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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1059

Filed 12 September 2023

Orange County, Nos. 18CRS1574, 18CRS53431

STATE OF NORTH CAROLINA

v.

AARON DELANEY RUSSELL, Defendant.

Appeal by Defendant from a judgment entered 23 March 2022 by Judge R. Allen Baddour, Jr., in Orange County Superior Court. Heard in the Court of Appeals 5 September 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Adrina G. Bass, for the State.*

*Jarvis John Edgerton, IV, for Defendant-Appellant.*

RIGGS, Judge.

Defendant Aaron Delaney Russell was tried and convicted of impaired driving and pleaded guilty to habitual impaired driving and driving while license revoked for impaired driving. On appeal, Mr. Russell contends his Confrontation Clause rights found in the Sixth Amendment to the United States Constitution were violated by the admission of expert toxicology testimony from an analyst who did not conduct the

lab tests disclosing Mr. Russell's intoxication. After careful review, we hold Mr. Russell received a fair trial, free from error.

**I. FACTUAL AND PROCEDURAL HISTORY**

Mr. Russell was driving through Chapel Hill, North Carolina, at 1:30 AM on 22 December 2018 when he ran a redlight on Henderson Street. A nearby police officer witnessed Mr. Russell run the redlight and initiated a traffic stop. The officer noticed the smell of alcohol from the driver's-side window and that Mr. Russell's eyes were red and glassy, so he requested Mr. Russell attempt several field sobriety tests. Mr. Russell exhibited several indicators of intoxication on each test and declined to take a preliminary breath test. When the officer attempted to place Mr. Russell in handcuffs, Mr. Russell attempted to run back towards a nearby road. Mr. Russell was immediately apprehended, handcuffed, and taken to the Chapel Hill Police Department for a chemical analysis of his blood pursuant to a search warrant.

SBI Agent Kayla Yang conducted a headspace gas chromatograph test of Mr. Russell's blood at the North Carolina State Crime Lab. Per her results and analysis, Mr. Russell's blood sample contained a blood alcohol concentration of .11 grams per hundred milliliters.

Mr. Russell's trial began on 21 March 2022. Agent Yang was no longer employed with the State Crime Lab, so the State tendered Bryan Morse, another forensic analyst with the State Crime Lab, as a toxicology expert. Mr. Morse was qualified as an expert without objection.

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Mr. Morse told the jury that he reviewed Agent Yang's results and analysis ahead of testifying. When asked whether he had formed his own opinion concerning the results of the headspace gas chromatograph test, Mr. Russell's counsel objected on the basis that Mr. Morse's opinion testimony violated Mr. Russell's Confrontation Clause rights because Mr. Morse was not the analyst who performed the test. The trial court overruled that objection. Mr. Russell's counsel renewed that objection when Agent Yang's report was admitted into evidence and published to the jury, and the objection was again overruled.

During his testimony, Mr. Morse testified as follows concerning his expert opinion:

[THE STATE]: Did you review the lab packet like you've described in this case?

[MR. MORSE]: Yes, I did.

[THE STATE]: And did you form an independent opinion as to the results in this case?

[MR. MORSE]: Yes, I did.

[THE STATE]: And did your opinion confirm or did it differ from the previous—the opinion of the initial conducting lab analyst?

[MR. MORSE]: It confirmed the opinion [that Mr. Russell's blood alcohol concentration was .11 based on the headspace gas chromatograph test performed by the other analyst].

The jury convicted Mr. Russell of impaired driving, he pleaded guilty to habitual impaired driving and driving while license revoked for impaired driving, and

the trial court sentenced Mr. Russell to 16 to 29 months' imprisonment. Mr. Russell gave oral notice of appeal.

## **II. ANALYSIS**

Mr. Russell reasserts his Confrontation Clause argument on appeal, contending that Mr. Morse did not offer an independent opinion of Agent Yang's testing and analysis and, as a result, Mr. Russell did not have the opportunity to cross-examine the source of the testimonial statements offered against him. The State counters by noting precedents establishing "[a]n expert may properly base his or her opinion on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field." *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001) (citations omitted). We agree with the State that the Confrontation Clause was not violated here.

### **A. Standard of Review**

Whether a substitute expert's testimony violates a defendant's Confrontation Clause rights is a question of law reviewed *de novo*. *State v. Ortiz-Zape*, 367 N.C. 1, 5, 743 S.E.2d 156, 159 (2013).

