No. COA23-395 7A JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

STATE OF NORTH CAROLINA )

) From Nash County

v. ) No. 21 CRS 52515

)

TIMOTHY QUAN HOLDER )

)

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

DEFENDANT-APPELLANT’S BRIEF

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**INDEX**

TABLE OF CASES AND AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF GROUNDS FOR

APPELLATE REVIEW 2

STATEMENT OF THE FACTS 2

­­

ARGUMENT:

1. THE TRIAL COURT ERRED IN ADMITTING OFFICER BASS’ EXPERT TESTIMONY THAT MR. HOLDER’S FINGERPRINT MATCHED A LATENT FINGERPRINT LEFT AT THE DOLLAR GENERAL STORE BECAUSE THE STATE FAILED TO LAY A PROPER FOUNDATION FOR THE RELIABILITY OF HIS TESTIMONY UNDER RULE 702 5

1. STANDARD OF REVIEW 5

2. ARGUMENT 5

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 21

CERTIFICATE OF FILING AND SERVICE 22

# TABLE OF CASES AND AUTHORITIES

**CASES**

Howerton v. Arai Helmet, Ltd.,

358 N.C. 440 (2004) 15

State v. Babich,

252 N.C. App. 165 (2017) 17

State v. Goode,

341 N.C. 513 (1995) 15

State v. Graham,

882 S.E.2d 719 (2023) 11,14,19

State v. Hunt,

250 N.C. App. 238 (2016) 17

State v. Koiyan,

270 N.C. App. 792 (2020) 11,13,18,19

State v. Lawrence,

365 N.C. 506 (2012) 17

State v. Meadows,

201 N.C. App. 707 (2010) 16

State v. McGrady,

368 N.C. 880 (2016) 5,10

State v. McPhaul,

256 N.C. App. 303 (2017) 10,11,12,18

State v. Pennington,

327 N.C. 89 (1990) 15

State v. Piland,

263 N.C. App. 323 (2018) 12

State v. Ward,

364 N.C. 133 (2010) 10

**STATUTES**

N.C. Gen. Stat. § 7A-27 2

N.C. Gen. Stat. § 8C, Rule 702 5, 9,10,11,12,13

N.C. Gen. Stat. § 15A-1443 16,17

N.C. Gen. Stat. § 15A-1444 2

No. COA23-395 7A JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

STATE OF NORTH CAROLINA )

) From Nash County

v. ) No. 21 CRS 52515

)

TIMOTHY QUAN HOLDER )

)

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

DEFENDANT-APPELLANT’S BRIEF

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

# issue Presented

1. **THE TRIAL COURT ERRED IN ADMITTING OFFICER BASS’ EXPERT TESTIMONY THAT MR. HOLDER’S FINGERPRINT MATCHED A LATENT FINGERPRINT LEFT AT THE DOLLAR GENERAL STORE BECAUSE THE STATE FAILED TO LAY A PROPER FOUNDATION FOR THE RELIABILITY OF HIS TESTIMONY UNDER RULE 702.**

**STATEMENT OF THE CASE**

Mr. Timothy Quan Holder pleaded not guilty to robbery with a dangerous weapon in the Superior Court of Nash County on 1 August 2022. (T p 5). On 5 August 2022, the jury found Mr. Holder guilty as charged and the trial court sentenced him to 64-89 months in the Division of Adult Correction. (R pp 41-42). Mr. Holder filed written notice of appeal on 5 August 2022 and the Office of the Appellate Defender was appointed to represent them the same day. (R pp 45-46). The record on appeal was served on the State on 21 March 2023 and was settled by operation of Rule 11 of the North Carolina Rules of Appellate Procedure on 20 April 2023. (R p 53). The settled record on appeal was filed on 3 May 2023 and the certificates of filing and settlement were mailed to the State on the same day. (R pp 53,56). This brief was filed on 30 May 2023.

**STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

Mr. Holder appeals pursuant to N.C. Gen. Stat. § 7A-27(b) and N.C. Gen. Stat. § 15A-1444(a) and (a1) from a final judgment entered against them in the Superior Court of Nash County.

**STATEMENT OF THE FACTS**

On 13 September 2021, Rhonda McNeil, the manager of a Dollar General store in Rocky Mount, called the police and reported that a man had come into the store, pulled out a kitchen knife, and demanded money from the cash register. (T pp 17,102). She alleged that he took a $12 blue hoodie sweatshirt and $578.79 from the registers. (T p 36). There was no allegation that he threatened to hurt anyone, or touched anyone with the knife, or grabbed anyone. (T p 42).

