No. COA 24-276 DISTRICT 2

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	From Martin
v.	)	No. 21 CRS 50171-73
	)	
ERIC RUFFIN	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

Other **Authorities**

No. COA 24-276 DISTRICT 2

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	From Martin
v.	)	No. 21 CRS 50171-73
	)	
ERIC RUFFIN	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

ISSUES PRESENTED

I. WHETHER THE TRIAL COURT ERRED BY DENYING MR. RUFFIN'S MOTION TO DISMISS THE MARIJUANA CHARGES BECAUSE THERE WAS NOT SUBSTANTIAL EVIDENCE THAT ONE OF THE SUBSTANCES PURCHASED BY THE CONFIDENTIAL INFORMANT WAS MARIJUANA.

II. WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING OFFICER HARRELL TO PROVIDE OPINION TESTIMONY THAT ONE OF THE SUBSTANCES PURCHASED BY THE CONFIDENTIAL INFORMANT WAS MARIJUANA.

III. WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING THE NORTH CAROLINA STATE CRIME LABORATORY ANALYST TO PROVIDE EXPERT TESTIMONY CONCERNING THE SUBSTANCE THAT WAS ALLEGED TO BE MARIJUANA WHERE HER TESTS FAILED TO DISTINGUISH MARIJUANA FROM HEMP.

IV. WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR BY NOT INSTRUCTING THE JURY ON THE LEGAL DEFINITIONS OF MARIJUANA AND HEMP.

V. WHETHER THE TRIAL COURT ERRED BY SENTENCING MR. RUFFIN FOR BOTH THE SALE OF MARIJUANA AND THE DELIVERY OF MARIJUANA.

VI. WHETHER THE TRIAL COURT JUDGE CONSIDERED EXTRANEOUS INFORMATION WHEN HE SENTENCED MR. RUFFIN TO TWO CONSECUTIVE SENTENCES FOR TRAFFICKING HEROIN BY SALE AND TRAFFICKING A MIXTURE OF HEROIN BY TRANSPORTATION.

STATEMENT OF THE CASE

Eric Ruffin was indicted on numerous drug charges for allegedly selling drugs to an informant on 8 March 2021. (R pp. 9-18). Initially, Mr. Ruffin was charged with: (1) trafficking heroin by selling, delivering, manufacturing, transporting, and possessing; (2) possession with intent to sell or deliver (PWISD) heroin; and (3) sale or delivery of marijuana. (R pp. 9, 11, 15). The North Carolina State Crime Laboratory report was generated on 23 June 2022, which revealed that one of the substances was a mixture containing heroin. (R p. 42). After this report was issued, there were superseding indictments for some of the trafficking offenses; however, not all counts were altered to reflect that the substance was a mixture of heroin. (R pp. 13, 17; T pp. 147-49). The final indictments were: (1) trafficking heroin by selling, delivering, and manufacturing; (2) trafficking *a mixture* of heroin by transporting and possessing[1]; (3) PWISD *a mixture* containing heroin; and (4) sale or delivery of marijuana. (R pp. 9-18).

The trial occurred on 27 March to 29 March 2023. At the close of evidence, the judge dismissed the trafficking heroin by manufacturing charge. (T p. 144). Mr. Ruffin was found guilty of all other charges. (R pp. 47-49). Mr. Ruffin was sentenced to two terms of 70 to 93 months imprisonment — one sentence for trafficking heroin (selling) and one sentence for trafficking a mixture containing heroin (transporting) — set to run *consecutively*. (R pp. 52-59). He was ordered to pay two separate $50,000 fines, for a total of $100,000. (R p. 64).

[1] The superseding indictment states the offense occurred on 8 March 2019 instead of 8 March 2021, and the judgment upon conviction also lists the incorrect date.

He was also sentenced to two terms of 70 to 93 months imprisonment — one sentence for trafficking heroin (delivering) and one sentence for trafficking a mixture containing heroin (possessing) — set to run *concurrently* with the trafficking heroin (selling) active sentence. (R pp. 52-59). He was also sentenced to 8 to 19 months imprisonment for PWISD a mixture containing heroin, 8 to 19 months imprisonment for the sale of marijuana, and 8 to 19 months imprisonment for the delivery of marijuana — all three sentences were set to run *concurrently* with the trafficking a mixture containing heroin (transporting) active sentence. (R pp. 60-63). Mr. Ruffin gave oral notice of appeal at trial. (R p. 67; T. p. 219).

GROUNDS FOR APPELLATE REVIEW

Mr. Ruffin appeals of right pursuant to N.C. Gen. Stat. § 15A-1444(a) (2023).

STATEMENT OF THE FACTS

Gilbert Hurst, an admitted drug user and felon, testified at trial that on 8 March 2021 he "ordered" a bag of fentanyl and a bag of marijuana from a man known as "E." (T pp. 17-18, 21-28, 78). Soon thereafter, Mr. Hurst met E outside Mr. Hurst's home on Bear Grass Road. (T pp. 26, 49). E parked a black Camaro outside the house and sold Mr. Hurst two bags of what Mr. Hurst believed to be drugs. (T p. 26). E did not exit the vehicle during the transaction. (T p. 26). This transaction was a "controlled buy" under the direction of Officer Justin Harrell with the Martin County Sheriff's Office. (T pp. 21-30, 40-42). Mr. Hurst was wearing a video recording device with a live feed during the transaction. (T pp. 43; Exh. 1). During the transaction, Officer Harrell was positioned approximately 100 yards away. (T p. 44). After Mr.

Hurst completed the purchase, Officer Harrell came to the house and Mr. Hurst gave him a bag of what appeared to be "heroin and/or fentanyl narcotic" and a bag of what appeared to be marijuana. (T p. 47). At trial, Officer Harrell acknowledged that there is a difference between marijuana and hemp, but he does know what that difference is. (T p. 87).

During the transaction, Officer Brandon Wynne with the Martin County Sherriff's Office was conducting a "surveillance and takedown." (T p. 89). He observed the transaction and then conducted a traffic stop of the black Camaro after the driver pulled away from the house on Bear Grass Road. (T pp. 91-92). Officer Wynne testified that Mr. Ruffin was the driver, and he took Mr. Ruffin into custody. (T p. 93).

