West's hesitancy.

Ultimately, neither of these instances are key to my dissent. As explained above, this reweighing of evidence is not properly part of the abuse of discretion review we engage in on the issue of expert qualifications. *McGrady*, 368 N.C. at 899, 787 S.E.2d at 15.

II. Discovery Issue

¶ 36 The Majority's opinion does not reach Defendant's argument that the trial court "erred by ruling the State did not violate the discovery statutes by failing to disclose that Ms. West would testify fentanyl was an opiate." I do not believe this case involved a discovery issue at all.

¶ 37 The State complied with its discovery obligations under North Carolina General Statutes §§ 15A-902, -903, -907 (2017). In relevant part, § 15A-903(a)(2) requires the State to:

> give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion.

N.C. Gen. Stat. § 15A-903(a)(2) (2017). The State had provided Defendant notice that West would testify as an expert witness, the lab report identifying the substance as fentanyl, and West's qualifications as an expert.

¶ 38 During the trial when Defendant mentioned the State's discovery obligations, he at the same time admitted the issue was not about such obligations but rather about whether West's opinion was sufficient to demonstrate fentanyl was an opiate, as required for a conviction under the statute:

MR. WRIGHT: Judge, *15A-903(a)(2) requires the State provide notice to the defendant of any expert witness State reasonably expects to call as a witness. We got that.*
THE COURT: Okay. And does that notice specify or -- contain any information relating to the scope of the expert's anticipated testimony?
MR. WRIGHT: Well, it gave us the sum -- her testing and results.
THE COURT: Okay.
MR. WRIGHT: And State shall -- each witness shall prepare a -- shall furnish to the defendant report of the results of any examination or test conducted by the expert. We have that. State shall also furnish to the defendant the expert's CV, comma, the expert's opinion, and the underlying basis for that opinion, which we have. *We have the lab report, the basis for it, the results of the testing, and saying this is what she's going to testify to.*

So what she will testify to is the testing that she did, the results of it, the materials that -- the testing of the materials, the instruments used, that it was fentanyl, Schedule II. That's what they disclosed she was going to testify to.

Now we start broadening that and saying now we're going to let her get into opium, opiate, opioid, which wasn't disclosed, which I don't -- I don't know but it sounds to me like that's getting into neuropharmacology mechanisms of the brain, things like that. And I think her expertise is disclosed well on her CV as a drug analyst, this casework, controlled substance analysis.

So that's what they told us is going on so that's -- now they're broadening that out and saying she will go into all the neuropharmacology things and drug classifications, which I don't think falls within the expertise, or at least wasn't told to us was going to be within her expertise that that's what she's going to be testifying to. That's my objection, your Honor.

> THE COURT: *Well, being an expert in forensic drug chemistry, would that not necessarily include whether something -- or what is an opiate an opioid or opiate derivative?*

(Emphasis added.) Defendant's attorney admitted he had received everything required under § 15A-903(a)(2), thereby negating any discovery issue. The heart of the objection was whether West had the correct expertise to testify to what the State needed her to testify to, whether fentanyl met the statutory definition of "opiate." The question of whether the State provided the required information in its discovery is distinct from the sufficiency of the expert opinions stated in the discovery to provide the evidence the State needs to make its prima facie case.

¶ 39 Defendant's last time raising the objection, this time in a trial brief, only serves to further emphasize the point. The section of the trial brief addressing the claimed discovery issue relies exclusively on *State v. Davis*, 368 N.C. 794, 785 S.E.2d 312 (2016). That case was not about whether the State had complied with its discovery duties. *See id.*, 368 N.C. at 798, 785 S.E.2d at 315 ("The central question here is whether the State's expert witnesses gave opinion testimony so as to *trigger* the discovery requirements under section 15A-903(a)(2)." (Emphasis added)). Rather, *Davis* focused on whether the State's experts were giving expert opinion testimony at all, as required for a discovery requirement to exist at all. *State v. Jackson*, 258 N.C. App. 99, 107, 810 S.E.2d 397, 402 (2018) (citing *Davis*, 368 N.C. at 798, 785 S.E.2d at

315). By relying on *Davis*, Defendant again reveals the issue was not whether the State provided the required discovery.