Officer Jessica Crawford with the Rocky Mount Police Department responded to the Dollar General. (T pp 16-17). She found no suspect and no weapon. (T p 38). However, at the scene, she spoke to Ms. McNeil, as well as another employee, Lakiya Davis. (T pp 17-18). Officer Crawford also reviewed camera footage at the store and dusted the registers, the counter, and a 2-liter soda bottle for latent fingerprints. (T pp 19-20,30).

Ms. McNeil reported that when the man entered the store, she recognized him as someone who had shopped at the store a couple of times prior. (T p 105). The man asked Ms. McNeil if the store offered cash back. (T p 93). She explained that they did not offer cash back at that time of night. (T p 93). The man seemed to be on the phone with his mother while he shopped. (T p 93). He put items on the counter near the register as he shopped. (T pp 82,93). He asked Ms. McNeil questions about the DVD movies sold at the store. (T p 94). Then he said, “[h]old up” and pulled out a knife and told her that “[w]e’re going to go up to the register, and give me the money.” (T p 94). He assured her that nobody would get hurt if she gave him the money. (T p 102). He had taken a sweatshirt from the store and pulled the hood of the sweatshirt over his head. (T p 95). He did not wave or poke the knife. (T p 102). He remained at arm’s length behind her and did not get closer to her than that. (T p 42).

At the same time, Ms. Davis was checking out another customer at the register, and heard a scream. (T p 83). She saw Ms. McNeil walk to the register. (T p 83). She saw the man with the knife. (T p 84). He told her to turn around and get down and not to look at them. (T p 18). She heard him tell Ms. McNeil to open the cash register and safe. (T p 84). He said not to call the police until he was gone; and if they called sooner, he would be back. (T p 84).

Officer Rayndall Bass, with the Rocky Mount Police Department, did a fingerprint comparison using the latent prints collected by Officer Crawford. (T pp 45-46). He testified that a fingerprint that Officer Crawford pulled from a two-liter soda bottle that the man had allegedly carried up to the register came up as a match to Mr. Holder, a 29-year-old father who worked two jobs as a server at Crab House and Madison Seafood. (T pp 27, 29, 142-43). He also testified that a fingerprint can stay on the surface of an object for years. (T p 66). Neither Dollar General employee was able to identify him. (T pp 41, 74,89).

**ARGUMENT**

1. **THE TRIAL COURT ERRED IN ADMITTING OFFICER BASS’ EXPERT TESTIMONY THAT MR. HOLDER’S FINGERPRINT MATCHED A LATENT FINGERPRINT LEFT AT THE DOLLAR GENERAL STORE BECAUSE THE STATE FAILED TO LAY A PROPER FOUNDATION FOR THE RELIABILITY OF HIS TESTIMONY UNDER RULE 702.**
2. **Standard of Review**

Where a defendant challenges the trial court’s allowance of expert testimony based on the requirements of Rule 702(a) of the North Carolina Rules of Evidence, the appellate court will not reverse “absent a showing of abuse of discretion.” State v. McGrady, 368 N.C. 880, 893 (2016).

1. **Argument**

The trial court abused its discretion by permitting Officer Bass to provide his expert testimony that Mr. Holder's fingerprints matched the latent fingerprints left at the Dollar General store. The testimony did not demonstrate that the expert applied accepted methods and procedures reliably to the facts of the case to reach his conclusion that the fingerprints were a match.

A. Testimony and Objections at Trial

Two officers from the Rocky Mount Police Department testified at trial regarding fingerprint collection and analysis. First, Officer Crawford testified that she dusted for latent fingerprints on the cash registers, on the counter, and on a 2-liter soda bottle at the Dollar General store. (T p 30). Officer Crawford testified that she had her own fingerprint kit, that she “used fingerprint powder”, that she “just sprinkled that on it”, and that she was able to see a fingerprint on all three surfaces. (T p 30). Then, she “put tape over that print”, “slowly peel[ed] it off”, and “place[d] it on a fingerprint card”. (T p 31). When asked if she had ever dusted for prints before this day, she answered, “Yes”. (T p 34). Then she “submit[ted] it into evidence”. (T p 40).