At trial, Lyndsay Cone, a forensic scientist with the North Carolina State Crime Laboratory, testified that one bag submitted by the State as evidence contained 2.57 grams of a "plant material belonging to the genus cannabinoid tetrahydrocannabinol, concentration of cannabinoid not determined." (T pp. 108, 131). She clarified that marijuana contains a high amount of THC, the psychoactive ingredient, while hemp contains a low amount of THC. (T p. 132). She did not specify the percentage of THC in marijuana versus the percentage of THC in hemp. (T p. 132). Ms. Cone's lab did not conduct tests to distinguish marijuana from hemp, and she was unable to say what amount of THC was present in the evidence. (T pp. 132-33). She admitted that the evidence could be hemp. (T p. 133). Ms. Cone testified that the other bag submitted by the State weighed 6.19 grams and contained "heroin,

fentanyl, and ANPP." (T p. 131). ANPP is a "precursor to make fentanyl" and is a controlled substance. (T p. 136).

As set out in the Statement of the Case, the prosecutor stacked numerous charges in this case. At the close of evidence, the judge dismissed the trafficking heroin by manufacturing charge. (T p. 144). The judge seemed confused and reluctant to submit both trafficking heroin and trafficking a mixture of heroin charges to the jury, but the prosecutor stated that the judge was not obligated to sentence Mr. Ruffin on all convictions. (T pp. 144-53).

Defense counsel requested an instruction that marijuana does not include hemp or hemp products, and the judge provided that instruction. (T pp. 172, 189). During deliberations, the jury asked to see Ms. Cone's "testimony about marijuana and hemp products" and "the written analysis of the marijuana." (R p. 45). The jury also asked, "Are we allowed to home in on the technicality of if it were in fact marijuana instead of hemp?" (R p. 45). The judge allowed the jury to see the lab report, but said the jury had to recall Ms. Cone's testimony. (T pp. 201-02). The judge said that he had instructed the jury on "the elements for each case that involves marijuana" and that the State bore the burden of proving each element beyond a reasonable doubt. (T p. 202).

Ultimately, the jury was allowed to render verdicts on eight different counts related to the sale of two bags of alleged drugs, which occurred in the same transaction. (R pp. 47-49). The jury returned guilty verdicts on all charges. (R pp. 47-49). Mr. Ruffin was sentenced on all convictions. (R pp. 52-63). While most

sentences were set to run concurrently with other sentences, he was sentenced to two consecutive prison sentences of 70-93 months. (R pp. 52-59). He was also ordered to pay two fines of $50,000 for the same drug transaction. (R p. 64). To aid the Court, the chart below sets out the charges, convictions, and sentences.

Charge	Count	Sentence
21 CRS 50171 Trafficking Heroin	51 Sale	70-93 Months $50,000 Fine
21 CRS 50171 Trafficking Heroin	52 Deliver	70-93 Months Runs Concurrent w/ 21 CRS 50171 Count 51 $50,000 Fine
21 CRS 50171 Trafficking Heroin	53 Manufacture	Dismissed
21 CRS 50172 Trafficking a Mix of Heroin	51 Transport	70-93 Months Runs Consecutive after 21 CRS 50171 Count 51
21 CRS 50172 Trafficking a Mix of Heroin	52 Possess	70-93 Months Runs Concurrent with 21 CRS 50172 Count 51
21 CRS 50173 PWISD a Mix of Heroin	51 PWISD a Mix of Heroin	8-19 Months Runs Concurrent with 21 CRS 50172 Count 51
21 CRS 50173 Selling or Delivering Marijuana	52 Sale	8-19 Months Runs Concurrent with 21 CRS 50172 Count 51

21 CRS 50173 Selling or Delivering Marijuana	53 Deliver	8-19 Months Runs Concurrent with 21 CRS 50172 Count 51

In sum, Mr. Ruffin is serving a minimum of almost *twelve years* in prison for *one* drug transaction. None of the arguments raised below would relieve Mr. Ruffin of 70-93 months in prison, which is a minimum of almost six years for that one drug transaction. The arguments relate to the integrity and fairness of the trial and sentencing processes.

ARGUMENTS

The trial court should have granted Mr. Ruffin's motion to dismiss the marijuana charges because the evidence did not constitute *substantial* evidence that one of the substances purchased by Mr. Hurst was marijuana; the evidence was merely speculative. Alternatively, Mr. Ruffin is entitled to a new trial absent Officer Harrell's and Ms. Cone's testimonies. Their testimonies should have been excluded because they were unable to provide *reliable* evidence that one of the substances purchased by Mr. Hurst was, in fact, marijuana.

Even assuming this case was properly presented to the jury, the jury should have been instructed on the legal difference between marijuana and hemp. Instead, the jury was left to apply an Occam's razor approach to decision-making — the simplest answer is probably the right one. Mr. Ruffin probably thought he was selling marijuana, and Mr. Hurst probably thought he was buying marijuana; ergo, the substance was marijuana. This manner of decision-making cannot stand under the law because it leaves the jury to render verdicts on mere speculation and relieves the

State of its burden of proof. Additionally, there were sentencing errors in this case that require reversal and remand.

I. THE TRIAL COURT ERRED BY DENYING MR. RUFFIN'S MOTION TO DISMISS THE MARIJUANA CHARGES BECAUSE THERE WAS NOT SUBSTANTIAL EVIDENCE THAT ONE OF THE SUBSTANCES PURCHASED BY MR. HURST WAS MARIJUANA.

Mr. Ruffin made a motion to dismiss all charges at the close of the State's evidence and at the close of all evidence. (T pp. 144, 160). Because there was not substantial evidence that the substance purchased by Mr. Hurst was marijuana, the trial court should have granted the motion to dismiss. Mr. Ruffin asks this Court to reverse the trial court's decision and vacate the judgments for selling and delivering marijuana.

A. *Standard of Review*

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted; italics added). "'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.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). The evidence is viewed in the light most favorable to the State, but "when the evidence . . . is sufficient only to raise a suspicion or conjecture . . . the motion to dismiss must be allowed. This is true even though the suspicion aroused by the evidence is strong." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (internal citation omitted).

