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State v. Leonard

Court of Appeals of North Carolina

November 27, 2012, Heard in the Court of Appeals; January 15, 2013, Filed

NO. COA12-570

Reporter

2013 N.C. App. LEXIS 20 *; 225 N.C. App. 266; 736 S.E.2d 647; 2013 WL 150035

STATE OF NORTH CAROLINA v. MICHAEL EUGENE
LEONARD

Judges: McGEE, Judge. Judges Robert C. HUNTER, and
ELMORE concur.

Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE
REFER TO THE NORTH CAROLINA RULES OF
APPELLATE PROCEDURE FOR CITATION OF
UNPUBLISHED OPINIONS.

Opinion by: McGEE

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CAROLINA COURT OF APPEALS REPORTS.

Prior History: [*1] Davidson County. Nos. 10 CRS 57890
and 5632.

Opinion

Appeal by Defendant from judgment entered 30 November
2011 by Judge Tanya T. Wallace in Superior Court, Davidson
County. Heard in the Court of Appeals 27 November 2012.

McGEE, Judge.

Michael Eugene Leonard (Defendant) was found guilty of
felony breaking or entering and of having obtained habitual
felon status on 30 November 2011. These convictions arose
out of the breaking or entering of a building in Lexington (the
building) from which copper was stolen. The building had
been used by Foam Tech, Inc. (Foam Tech), a Lexington
business. Ryan Harmon (Harmon) was a part owner of Foam
Tech and of the building. The building was shuttered in 2009
when Foam Tech filed for bankruptcy and was seized in
March of 2010. After that time, only BB&T Bank and the
Davidson County Sheriff's Department had access to the
building.

Disposition: No error.

Core Terms

reliability, print, copper, fingerprint, breaking, latent
fingerprint, expert testimony, ineffective, wiring, defense
motion, trial court, electrical, larceny

The building was broken into sometime prior to 9 September
2010. Large amounts of copper, including wiring, was stolen
from the building. Some [*2] of the copper wiring had been
removed from electrical panels, some of which the police
dusted for fingerprints. The prints were sent to the North
Carolina State Crime Laboratory for analysis. Agent Adrienne
Reeve (Agent Reeve) conducted a latent print analysis. Agent

Counsel: Attorney General Roy Cooper, by Assistant
Attorney General Ebony J. Pittman, for the State.

Heather L. Rattelade, for Defendant.

Reeve determined that one of the submitted fingerprints was of sufficient quality for comparison. After preparing the print, Agent Reeve entered it into the Automated Fingerprint Identification System (AFIS). AFIS compared the entered print to prints contained in its database, and returned the ten closest matches. Agent Reeve compared the print recovered from the electrical panel to the ten prints from AFIS, and determined that the latent print recovered from the electrical panel matched one of the prints in the AFIS database. The match was to Defendant.

Martin Lyon (Lyon) testified that he owned a scrap metal business in Lexington. Lyon testified that when purchasing certain scrap metal, including copper, he was required by law to record the seller's driver's license information, or other valid identification. According to Lyon's records, Defendant sold Lyon hundreds of pounds of copper in September and October of 2010. [*3] Defendant did not present evidence at trial. Defendant was sentenced to 102 to 132 months in prison for felony breaking or entering and of having attained habitual felon status. Defendant appeals. Additional relevant facts will be included below.

I.

The issues on appeal are: (1) whether Defendant's trial counsel was ineffective for failing to move to suppress Agent Reeve's testimony, and (2) whether the trial court erred in denying Defendant's motion to dismiss the charge of felony breaking or entering.

II.

In Defendant's first argument, he contends that his trial attorney provided ineffective assistance of counsel by failing to move to suppress expert testimony related to fingerprint analysis. We disagree.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." To meet this burden, the defendant must satisfy the two-pronged test promulgated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), and expressly adopted by this Court[.] First, the defendant must demonstrate a deficiency in counsel's performance by showing "errors [*4] so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." Second, the defendant must also show prejudice by establishing that "the error committed was so serious that a reasonable probability exists that the trial result would have been different" absent the error. Thus, the error must be "so

grave that it deprived [the defendant] of a fair trial because the result itself is considered unreliable."

State v. Augustine, 359 N.C. 709, 718-19, 616 S.E.2d 515, 524 (2005) (citations omitted).

Defendant fails to carry this burden. Defendant argues that his counsel was ineffective because he "failed to test the State's case when he failed to file a motion to exclude SBI Agent Reeve's expert testimony on the grounds that her opinion was not based on a sufficiently reliable method of proof." Defendant did not challenge the reliability of the method of fingerprint analysis at trial, and he does not now argue that admission of this testimony rises to the level of plain error. Instead, Defendant argues his trial counsel was ineffective for not challenging this allegedly inadmissible evidence. Because Defendant fails to show that Agent Reeve's [*5] testimony was inadmissible, Defendant fails to prove on these facts that his "counsel was not functioning as the "counsel" guaranteed [Defendant] by the Sixth Amendment." Augustine, 359 N.C. at 719, 616 S.E.2d at 524.