Next, the State tendered Officer Rayndall Bass as an expert in the field of fingerprint comparison. (T p 49). Officer Bass testified that he did a fingerprint comparison using the latent prints collected by Officer Crawford. (T pp 45-46). He testified that he has an associate’s degree from Nash Community College, where he took no science classes whatsoever. (T pp 56-57). He testified that he received specialized training in the form of “numerous classes I’ve been to with the North Carolina Justice Academy, along with some online classes.” (T p 46). He listed the four relevant classes he took, which were “Basic Fingerprint Comparison Techniques which was hosted by Coastal Plains Law Enforcement Training Center in Wilson, North Carolina” in 2017; “Advanced Crime Scene Investigations and Fingerprinting Techniques which was hosted by the North Carolina Justice Academy in Edneyville, North Carolina” in 2018, “Understanding Exclusion and Sufficiency Decisions dealing with fingerprinting analysis, hosted by Ron Smith and Associates at Wake Tech Community College” in 2019, a two-week online class called “Emerging Issues in Fingerprinting Examination and Analysis, which was hosted by Stetson University” in 2020; and “Friction Ridge Comparison Concepts, Palm Print Identification and Comparison Techniques and Analysis” a four-week online course hosted by Ron Smith and Associates in 2021. (T pp 46-47). Officer Bass asserted that he had previously testified regarding fingerprint analysis in District and Superior Courts; but he did not testify as to whether he had been qualified as an expert. (T pp 48-49). He testified that he had examined hundreds if not a few thousand fingerprints in the private crime lab at the police station which, he admits, has never been accredited. (T pp 47, 57).

Officer Bass testified that he was asked to review latent print cards in this case. (T p 50). He testified that, in general, the process is as follows. First, an officer collects latent prints from a crime scene. (T p 50). Then he gets the evidence out of his “holding box”. (T p 50). Next, “[e]ach card is visually examined for quality and sufficient points of minutia to determine at that point if it is a viable print quality to be entered into the AFIS system, which is the automatic fingerprint information system.” (T p 51). He explained that the AFIS system is a fingerprint database consisting of fingerprints collected from “[w]hen a person is fingerprinted for a criminal offense”. (T pp 51-52).

Officer Bass testified that when he looks for a fingerprint, he looks for “in a nutshell, quality” to determine whether he can submit the latent fingerprint into the database. (T pp 47-48). He looks for “ridge detail” to see if there are a “sufficient amount of ridges that have bifurcation” such as an “ending ridge”, or a “starting ridge”, “split”, a ridge that “Y's off”, or “islands, which are like your little dots”, and “different characteristics”. (T pp 47-48). He testified that there are four groups -- arches, whirls, tented arches, and flat arches. (T p 48). “It's just many different characteristics that you're looking for.” (T p 48). If he determines that a card has “a viable print quality”, because it has enough of the details he described, then he enters it into the AFIS database. (T p 51).

He testified that the AFIS system is set up to look for the top ten fingerprints contained in the database that could be possible matches to the submitted latent print. (T p 52). The individual examiner compares the ten database results with the latent print evidence. (T p 52). And “it’s up to the individual examiner to pull up each one side-by-side on the screen and look for the exact points of minutia and make a comparison.” (T p 52). If the officer determines that there is a match, then an officer with equal or more experience conducts a second comparison. (T p 52).

Officer Bass testified that, in this case, he reviewed five cards with latent prints. (T p 51). He testified that he was able to find enough points of minutia and characteristics on one of the five cards to enter that fingerprint into the AFIS database system to search for a match. (T pp 51-52). That was the print lifted from the 2-liter bottle. (T p 53). He testified that the database determined that it was a “left middle finger impression”. (T p 53). He then testified that the database determined that the latent fingerprint matched with a fingerprint associated with a “SID number” that was assigned to Mr. Holder. (T p 54-55). And then he confirmed the match with his own visual comparison, which he did not describe. (T p 54).

Mr. Holder’s trial counsel preserved this error for review by repeatedly objecting at trial. (T p 49). When the State tendered Officer Bass as an expert in the field of fingerprint comparison so that he could give his opinion as to a fingerprint match, trial counsel objected “to the foundation”. (T p 49). When the State asked Officer Bass, “were you able to obtain the identity of an individual that had that particular fingerprint?”, trial counsel objected again. (T p 53). When the State asked Officer Bass whether it was his opinion that Mr. Holder left the fingerprint on the soda bottle at the Dollar General store, trial counsel objected again, arguing that “this officer doesn’t satisfy the rules of 702 of the expert testimony.” (T p 56). The trial court overruled all of trial counsel’s objections to Officer Bass’ testimony. (T pp 49,53,56).