B. *Analysis*

To obtain a conviction for buying or selling a controlled substance, the State bears the burden of proving that the substance is a controlled substance. N.C. Gen. Stat. § 90-95(a)(1) (2023); *State v. Harris*, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007). Marijuana is a controlled substance with a Delta-9 THC concentration in excess of .3%. N.C. Gen. Stat. § 90-94(a) (2023). This definition of marijuana excludes hemp or hemp products with a Delta-9 THC concentration of .3% or less. *Id.*; N.C. Gen. Stat. § 90-87(13a) (2023).[2]

In *State v. Osborne*, 372 N.C. 619, 630, 831 S.E.2d 328, 335 (2019), the Supreme Court of North Carolina reasserted that "all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question." While Mr. Ruffin argues below that Officer Harrell's and Ms. Cone's testimonies were inadmissible, that inadmissible evidence must still be considered

[2] On 9 May 2021, the definitions of marijuana and hemp were the same as the current statutes provide. Hemp was legal at that time under the now-repealed Industrial Hemp Act, Article 50E of Chapter 106 of the North Carolina General Statutes. N.C. Gen. Stat. § 106-568.51(7) (2021); N.C. Gen. Stat. § 90-87(16) (2021).

when determining sufficiency of the evidence at the motion to dismiss stage. *Id.* However, their testimonies were insufficient to establish that the substance was, in fact, marijuana.

In *Osborne*, no expert analyst testified that the substance defendant possessed was, in fact, heroin. *Id.* at 622, 831 S.E.2d at 330. The Court held that there was still substantial evidence that the defendant possessed heroin where: (1) the defendant was found in a hotel that was frequented by drug users; (2) the defendant was found unresponsive and turning blue; (3) when she awoke, the defendant admitted that she had used heroin; (4) there were syringes and other drug paraphernalia in the hotel room; (5) two officers visually identified the substance as heroin; (6) the confiscated substance reacted positively to a field test, indicating the presence of heroin; and (7) at trial, an officer duplicated the field test before the jury. *Id.* at 620-21, 831 S.E.2d at 329-30.

In *State v. Massey*, 287 N.C. App. 501, 503, 882 S.E.2d 740, 744 (2023), this Court applied *Osborne* and held that there was substantial evidence that the defendant possessed marijuana. There, the officers executed a search warrant at the defendant's home and discovered: (1) what the officers believed to be a bag of marijuana; (2) what the officers believed to be five bags of crystal methamphetamine hidden in a recliner; (3) digital scales with a powder residue on them; and (4) rolling papers, plastic bags, what appeared to be more marijuana, and a device for smoking marijuana on the coffee table. *Id.* The officers confiscated the defendant's cellular phone that contained "text messages ranging from October 2018 to February 2019 . .

. [that] illustrate defendant's interest in 1) purchasing marijuana from an unidentified source; or 2) possessing marijuana. The challenged photos include 1) defendant's face; 2) money; and 3) a photo of a crystalline substance dated 25 December 2018." *Id.* at 506, 882 S.E.2d at 745-46. At trial, the testifying analyst stated that she could not ascertain the amount of THC in the substance that was alleged to be marijuana. *Id.* at 503, 882 S.E.2d at 744.

Based on the appellate court holdings in *Osborne* and *Massey*, Mr. Ruffin recognizes that, under the current law, a chemical analysis that establishes a concentration of Delta-9 THC in excess of .3% is not required for the case to proceed to the jury.[3] However, in those cases, there were many other facts that established possession of a controlled substance. Importantly, the Court in *Osborne* emphasized that there were two field tests that indicated the substance was heroin. *Osborne*, 372 N.C. at 631, 831 S.E.2d at 336-37. A critical distinction between heroin and marijuana is that heroin is a controlled substance with no percentage qualifiers. N.C. Gen. Stat. § 90-89(2) (2023). Marijuana must have a Delta-9 THC content in excess of .3%. N.C. Gen. Stat. § 90-94(a). Consequently, the field tests in *Osborne* provided a solid indication that the substance was a controlled substance because it signaled the presence of heroin; there was no need for a percentage qualifier. *See Osborne*, 372 N.C. at 631, 831 S.E.2d at 336-37. A test that shows the substance is a cannabinoid but does not indicate the THC content should not be given the same

[3] Mr. Ruffin is raising a preservation argument that the State can only meet its burden of proof by establishing the substance contains a concentration of Delta-9 THC in excess of .3% via scientific testing by a qualified expert.

evidentiary weight. There are legal hemp products that would signal the same result because they are cannabinoids. Moreover, as noted above, there were many other facts that supported the State's charge, including the defendant's own admission that she had used heroin. *Id.* at 620-21, 831 S.E.2d at 329-30.

In *Massey*, there were *many* facts beyond the officer's testimony that he believed the bag contained marijuana and the analyst's testimony that the substance was a cannabinoid. *Massey*, 287 N.C. App. at 503, 882 S.E.2d at 744. Here, the State is relying almost exclusively on the officer's and the analyst's testimonies. There is no admission by Mr. Ruffin that the drug was, in fact, marijuana. Officers did not find any attendant drug paraphernalia or other packaging supplies. There was no string of text messages associating Mr. Ruffin with prior drug sales. The facts indicating that Mr. Ruffin was the perpetrator — i.e., that he was the person who engaged in the transaction — should not be conflated with the facts needed to establish that the substance he sold was, in fact, marijuana.

In sum, the facts in this case do not provide substantial evidence that the bag contained marijuana as a matter of law; there is evidence that creates a suspicion that it was marijuana. The trial court erred by denying Mr. Ruffin's motion to dismiss the marijuana charges. Mr. Ruffin asks this Court to reverse the trial court's decision and vacate the judgments.

II. THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING OFFICER HARRELL TO PROVIDE OPINION TESTIMONY THAT ONE OF THE SUBSTANCES PURCHASED BY THE CONFIDENTIAL INFORMANT WAS MARIJUANA BECAUSE HE COULD NOT TELL THE DIFFERENCE BETWEEN MARIJUANA AND HEMP.

Officer Harrell should not have been permitted to testify that the substance was marijuana because he could not visually identify the amount of Delta-9 THC present in the substance. He admitted that there is a difference between marijuana and hemp, but he could not describe that difference. (T p. 87). In the absence of any analysis revealing the Delta-9 THC content, the jury likely weighed Officer Harrell's testimony heavily when determining that Mr. Ruffin sold marijuana. Without his testimony, the jury likely would have reached a different result. Mr. Ruffin asks this Court to hold that Officer Harrell's testimony was inadmissible, vacate the judgments, and remand the case for a new trial on the marijuana charges.