Under Rule of Evidence 702, this Court has established three steps "for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" The proponent of the expert witness, in this case the State, has "the burden of tendering the qualifications of the expert" and demonstrating the propriety of the testimony under this three-step approach.

State v. Ward, 364 N.C. 133, 140, 694 S.E.2d 738, 742 (2010) (citations omitted). In the present case, Defendant challenges the reliability of the method used - the ACE-V "method" of fingerprint analysis.

Determining the reliability of a method of proof is "a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony." In order to "determine whether an expert's area of testimony [*6] is considered sufficiently reliable, 'a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two.' Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable."

Id. at 140, 694 S.E.2d at 742-43 (citations omitted). "In the event that precedent does not guide the determination, or if a trial court is 'faced with novel scientific theories,

unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques,' then 'nonexclusive "indices of reliability"' may be used to answer the question of reliability." *Id. at 140, 694 S.E.2d at 743* (citations omitted).

The validity of latent fingerprint analysis as a method of identification in criminal trials in North Carolina is well established by precedent. See *State v. Bullard, 312 N.C. 129, 146, 322 S.E.2d 370, 379-80 (1984)*. It is true, as Defendant states in his brief, that a 2009 report by the National Academy of Sciences, Nat'l Research Council, *Strengthening Forensic Science in the United States: A Path Forward* [*7] (2009) (*National Academy Report*), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>, concluded that the ACE-V "method" of latent fingerprint analysis is likely not as reliable as often portrayed. *National Academy Report* at 142 ("Historically, friction ridge analysis has served as a valuable tool, both to identify the guilty and to exclude the innocent. Because of the amount of detail available in friction ridges, it seems plausible that a careful comparison of two impressions can accurately discern whether or not they had a common source. Although there is limited information about the accuracy and reliability of friction ridge analyses, claims that these analyses have zero error rates are not scientifically plausible.").

However, it is not correct to assert that the National Academy Report concluded that latent fingerprint evidence is too unreliable to be admitted at trial. The National Academy Report lamented the lack of scientific studies of the reliability of latent fingerprint analysis, and advocated for more of these studies and more rigorous and uniform methodology. *Id. at 143-45*. Studies into the reliability of latent fingerprint analysis have been undertaken [*8] subsequent to the National Academy Report. See, e.g., Bradford T. Ulery, R. Austin Hicklin, JoAnn Buscaglia, and Maria Antonia Roberts, *Accuracy and reliability of forensic latent fingerprint decisions*, PNAS, May 10, 2011 vol. 108 no. 19, 7733-38, abstract available at <http://www.pnas.org/content/108/19/7733> (169 latent print examiners each compared approximately 100 pairs of latent and exemplar fingerprints from a pool of 744 pairs, finding an overall false positive rate of 0.1% and an overall false negative rate of 7.5%).

We are not prepared to throw out decades of precedent based upon a single report. Nor will we find that Defendant has demonstrated that his trial counsel, by not challenging the general method used by Agent Reeve, committed "errors so serious that counsel was not functioning as the "counsel" guaranteed [Defendant] by the *Sixth Amendment*." *Augustine, 359 N.C. at 718-19, 616 S.E.2d at 524* (citations omitted).

Because Defendant fails to prove the first prong required to find ineffective assistance of counsel, Defendant's argument fails. Defendant's argument is without merit.

III.

In Defendant's second argument, he contends the trial court erred in denying Defendant's [*9] motion to dismiss the charge of breaking or entering with intent to commit larceny because there was insufficient evidence presented at trial. We disagree.

"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)*. "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. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000)* (citation omitted). "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)*.

The evidence, taken in the light most favorable to the State, tends to show the following: The building was padlocked shut at the time of the crime. The owner of the building did not know [*10] Defendant, and Defendant had not been given permission to enter the building. On 9 September 2010, it was discovered that the back door to the building had been kicked in. The inside of the building was in disarray, and copper wiring had been removed, including from electrical panels. Defendant's fingerprint was recovered from one of those electrical panels. Defendant sold hundreds of pounds of copper, including wiring, to a scrap yard between 2 September 2010 and 12 October 2010.

"Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." *N.C. Gen. Stat. § 14-54(a)* (2011). In order to prove a violation of *N.C.G.S. § 14-54(a)*, the State must prove the entry was without "consent of the owner of a building, or anyone empowered to give effective consent to entry[.]" *State v. Boone, 297 N.C. 652, 659, 256 S.E.2d 683, 687 (1979)*. Defendant argues there was insufficient evidence of lack of consent to enter, and of intent to commit larceny. Evidence that Defendant did not have permission to enter the building, and that the building was broken into, was sufficient to survive Defendant's motion to dismiss with respect [*11] to consent. Evidence that a large quantity of copper wiring was

stolen from the building, and that Defendant sold a large quantity of copper wiring around the time of the breaking or entering and larceny, was sufficient to survive Defendant's motion to dismiss based on intent to commit larceny. Defendant's argument is without merit.

No error.

Judges HUNTER, Robert C. and ELMORE concur.

Report per Rule 30(e).

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