B. There was an insufficient foundation laid for Officer Bass’ opinions

because the State failed to show reliable methods were used to compare

the latent and database fingerprints.

Officer Bass’ testimony is insufficient pursuant to N.C.R. Evid. 702(a)(3). The Supreme Court of North Carolina has enumerated a three-step analysis for the trial court to determine the admissibility of opinion testimony from an expert witness: “(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?” State v. Ward, 364 N.C. 133, 140 (2010). Pursuant to N.C. Gen. Stat. § 8C-1, Rule 702(a), the three-prong test of reliability is:

(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.

Under Rule 702(a)’s three-pronged reliability test, the primary focus is “the reliability of the witnesses’ principles and methodology, not . . . the conclusions that they generate[.]” State v. McGrady, 368 N.C. at 890. To satisfy Rule 702’s three-pronged reliability test, an expert witness must be able to explain both the abstract methodology underlying the witnesses’ opinion and that the witness reliably applied that methodology to the facts of the case. State v. McPhaul, 256 N.C. App. 303, 305 (2017).

Officer Bass testified that he generally looks at a latent print to determine if it is of a high enough quality to submit it into the AFIS database, and that he was able to find enough points of minutia and characteristics on one card to enter it into the database to search for a match. (T p 51). However, he did not testify as to what abstract methodology of visual comparison of latent prints is generally used to form an opinion. He testified only that, an examiner would generally “look for the exact points of minutia and make a comparison.” (T p 52). He did not testify regarding what details are compared, such as comparisons of pattern types or comparisons of sequence similarities, or how one would determine if there was a print match, as is typically seen in other fingerprint cases. In contrast to Officer Bass’ testimony, in State v. Koiyan, 270 N.C. App. 792, 797 (2020) and State v. Graham, 882 S.E.2d 719, 729-30 (2023), the fingerprint experts testified to the abstract methodology when they testified that they generally compared three levels of details, and described those levels of comparison including ridge flow, ending ridges and bifurcations, and pores, and also described the magnification process. In State v. McPhaul, 256 N.C. App. at 316, the expert testified to the abstract methodology when she testified that she generally compares the pattern type and minutia points of the latent print and known impressions until she is satisfied that there are “sufficient characteristics and sequence of the similarities” to conclude that the prints match.

More importantly, Officer Bass did not testify as to how he reliably applied a methodology to the facts of the case. He did not testify as to how he arrived at his actual conclusions in conducting a visual comparison in this case. He never explained what, if any, characteristics from the latent fingerprints matched with Mr. Holder’s fingerprint.

Without an explanation of how a visual comparison of latent prints is generally compared and without an explanation of how the latent print in evidence was visually compared to the latent prints returned from the database, Officer Bass implicitly asked the jury to accept his expert opinion that the prints matched. See State v. McPhaul, 256 N.C. App. at 305. Since he failed to demonstrate the abstract methodology underlying his opinion and he failed to demonstrate that he reliably applied that methodology to the facts of the case, as required by Rule 702(a)(3), the trial court abused its discretion by admitting this testimony. See eg.; State v. Piland, 263 N.C. App. 323, 339 (2018)(holding that the trial court abused its discretion in exercising its gatekeeping function where an expert witness did not identify the test performed, describe how she performed it, or explain why she considered it reliable).

This Court has recently addressed Rule 702 violations in the context of expert witness testimony in the field of latent print analysis. For example, in State v. McPhaul, 256 N.C. App. 303 (2017), the expert witness testified that during an examination, she compares the pattern type and minutia points of the latent print and known impressions until she is satisfied that there are “sufficient characteristics and sequence of the similarities” to conclude that the prints match. Id., 256 N.C. App. at 304. However, the expert provided no detail in testifying how she arrived at her actual conclusions in the case. Without further explanation for her conclusions, the expert implicitly asked the jury to accept her expert opinion that the prints matched. Since the expert failed to demonstrate that she “applied the principles and methods reliably to the facts of the case,” as required by Rule 702(a)(3), this Court held that the trial court abused its discretion by admitting her testimony. Id., 256 N.C. App. at 305. However, because the State presented abundant additional evidence, there was no prejudicial error. Id. Here, in contrast, Officer Bass failed to testify as to how he conducts a visual comparison of the latent prints at all, let alone how he arrived at his actual conclusion. Further, in contrast to McPhaul, there was no other evidence, aside from the fingerprint evidence, tying Mr. Holder to the alleged crime.