A. *Standard of Review*

Mr. Ruffin did not object to Officer Harrell's identification of the substance as marijuana; however, Mr. Ruffin is entitled to plain error review. N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.'" *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

B. *Analysis*

Now that hemp is widely available, an officer's testimony that a substance is marijuana by sight or smell is unreliable and, therefore, inadmissible. The testimony should be excluded, and convictions for marijuana-based offenses should rest on scientific data that reveals the amount of Delta-9 THC content.

A lay witness's "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2023). An officer's testimony that a substance is marijuana by sight or smell is not helpful in determining that the substance is, in fact, marijuana; rather, it could mislead the jury and result in wrongful convictions. The North Carolina State Bureau of Investigations has noted that "[t]here is no easy way for law enforcement to distinguish between [ ] hemp and marijuana. There is currently no field test which distinguishes the difference. Hemp and marijuana look the same and have the same odor, both unburned and burned." N.C. State Bureau of Investigation, *Industrial Hemp/CBD Issues* 2, https://www.sog.unc.edu/sites/default/files/doc_warehouse/NC%20SBI%20%20Issues%20with%20Hemp%20and%20CBD%20Full.pdf (last visited May 31, 2024).

Consequently, an officer's visual inspection was reliable in the past when there was no distinction between marijuana and hemp under the law, but that inspection is now rendered unreliable in the current legal landscape. *State v. Highsmith*, 285 N.C. App. 198, 199, 877 S.E.2d 389, 390 (2022) (acknowledging that hemp and marijuana look and smell the same, which casts doubt on officers' "traditional[]"

means of identification). Law enforcement, lab analysis methods, and case law jurisprudence must adapt to the legislature's decision to legalize hemp.

"Ultimately, the State is better served by identifying perpetrators with reliable evidence and reducing the likelihood that convictions rest on inaccurate data." *State v. Ward*, 364 N.C. 133, 148, 694 S.E.2d 738, 747 (2010). As discussed above, in *Osborne*, the Court held that incompetent evidence must be considered when determining sufficiency of the evidence at the motion to dismiss stage, but the Court did not abrogate *Ward*'s holding that

> "the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required."

Osborne, 372 N.C. at 629, 831 S.E.2d at 335 (quoting *Ward*, 364 N.C. at 147, 694 S.E.2d at 747). As discussed below, Ms. Cone's testimony and data did not satisfy this requirement under Rule 702. Certainly, Officer Harrell's testimony did not satisfy this requirement under Rule 701.

Mr. Ruffin acknowledges that this Court reached a contrary ruling in *State v. Arthur*, 2021-NCCOA-548, 2021 WL 4535680 (N.C. Ct. App. Oct. 5, 2021) (unpublished), *disc. rev. improvidently allowed*, 385 N.C. 330 (2023). However, that case was unpublished and not binding precedent. Mr. Ruffin asks this panel to hold that *Ward* is controlling, and the State is not relieved of its burden to establish, through scientific testing, that the substance he possessed was, in fact, marijuana. Officer Harrell's testimony cuts against the core of *Ward*'s mandate by providing

unreliable identification testimony in violation of Rule 701. Given the absence of reliable scientific testing, Officer Harrell's testimony improperly led the jury to convict Mr. Ruffin and, therefore, amounted to plain error. Mr. Ruffin asks this Court to hold that Officer Harrell's testimony was inadmissible, vacate the judgments, and remand the case for a new trial on the marijuana charges.

III. THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING MS. CONE TO PROVIDE EXPERT TESTIMONY CONCERNING THE SUBSTANCE THAT WAS ALLEGED TO BE MARIJUANA WHERE HER TESTS FAILED TO DISTINGUISH MARIJUANA FROM HEMP.

Arguably, Ms. Cone's testimony as an *expert* witness was even more misleading than Officer Harrell's visual identification. Ms. Cone informed the jury that the substance was a cannabinoid and that it could be hemp. (T pp. 131-32). She explained that there is a difference in THC content but failed to tell the jury what percentage of Delta-9 THC is required to differentiate marijuana from hemp. (T p. 132). She could not say how much THC was present in the sample. (T p. 132). The jury was left to speculate regarding the technical difference between hemp and marijuana, as shown by their questions during deliberation. (R p. 45). Ms. Cone's testimony should have been excluded and amounted to plain error. Without her testimony, it is likely the jury would have reached a different result. Mr. Ruffin asks this Court to hold that Ms. Cone's testimony was inadmissible, vacate the judgments, and remand the case for a new trial on the marijuana charges.

A. *Standard of Review*

Mr. Ruffin did not object to Ms. Cone's testimony on the grounds now argued before this Court; however, Mr. Ruffin is entitled to plain error review. N.C. R. App. P. 10(a)(4).

B. *Analysis*

A testifying expert's testimony is admissible if it complies with Rule 702 of the North Carolina Rules of Evidence, which provides:

> (a) If 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, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702 (2023). None of the three criteria were satisfied in this case.

The SBI reported that "[t]he State Crime Lab, as well as most municipal crime labs in NC, perform a qualitative analysis on plant material to determine whether THC is present. All hemp and CBD products contain some level of THC; therefore, the crime labs will report these products as containing marijuana or THC . . . ." N.C. State Bureau of Investigation, *supra*, at 2. This method of testing, while reliable for many years, is outdated and does not reliably identify illegal marijuana. *See Ward*, 364 N.C. at 146, 694 S.E.2d at 746 ("[T]he length of time a method has been employed does not necessarily heighten its reliability . . . ."). In *State v. Teague*, 286 N.C. App.

160, 184-85, 879 S.E.2d 881, 900 (2022), *disc. review denied*, 891 S.E.2d 281 (2023), this Court noted that a chemical analysis was performed that established an "unlawful concentration" of THC. Thus, the State has, in recent years, been able to provide analysis of THC concentration. While Ms. Cone's laboratory, and likely others around the State, are unable to do so, that does not mean the State should be relieved of its burden of proof.

It appears that Ms. Cone used the methodology that was available to her, but that methodology resulted in insufficient data, which was unreliably applied to this case. Given the outdated methodology she was using, it was incumbent on Ms. Cone to specifically tell the jury that marijuana must contain Delta-9 THC in excess of .3%, and that hemp contains no more than .3% Delta-9 THC. Those key facts related to the data as applied to this case would have answered the jury's question "Are we allowed to home in on the technicality of if it were in fact marijuana instead of hemp?" (R p. 45). That "technicality" is everything. That technicality is the difference between guilt and innocence. It is the job of an analyst, and the methodology utilized by that analyst, to provide reliable results that allow the jurors to make a *legal* determination, not pass judgment based on what they think is *probably* true.

