

DRUG IDENTIFICATION
TESTIMONY IN CRIMINAL
CASES

Shea R. Denning, School of Government

State v. Llamas-Hernandez, 363 N.C. 8 (2009)

- Error for detectives to testify to their lay opinion that nondescript white powder was cocaine



State v. Llamas-Hernandez (2009)

- Controlled substances defined in Chapter 90 by their chemical properties
- Detectives did not testify as to ability to identify drugs by sight
- No evidence of distinguishing characteristics of white powder

State v. Ward, 364 N.C. 133 (2010)

- Abuse of discretion to permit expert to identify pills as controlled substances based solely on visual identification and comparison with medical literature

State v. Ward, 364 N.C. 133 (2010)

- Visual inspection is not sufficiently reliable as an area for expert testimony
 - Schedules I – VI imply that a chemical analysis is necessary to accurately identify controlled substances
 - Selling counterfeit substances, defined as substance substantially identical to controlled substance, is prohibited
 - Rationale for using visual identification rather than a more complete analysis is to save time and resources
- Scientifically valid chemical analysis is required
 - Limited to Rule 702
 - Analysis of each, individual pill not necessary

State v. Ward

- The natural next step following Llamas-Hernandez “is to conclude here that the expert witness testimony required to establish that the substances introduced here are in fact controlled substances must be based on a scientifically valid chemical analysis and not mere visual inspection.”
- The scientific definitions in Schedules I through VI “imply the necessity of performing a chemical analysis to accurately identify controlled substances before the criminal penalties in [N.C.G.S. § 90-95](#) are imposed.”

Testimony by experts

- Rule 702(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.

State v. Goode, 341 N.C. 513 (1995): Three-part test

1. Is expert's proffered method of proof sufficiently reliable?
2. Is the witness qualified as an expert?
3. Is the expert's testimony relevant?

State v. Goode, 341 N.C. 513 (1995): Three-part test

1. Is expert's proffered method of proof sufficiently reliable?
 - First look to precedent for guidance in determining whether method is reliable
 - If no precedent, then look to other indications of reliability, including
 - Expert's use of established techniques
 - Expert's professional background
 - Use of visual aids before jury so that jury is not asked to sacrifice its independence by accepting science on faith
 - Independent research conducted by expert

State v. Goode, 341 N.C. 513 (1995):

Three-part test

- 2. Is the witness qualified as an expert?
 - ❑ Witness may qualify as expert by knowledge, skill, experience, training, or education
 - ❑ Sufficient that expert because of expertise is in a better position to have an opinion than is trier of fact
 - ❑ No distinction between formal academic training and practical experience

State v. Goode, 341 N.C. 513 (1995):

Three-part test

- 3. Is the expert's testimony relevant?
 - ❑ Apply Rule 401 standard
 - ❑ Relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination more or less probable than it would be without the evidence. Rule 401.

State v. Goode, 341 N.C. 513 (1995):

Three-part test

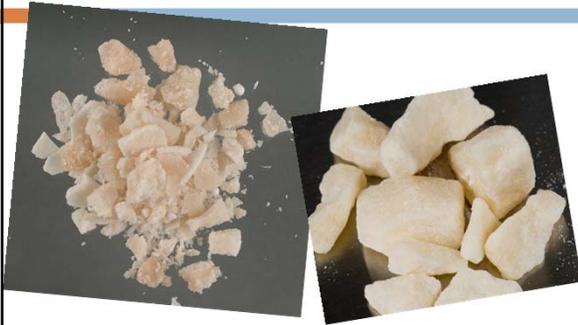
- 1. Is expert's proffered method of proof sufficiently reliable?
- 2. Is the witness qualified as an expert?
- 3. Is the expert's testimony relevant?

Once 3-part test is satisfied, any lingering questions go to weight, not admissibility

Rule 701:
Opinion Testimony of Lay Witnesses

- If the witness is not testifying as an expert, his 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.

What about crack cocaine?



What about crack cocaine?

- **State v. Freeman, 185 N.C. App. 408 (1997)**
 - No error to admit lay opinion testimony from experienced officer that pills were crack cocaine
- **State v. Meadows, __ N.C. App. __ (Jan. 5, 2010)**
 - Error to admit testimony from LEO that he believed substance was crack cocaine based on visual identification
- **State v. Davis, __ N.C. App. __ (Feb. 16, 2010)**
 - **Freeman** is still binding precedent as to an officer's lay opinion identifying crack cocaine

What about marijuana?

- State v. Fletcher, 92 N.C. App. 50 (1988)
 - ▣ Expert testimony from experienced officers identifying substance as marijuana properly admitted; absence of chemical analysis did not render State's evidence insufficient



What about marijuana?

- State v. Ferguson, ___ N.C. App. ___ (June 15, 2010)
 - ▣ No error in admitting officer's testimony that substances found in bags in car and in a cigarette were marijuana



Other Drugs



Things we know . . .

- Opinion testimony identifying powder cocaine based solely on visual inspection is inadmissible
- Opinion testimony identifying pharmaceuticals as controlled substances based solely on visual inspection is inadmissible

Open Questions

- Does Ward apply to bar opinion testimony identifying any drug in Schedules I through VI, including marijuana, unless that opinion is based on a chemical analysis?
- Does Ward alter the sufficiency of the evidence analysis in all drug cases?
 - Can a person be convicted without a chemical analysis?