### **B. Mr. Morse's Testimony and The Confrontation Clause**

As noted above, our caselaw on the admissibility of substitute expert testimony offering an opinion drawn from lab reports performed by a non-testifying analyst is reducible to a single, straightforward proposition: "An expert may properly base his or her opinion on tests performed by another person, if the tests are of the type

reasonably relied upon by experts in the field.” *Fair*, 354 N.C. at 162, 557 S.E.2d at 522 (citations omitted). So long as that opinion is independently drawn from the tests performed by another, no confrontation issues arise because “when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront.” *Ortiz-Zape*, 367 N.C. at 9, 743 S.E.2d at 161. This Court recently applied these legal principles to a DWI conviction based on substitute expert toxicology testimony in *State v. Watson*, 286 N.C. App. 143, 879 S.E.2d 355 (2022).

In *Watson*, the SBI agent who conducted the headspace gas chromatograph test was unavailable to testify, and a substitute SBI agent testified as a toxicology expert in her stead. *Id.* at 145, 879 S.E.2d at 358. The substitute expert testified that she reviewed the testing and analysis conducted by the prior SBI agent, detailed the gas chromatograph test for the jury, and testified that it was “the gold standard of toxicology.” *Id.* at 146, 879 S.E.2d at 358 (quotation marks omitted). She then testified to her own independent opinion, which mirrored the testing agent’s determination that the blood sample contained a BAC of .27 grams per 100 milliliters. *Id.* We held that no Confrontation Clause violation occurred because the substitute expert “was available for cross-examination” and could rely on the otherwise-inadmissible information generated by the other SBI agent in forming her independent opinion. *Id.* at 147, 879 S.E.2d at 359.

We see no meaningful distinction between the substitute expert testimony properly presented in *Watson* and Mr. Morse’s testimony here. As in *Watson*, Mr.

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Morse reviewed Agent Yang’s test results and analysis before arriving at an independent opinion, matching Agent Yang’s, that Mr. Russell’s blood sample contained a BAC of .11.

While Mr. Russell contends under Rule 703 of the North Carolina Rules of Evidence that *Watson* does not apply here because Mr. Morse did not testify that the headspace gas chromatograph test is one “reasonably relied upon by experts in the . . . field,” N.C. Gen. Stat. § 8C-1, Rule 703 (2021), Mr. Russell did not present a Rule 703 objection at trial or in his principal brief on appeal. *See* N.C. R. App. P. 10(a)(1) (requiring an objection “stating the specific grounds” therefor to preserve the issue for appellate review); *State v. Dinan*, 233 N.C. App. 694, 698-99, 757 S.E.2d 481, 485 (2014) (noting that any alleged plain error in unpreserved evidentiary issues must be distinctly alleged in a defendant’s principal brief). And, in any event, we can discern on appellate review that the headspace gas chromatograph is such a test. *See State v. Demery*, 113 N.C. App. 58, 65-6, 437 S.E.2d 704, 709 (1993) (holding an expert could testify in reliance on blood group statistics under Rule 703 because precedents showed they “are commonly used and accepted in [the expert’s] field in North Carolina, and similar statistics are commonly used and accepted in forensic serology throughout the country” (citations omitted)); *State v. Purdie*, 93 N.C. App. 269, 276-77, 377 S.E.2d 789, 793 (1989) (holding physical crash scene evidence relied upon by a testifying expert was “information reasonably relied upon by experts in the field of accident reconstruction” based on collected cases from numerous other jurisdictions

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(citations omitted)); *cf. Watson*, 286 N.C. App. at 146, 879 S.E.2d at 359 (holding headspace gas chromatograph test evidence fell within Rule 703 for purposes of substitute expert testimony).

In sum, Mr. Morse could rely on Agent Yang's headspace gas chromatograph testing and analysis so long as he reached an independent opinion concerning the sample's BAC level. He testified that he reached such an opinion on direct examination, and Mr. Russell's confrontation rights were preserved through his cross-examination of Mr. Morse. We therefore hold that Mr. Russell has failed to demonstrate error.

**III. CONCLUSION**

For the foregoing reasons, we hold Mr. Russell received a fair trial, free from error.

NO ERROR.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).