Ms. Cone's testimony and the attendant lab report did not satisfy the requirements of Rule 702. Again, failure to keep up with reliable testing methodology does not relieve the State of its burden of proof. Unreliable testing misleads and confuses the jury. The admission of Ms. Cone's testimony was plain error because the jury would likely have reached a different result had she not testified. Her

testimony provided the foundation for the jury's decision, but it was an unreliable and misleading foundation. Mr. Ruffin asks this Court to hold that Ms. Cone's testimony was inadmissible, vacate the judgments, and remand the case for a new trial on the marijuana charges.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR BY NOT INSTRUCTING THE JURY ON THE LEGAL DEFINITIONS OF MARIJUANA AND HEMP.

Per defense counsel's request, the jury was instructed that "the term marijuana does not include hemp or hemp products." (T pp. 171, 189). That instruction is not a complete and accurate statement of the law. The judge should have provided the following instruction or similar language: "The term marijuana does not include hemp or hemp products. For the jury to find the defendant guilty of selling or delivering marijuana, the jury must determine that the substance alleged to be marijuana is, in fact, marijuana. As defined by North Carolina statute, marijuana has a Delta-9 THC content in excess of .3%, and hemp has a Delta-9 THC content of .3% or less." Had the jury received this instruction, it is virtually certain that the jury would have reached a different result. Mr. Ruffin asks this Court to vacate the judgments and remand the case for a new trial on the marijuana charges.

A. *Standard of Review*

Because Mr. Ruffin's attorney did not request the specific instruction regarding the Delta-9 THC percentages, the standard of review is plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

B. *Analysis*

Jury instructions are "for the guidance of the jury." *Sugg v. Baker*, 258 N.C. 333, 335, 128 S.E.2d 595, 597 (1962). The purpose "is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971). "In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented." *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253 (1985). A judge has the obligation "to instruct the jury on every substantive feature of the case." *State v. Mitchell*, 48 N.C. App. 680, 682, 270 S.E.2d 117, 118 (1980).

The jury in this case was confused because the instructions were not clear on a substantive feature of the case — whether the substance alleged to be marijuana was, in fact, marijuana. During deliberations, the jury asked to see Ms. Cone's "testimony about marijuana and hemp products" and "the written analysis of the marijuana." (R p. 45). The jury also asked, "Are we allowed to home in on the technicality of if it were in fact marijuana instead of hemp?" (R p. 45). The judge allowed the jury to see the lab report, but said the jury had to recall Ms. Cone's testimony. (T pp. 201-02). The judge said that he had instructed the jury on "the elements for each case that involves marijuana" and that the State bore the burden of proving each element beyond a reasonable doubt. (T p. 202).

As stated above, the jury was never provided the legal definition of marijuana during Ms. Cone's testimony; she gave a vague statement that marijuana has a high level of THC and hemp does not. Her testimony opened the door to this "technicality,"

but the jury could not ascertain what that technicality was without knowledge of the Delta-9 THC percentages. In *Fritz v. State*, 223 N.E.3d 265, 277 (Ind. Ct. App. 2023) (citation and quotation marks omitted), the Indiana Court of Appeals held:

> Our General Assembly has established a clear distinction between legal hemp and illegal marijuana based on the THC concentration present in the plant material, the effect being to now require the State to prove beyond a reasonable doubt that a substance is marijuana by proving that the substance's delta-9-THC concentration exceeds 0.3% on a dry weight basis. Here, the State failed to present any evidence of the delta-9 THC concentration of the substance in the cigarettes found on Fritz's person. Consequently, . . . no evidentiary basis from which a reasonable fact-finder could conclude that the [substance in the cigarettes was] in fact marijuana and not hemp.

The jurors in this case were likewise left with no evidentiary basis for their decision, and no jury instruction to inform them that they had been deprived of crucial information.

In sum, a jury instruction that hemp and hemp products are legal, standing alone, furthers a jury's confusion. If this Court continues to allow cases to proceed to the jury without test results establishing the Delta-9 THC concentration, then the jury should at least be fully informed of what the law requires. The jurors in this case were left to speculate and simply guess; however, given their questions, they seemed poised to acquit Mr. Ruffin, and would likely have done so, had they been properly instructed on the law. Consequently, the judge's incomplete jury instruction was plain error. Mr. Ruffin asks this Court to vacate the judgments and remand the case for a new trial on the marijuana charges.

V. THE TRIAL COURT ERRED BY SENTENCING MR. RUFFIN FOR BOTH THE SALE OF MARIJUANA AND THE DELIVERY OF MARIJUANA.

According to well-established precedent, Mr. Ruffin was improperly sentenced for both selling and delivering marijuana in the same transaction. Mr. Ruffin asks this Court to vacate the sentences, and remand for resentencing.

A. *Standard of Review*

A sentence that is invalid as a matter of law may be raised for the first time on appeal. N.C. Gen. Stat. § 15A-1446 (2023).

B. *Analysis*

A defendant may be indicted and tried under N.C. Gen. Stat. § 90-95(a)(1) for both the sale and delivery of a controlled substance, but the defendant may not be *convicted* of both sale and delivery *if those charges arose from a single transfer*. *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990); *State v. Morris*, 288 N.C. App. 65, 88, 884 S.E.2d 750, 766 (2023). The trial court erred by entering judgment on selling *and* delivering marijuana. On remand, the term of imprisonment might not change because these sentences ran concurrently with the trafficking heroin (transporting) conviction, but an erroneous conviction must be stripped from Mr. Ruffin's record. Mr. Ruffin asks this Court to vacate the sentences, and remand for resentencing.

VI. THE TRIAL COURT JUDGE CONSIDERED EXTRANEOUS INFORMATION WHEN HE SENTENCED MR. RUFFIN TO TWO CONSECUTIVE SENTENCES FOR TRAFFICKING HEROIN BY SALE AND TRAFFICKING A MIXTURE OF HEROIN BY TRANSPORTATION.

The prosecutor brought up extraneous information that affected the judge's sentencing decisions. Mr. Ruffin asks that, on remand, the court reconsider the consecutive sentences that were imposed without consideration of extraneous information.