¶ 40 Here, the State provided discovery, and Defendant did not raise an issue of a discovery violation. In fact, Defendant admitted he received the required discovery. Instead, Defendant cloaked his objections to West's expertise in the shroud of a discovery issue. As already explained above, I would find the trial court did not abuse its discretion on the issue of West's expertise, and thus I would also find no error on the alleged discovery issue.

III. **Fentanyl as an Opiate Under the Relevant Statute**

¶ 41 Finally, I write separately to address the underlying issue in this case, whether fentanyl qualified as an opiate under the relevant statute at the time of Defendant's offense. Since the parties addressed it in supplemental briefing, I write to clarify the status of fentanyl under the relevant statute going forward. At the time of Defendant's offense, which was 7 April 2018, North Carolina General Statute § 90-95(h)(4) (2018) criminalized, *inter alia*, the sale, manufacture, and possession of "opium or opiate," and their derivatives. The relevant definitions defined "opium poppy," "opiate," and a third category, "opioid." N.C. Gen. Stat. § 90-87(18), (18a), (19) (2018). As a result of these changing laws, the State was concerned about whether fentanyl, which could be classified as an opioid, could also be classified as an opiate as necessary to meet its burden of proof under § 90-95(h)(4). While, as the

Majority's opinion notes, the State's expert West ultimately testified fentanyl "is considered an opiate" in "this particular case," I write to provide some clarity on the statutes more generally.

¶ 42 In a recent case with an opinion issued just before oral argument in this case, this Court addressed whether fentanyl is opium or an opiate, or derivative thereof, within the meaning of these statutes as they were written in 2016. *State v. Garrett*, 2021-NCCOA-214, ¶ 16. In that case, this Court held fentanyl "does indeed qualify as an opiate" as a matter of statutory interpretation. *Id.* ¶¶ 16, 18.

¶ 43 While *Garrett* was based on the 2016 statutes, the statute criminalizing possession, sale, manufacture, etc. of opium and opiates remained the same between 2016 and Defendant's offense date. *Compare* N.C. Gen. Stat. § 90-95(h)(4) (2016) *with* N.C. Gen. Stat. § 90-95(h)(4) (2018). The applicable definitions section changed between 2016 and 2018, with the addition of a definition of "opioid." *Compare* N.C. Gen. Stat. § 90-87(18)–(19) (2016) *with* N.C. Gen. Stat. § 90-87 (18), (18a), (19) (2018). Further, later in 2018, after Defendant's offense date, the legislature amended § 90-95(h)(4) by adding "opioid" to the list of prohibited substances aligning the statute with the definitional change. N.C. Gen. Stat. § 90-95(h)(4) (effective Dec. 1, 2018). The *Garrett* opinion addressed the addition of "opioid" to § 90-95(h)(4) in the context of the impact of a subsequent amendment on its statutory interpretation. *Garrett*, ¶¶ 21–23. Specifically, this Court held "the legislature's amendment of § 90-95(h)(4)

was intended to clarify rather than alter the meaning of this term [opiate], and to clarify the scope of the substances covered by the statute." *Id.* ¶ 23. The same logic applies here. The change in the definitions section from the relevant time in *Garrett* was merely intended to clarify rather than alter the meaning of opiate, as further supported by the fact that the definition of "opiate" did not change. *Compare* N.C. Gen. Stat. § 90-87(18) (2016) *with* N.C. Gen. Stat. § 90-87(18) (2018). The later change in § 90-95 likewise merely clarified the statute, as this Court held in *Garrett*. *Garrett*, ¶ 23. Thus, as in *Garrett*, fentanyl fits within the definition of "opiate" as that term is used in § 90-95(h)(4) as that statute was written on Defendant's offense date in April 2018.

¶ 44 The Majority's opinion briefly addresses *Garrett* in a footnote, indicating the dispositive issue in that case was different from the one here. I agree that the issues before us are different than the statutory interpretation and indictment issue in *Garrett*. This case and *Garrett* are linked by the underlying issue of whether fentanyl was an opiate as that term is used in § 90-95(h)(4). I bring up *Garrett* to show a different means of addressing the issue that the State here addressed by having its expert, West, testify fentanyl is an opiate.

IV. Conclusion

¶ 45 The trial court did not abuse its discretion in finding the State's expert to be qualified. Further, this case did not have any discovery issues as Defendant's brief

argues. Since I also concur with the Majority in finding the trial court was correct to not dismiss the resisting, delaying, or obstructing a public officer charge, I would find no error in this case.

¶ 46 Respectfully, I dissent.