A. *Standard of Review*

"The extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review." *State v. Pinkerton*, 205 N.C. App. 490, 494, 697 S.E.2d 1, 4 (2010), *rev'd on other grounds*, 365 N.C. 6, 708 S.E.2d 72 (2011).

B. *Analysis*

A defendant may be sentenced to consecutive or concurrent terms of 70-93 months imprisonment for each conviction of trafficking by selling and transporting heroin. N.C. Gen. Stat. § 90-95(h)(4)(a) (2023); N.C. Gen. Stat. § 15A-1354 (2023). A sentence "within the statutory limit will be presumed regular and valid," *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987), unless "the record discloses that the court considered irrelevant and improper matter[s] in determining the severity of the sentence," *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977).

Mr. Ruffin, therefore, concedes that his consecutive terms of 70-93 months imprisonment for trafficking in heroin (selling) and trafficking in a mixture

containing heroin (transporting) were within the statutory limits. However, the judge likely ordered two consecutive sentences instead of running them concurrently because he considered extraneous information.

Pursuant to N.C. Gen. Stat. § 15A-1340.12 (2023),

> [t]he primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

This Court has held that in "determining the sentence to be imposed, the trial judge may consider such matters as the age, character, education, environment, habits, mentality, propensities and record of the defendant." *State v. Morris*, 60 N.C. App. 750, 754-55, 300 S.E.2d 46, 49 (1983). "On the other hand, our Courts have held it is improper during sentencing for a trial judge to consider conduct not included in the indictment[.]" *State v. Johnson*, 265 N.C. App. 85, 88, 827 S.E.2d 139, 141 (2019).

> The following is the relevant colloquy during sentencing:
>
> PROSECUTOR: Judge, as you know, there are circumstances around this particular sale that didn't come out in the trial, but Debbie Harrison has been here throughout the whole trial, and we know that there are -- there are circumstances around it, that being the death of Tina Harrison, and, Judge, I know he hasn't been convicted of that, but the State would ask that you take that into consideration. Additionally, these charges didn't stop Mr. Ruffin's criminal activity. While out on bond on these charges he became a target of the regional drug task force which resulted in numerous drug charges in Pitt County. Additionally, a search warrant was served on his residence by the regional drug task force, and they found $20,000 in cash in Mr. Ruffin's residence. I know those aren't convictions, but the State would like for you to take those into consideration with your sentencing decisions.
> . . .

I think those are the significant acts, is the bringing of those drugs from somewhere else into this community, lethal drugs, Judge, and selling those here to Mr. Hurst. As we heard during the trial, this isn't the only time he's been in Martin County selling drugs, apparently, 50 to 60 other times to Mr. Hurst, and the State believes that Mr. Hurst is not the only customer that Mr. Ruffin has in this community, so he's bringing lethal drugs over and over and over into this community, and we would ask that you would punish him as such.

THE COURT: -- anything you'd like to say?

MR. RUFFIN: I mean, I know I've made some mistakes, and I don't have a criminal record. I'm not – I'm not accustomed to being in trouble, just made some mistakes, you know, so –

THE COURT: Well, what do you call peddling dope that kills people? What do you call that?

MR. RUFFIN: I'm sorry, Your Honor.

THE COURT: I just can't understand. Marijuana you know . . . marijuana is marijuana. You jacked it up to heroin and fentanyl. Just hearing your lawyer talk about your little girl and remembering State's exhibit of the fentanyl heroin mixture made me wonder if you had ever, you know, cut whatever you got, divided it up, or did in any way touched it and if you had done that and touched your little girl she may have died. Do you understand that?

MR. RUFFIN: Yes, sir. I definitely understand.

THE COURT: How does that make you feel?

MR. RUFFIN: Not too good.

. . . [Sentencing]

THE COURT: I've took very much into consideration your request that I sentence him to over 20 years, but I don't believe that that is warranted by these charges that the jury found him guilty of today. Now we have another proceeding at some point in the future because he's charged with death by distribution. I did not consider that. That will -- that will rise or fall on its own evidence. I did what I thought was appropriate for the defendant's level of involvement in the sale of heroin and fentanyl. Now, Mr. Ruffin, you don't have much of a record, but I don't know how

> in the world you thought that it was anywhere near a good business to be in to sell fentanyl and heroin but fentanyl that kills people just by touching it and you seem like a smart guy, and I'm pretty sure you saw on the news people dying of fentanyl all the time, and it escapes me that you didn't just dismiss that because you were making money with -- with getting people hooked on this terrible, terrible, drug. You need to think long and hard while you're in prison and try in some way to turn your life around because you have been engaged in a very evil business, therefore, making you sort of an evil person. You may not be an evil person. You may just have been hung up in the money, but you were putting so many people at risk, and Gilbert Hurst and his girlfriend were the prime targets. They were addicts, so much that, you know, he was in jail. She was out by herself. I'm only glad that you were stopped at this point.

(T pp. 208-17). The prosecutor asked the judge to consider outside charges, specifically other drug charges and a death by distribution charge related to the death of Mr. Hurst's girlfriend, Tina Harrison. (T pp. 208-09). While the judge said out loud that he did not consider the death by distribution charge, it is clear by his other statements that he did. The judge repeatedly alludes to the deadly nature of fentanyl, and he states that Ms. Harrison was a "prime target." (T pp. 213, 217).

This case is analogous to *Johnson* where the defendant was convicted of numerous possession and trafficking offenses. *Johnson*, 265 N.C. App. at 86, 827 S.E.2d at 140. At sentencing, the judge stated that another individual had been mentioned during debriefing who was allegedly charged with homicide for selling heroin to someone in the community. *Id.* at 88, 827 S.E.2d at 141. The judge stated, "So it is not just, 'Oh, well, you know, I was just maybe dealing a little drugs.' It is actually a link in the chain that is leading to the deaths of tens of thousands of people in our country. It is a big deal to me. A big deal." *Id.* This Court stated, "[i]f the trial court had only addressed the severity of the offenses by reference to the effects

of the drug epidemic in her community or nationwide, there would be no issue in this case." *Id.* at 89, 827 S.E.2d at 142. However, it was clear in context that the judge was considering a specific alleged homicide perpetrated by some other individual. *Id.* The Court remanded for resentencing, stating, "[w]hile we cannot ascertain from the record the precise impact the improper consideration had on the sentences handed down by the trial judge, it is evident from the judge's statement that the improper consideration was important in sentencing." *Id.* at 90, 827 S.E.2d at 143.

In the present case, it is clear that the judge considered not just the impact of drugs in the community at large, but the death of Ms. Harrison. Again, simply saying that he did not consider it does not make it so when the context indicates otherwise. In *Johnson*, the judge was considering the crime of some other person, not the defendant, and the Court held that was improper. *Id.* at 88, 827 S.E.2d at 141. Here, the judge was considering Mr. Ruffin's alleged crime that was outside the record, which creates an even tighter connection between the improper consideration and sentencing. Mr. Ruffin acknowledges that he could have been sentenced to even more time in prison, but he also could have been sentenced to less time. He was sentenced to a minimum of almost twelve years in prison for one drug transaction. That is a significant amount of time that he will spend away from his daughter. Even six years is a long time, but again, Mr. Ruffin makes no arguments in this brief that would prohibit a sentence of 70-93 months in prison for trafficking heroin. Mr. Ruffin asks this Court to remand for resentencing so the judge may reconsider the sentence without considering extraneous information. Mr. Ruffin also asks that the judge

reconsider the imposition of two $50,000 fines without considering extraneous information.

CONCLUSION

Mr. Ruffin respectfully asks this Court to hold that the trial court erred by denying the motion to dismiss the marijuana charges. The Court should vacate the judgments related to the marijuana charges and remand for resentencing on the trafficking charges because the judge considered extraneous information. Alternatively, Mr. Ruffin asks that the Court order a new trial, excluding Officer Harrell's and Ms. Cone's testimonies and requiring the trial court to give the proper jury instruction regarding the difference between hemp and marijuana if the case ultimately reaches the jury. Should the case result in similar convictions, the trial court must not sentence Mr. Ruffin for both the sale and delivery of marijuana, and the trial court must not consider extraneous information at sentencing.

Respectfully submitted this the 3rd day of June, 2024.

(Electronically Filed)

Shelly Bibb DeAdder
sadeadder@gmail.com
P.O. Box 12717
Durham, N.C. 27709
Bar No. 38032
ATTORNEY FOR DEFENDANT

CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(J)(2)

I hereby certify that Defendant-Appellant's Brief is on compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in twelve-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Microsoft Word, the program used to prepare this brief.

This the 3rd day of June, 2024.

(Electronically Filed)
Shelly Bibb DeAdder
sadeadder@gmail.com
P.O. Box 12717
Durham, N.C. 27709
Bar No. 38032

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Brief has been filed electronically per N.C. R. App. P. 26(a)(2). I further hereby certify that a copy of Defendant-Appellant's Brief has been electronically served upon Alexander Ward, Assistant Attorney General, at award@ncdoj.gov.

This the 3rd day of June, 2024.

(Electronically Filed)
Shelly Bibb DeAdder
sadeadder@gmail.com
P.O. Box 12717
Durham, N.C. 27709
Bar No. 38032

ADDENDUM OF UNPUBLISHED CASE

279 N.C.App. 684
Unpublished Disposition

Court of Appeals of North Carolina.

STATE of North Carolina
v.
Roger ARTHUR, Jr.

No. COA20-635
|
Filed October 5, 2021

Appeal by Defendant from judgments entered 31 October 2019 by Judge Joshua W. Willey, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 8 September 2021. New Hanover County, Nos. 19CRS050630-050632

Attorneys and Law Firms

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for the State-Appellee.

Anne Bleyman, for Defendant-Appellant.

Opinion

COLLINS, Judge.

***1** ¶ 1 Defendant appeals from judgments entered upon guilty verdicts of various drug-related crimes and his plea of guilty to attaining habitual felon status. Defendant argues that the trial court erred by permitting a lay witness to give opinion testimony identifying a substance as marijuana, and his sentence as a habitual felon constitutes cruel and unusual punishment. We discern no error.

I. Background

¶ 2 On 22 April 2019, Defendant was indicted for possession with intent to manufacture, sell, and deliver heroin; possession of heroin; possession of heroin on the premises of a local confinement facility; possession of marijuana; possession of marijuana on the premises of a local confinement facility; two counts of possession of drug paraphernalia; and attaining habitual felon status. All but the charge of attaining habitual felon status were tried before a jury on 29 and 30 October 2019.

¶ 3 The evidence at trial tended to show the following: Defendant was arrested and booked into the New Hanover County Detention Facility on 21 January 2019. The next day, Deputy Heavin Mason was working as a detention officer and smelled marijuana in the cell where Defendant and another inmate were housed. Mason checked the nearby cells and confirmed that the odor was coming from Defendant's cell. Officers removed Defendant and his cellmate from the cell, conducted a pat-down search of each, and then searched the cell.

¶ 4 After the officers did not find any narcotics in the cell, they conducted a "visual body inspection" on both Defendant and his cellmate. A visual body inspection begins with a pat-down while the inmate is dressed. Then, the officer directs the inmate to remove one article of clothing at a time, searches the article of clothing, and moves to the next article. Once the inmate is undressed, the officer searches the inmate's mouth, behind the ears, in any long hair, and behind the inmate's scrotum. Finally, the officer directs the inmate to squat and cough "to make sure that no contraband is being smuggled into the facility" via the inmate's anal cavity.

¶ 5 Mason testified that when he instructed Defendant to squat and cough, Defendant only partially performed the maneuver. After Mason again instructed Defendant to squat and cough, Defendant complied, and Mason "saw a clear plastic bag, material, sticking out of ... his rectum." Mason instructed Defendant to perform the maneuver again, but Defendant refused. Mason informed a superior, Corporal James Biondo, who attempted to perform another visual body inspection on Defendant in the intake area of the jail. According to the officers, Defendant only partially performed the squat and cough maneuver and became "belligerent and argumentative." The officers restrained Defendant and took him to the hospital.

¶ 6 Deputy Wes Baxley of the New Hanover County Sheriff's Office vice and narcotics unit came to the hospital. After Baxley obtained a search warrant to search Defendant's rectal cavity, Defendant spoke to a nurse and

agreed to remove the items hidden in his rectal cavity. Baxley testified that Defendant first reached behind himself and "produced a small amount of marijuana." Baxley "still could hear crinkling of plastic on or about [Defendant's] person" and asked Defendant what else was hidden. Baxley testified that Defendant then reached behind himself and produced "a small amount of heroin in a plastic bag." This second bag contained 30 smaller individual baggies bundled together with rubber bands. Once an x-ray revealed no further hidden items, Defendant was transported back to the detention center.

***2** ¶ 7 Lyndsay Cone, a forensic scientist in the State Crime Lab's drug chemistry section, testified at trial as "an expert in the field of forensic chemistry analyzing substances for the purposes of determining whether they contain controlled substances." Cone analyzed the substance found in one of the 30 small bags within the second bag, but did not analyze the substance which Baxley identified as marijuana.

¶ 8 The State dismissed the possession of heroin charge during the charge conference. The jury found Defendant guilty of the remaining drug charges. Defendant thereafter pled guilty to attaining habitual felon status. The trial court consolidated the convictions into two judgments and sentenced Defendant as a habitual felon to two consecutive terms of 67 to 93 months in prison. Defendant gave oral notice of appeal in open court.

II. Discussion

A. Lay Opinion Testimony

¶ 9 Defendant argues that the trial court erred by permitting Baxley to give lay opinion testimony identifying the substance in the first bag produced by Defendant as marijuana. Defendant contends that Baxley's testimony was inadmissible because "[a] law enforcement officer may not express a lay opinion as to the visual identification of the chemical composition of a purported controlled substance."

¶ 10 To preserve an issue for appellate review, a party "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context" and must "obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1). Defendant did not object to any of the instances in which Baxley identified the substance as marijuana. However, because Defendant "specifically and distinctly" contends that the trial court's admission of Baxley's testimony amounted to plain error, we will review this issue for plain error. N.C. R. App. P. 10(a)(4).

¶ 11 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

¶ 12 A lay witness' "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2019). This Court has consistently held that "a police officer experienced in the identification of marijuana may testify to his visual identification of evidence as marijuana[.]" *State v. Garnett*, 209 N.C. App. 537, 546, 706 S.E.2d 280, 286 (2011) (citation omitted); *see also State v. Johnson*, 225 N.C. App. 440, 455, 737 S.E.2d 442, 451 (2013) ("It is well established that officers with proper training and experience may opine that a substance is marijuana."); *State v. Mitchell*, 224 N.C. App. 171, 179, 735 S.E.2d 438, 444 (2012) (noting that "marijuana is distinguishable from other controlled substances that require more technical analyses for positive identification" and "the State is not required to submit marijuana for chemical analysis"); *State v. Cox*, 222 N.C. App. 192, 198, 731 S.E.2d 438, 443 (2012) ("[T]he trial court did not err by allowing the two officers to identify the green vegetable matter as marijuana based on their observation, training, and experience."), *rev'd on other grounds*, 367 N.C. 147, 749 S.E.2d 271 (2013); *State v. Jones*, 216 N.C. App. 519, 526, 718 S.E.2d 415, 421 (2011) ("[O]ur case law provides that an officer may testify that the contraband seized was marijuana based on visual inspection alone.").

***3** ¶ 13 Defendant contends that these cases are at odds with *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009) (per curiam), and *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010), in which our Supreme Court held that certain lay and expert opinion testimony was inadmissible to identify certain substances as controlled substances. As the State argues, however, the Supreme Court's decisions in *Llamas-Hernandez* and *Ward* do not control the issue here—the admissibility of Baxley's opinion testimony identifying a substance as marijuana. Instead, we are bound by the multiple cases since *Ward* in which this Court has permitted officers to give lay opinion testimony identifying marijuana based upon their training and experience. *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.").

¶ 14 At trial, Baxley testified that the first bag produced by Defendant contained marijuana. Baxley testified that he identified the substance "from what it looks like [and] what it smelled like"; he had been "exposed [ ] to what marijuana smelled like and looked like" during training; and he had "done numerous cases involving marijuana, small to large quantities," in his time with the vice and narcotics unit. Baxley permissibly offered an opinion identifying the substance as marijuana based on his training and experience. *See Johnson*, 225 N.C. App. at 455, 737 S.E.2d at 451. The trial court did not err, let alone commit plain error, by admitting his testimony.

B. Sentencing as a Habitual Felon

¶ 15 Defendant next argues that being sentenced as a habitual felon violated his right to be free of cruel and unusual punishment under the state and federal constitutions. Defendant acknowledges "that this Court has previously upheld the statutory scheme against an identical challenge and raises this issue in [his] brief to urge the Court to re-examine its prior holdings and so as not to be considered to have abandoned these claims under N.C. R. App. P. 28(b)(6)."

¶ 16 Defendant is correct that our appellate courts have upheld sentences under the habitual felon laws against similar constitutional challenges. *See State v. Todd*, 313 N.C. 110, 118-19, 326 S.E.2d 249, 253-54 (1985) (habitual felon laws are constitutional); *State v. Blackwell*, 228 N.C. App. 439, 449, 747 S.E.2d 137, 144-45 (2013) (holding that a sentence of 107 to 138 months' imprisonment for drug offenses did not violate the prohibition against cruel and unusual punishment); *State v. Lackey*, 204 N.C. App. 153, 159, 693 S.E.2d 218, 222 (2010) (holding that a sentence "of 84 to 110 months in prison for possession of [0.1 grams of] cocaine, as an habitual felon, did not offend the proscription against cruel and unusual punishment ...."); *State v. Hall*, 174 N.C. App. 353, 355-56, 620 S.E.2d 723, 725 (2005) (holding that sentencing defendant convicted of obtaining property by false pretenses to 121 to 155 months in prison did not amount to cruel and unusual punishment); *State v. Clifton*, 158 N.C. App. 88, 96, 580 S.E.2d 40, 46 (2003) (holding that sentencing a defendant convicted of a Class H felony as a Class C felon to two prison terms of a minimum of 168 months and a maximum of 211 months did not amount to cruel and unusual punishment). This Court is bound by those prior decisions and cannot overrule itself. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. Therefore, we must overrule Defendant's argument and hold that Defendant's sentence did not violate Defendant's right to be free of cruel and unusual punishment.

III. Conclusion

¶ 17 The trial court did not err in admitting Baxley's opinion testimony, based on his training and experience, that one of the substances in Defendant's possession was marijuana. Defendant's sentence did not violate the prohibition against cruel and unusual punishment in the state and federal constitutions. We discern no error.

***4** NO ERROR.

Report per Rule 30(e).

Judges ARROWOOD and JACKSON concur.

All Citations

279 N.C.App. 684, 2021-NCCOA-548, 863 S.E.2d 327 (Table), 2021 WL 45356