In State v. Koiyan, 270 N.C. App. 792, 794-97 (2020), this Court held the expert witness’s testimony was not sufficiently reliable under Rule 702 because it failed to show that the expert applied accepted methods and procedures reliably to the facts of the case in reaching his conclusion that the fingerprints were a match. There, the expert witness testified that he “examines fingerprints by looking for three levels of detail”, and he “takes the latent fingerprints, puts it beside an inked fingerprint, magnifies the prints, and examines the likenesses or dissimilarities[d]”. Id. This Court held that he failed to provide any such details when testifying as to how he arrived at his conclusion in the case at hand. While the trial court erred in admitting the testimony, it did not plainly err due to otherwise overwhelming evidence. Id., 270 N.C. App. at 798. Again, here, in contrast, Officer Bass failed to testify as to how he conducts a visual comparison of the latent prints at all, let alone how he arrived at his actual conclusion. And the fingerprint testimony was the only evidence tying Mr. Holder to the crime.

Most recently, in State v. Graham, 882 S.E.2d 719, 727-31 (2023), the expert witness (who also testified in Koiyan) did not clearly indicate whether he used the comparison process he described generally when he compared the defendant’s fingerprints with the latent fingerprints from the crime scene. As in McPhaul and Koiyan, the expert witness’s testimony lacked detail concerning the methodology he used in the case at issue to reach his conclusions. His testimony merely demonstrated that he compared two sets of fingerprints, found the prints to be consistent, identified no dissimilarities, and his supervisor reached the same result. Id. That testimony did not establish that he reliably applied his procedure to the facts in the case at hand and thus his testimony was insufficient to meet the reliability requirements of Rule 702 and the trial court erred in admitting it. Id. However, the defendant did not object at trial and could not establish plain error since there was separate DNA evidence of his guilt. Id.; 882 S.E.2d at 733. Again, here, in contrast, Officer Bass failed to testify as to how he conducts a visual comparison of latent prints at all, let alone how he arrived at his actual conclusion; and the defendant preserved the error with his objection. Further, the fingerprint testimony was the only evidence tying Mr. Holder to the crime.

C. The expert’s proferred method of proof, the AFIS database, was not

shown to be sufficiently reliable as an area for expert testimony.

In addition, the trial court was required to consider whether Officer Bass’ use of the AFIS database was “sufficiently reliable as an area for expert testimony”. State v. Goode, 341 N.C. 513, 527-29 (1995). “[T]o determine whether an expert's area of testimony 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.” Id. “[T]he trial court should generally focus on the following nonexclusive indices of reliability to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable: the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting the scientific hypotheses on faith, and independent research conducted by the expert.” Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458 (2004)(citing State v. Pennington, 327 N.C. 89, 98 (1990)).

Here, there was no evidence that the AFIS database is an established technique. There was no evidence as to any other testing methods currently used for latent print analysis or how this database compares with the others. There was no evidence that the database system has been recognized as an accepted method of analysis of latent fingerprints in North Carolina or in other jurisdictions. Further, Officer Bass did not testify as to the reliability of the AFIS database or about the methodology used by the database system to perform its analysis. (T pp 51-52).

With regard to Officer Bass’s professional background in the field, he had attended four classes, although he had taken no science courses while earning his associate’s degree. (T pp 46-47,56-57). He did not testify as to whether he was certified to use the database and there was no evidence as to whether a certification in the use of the database exists. He had never worked in an accredited crime lab. (T pp 57-58). No visual aids were presented before the jury to demonstrate the use of the database or how it works; and there was no testimony as to any independent research he may or may not have conducted regarding the database. The only evidence regarding the database presented by the State was that it was a database of fingerprints and palm prints. (T p 52).

Accordingly, the trial court abused its discretion in allowing testimony based on that database system. See State v. Meadows, 201 N.C. App. 707, 708-09 (2010)(holding that an officer could not testify as an expert regarding the use of the NarTest machine to identify controlled substances because there was insufficient evidence of the machine’s reliability and the officer had no training in chemistry to allow him to assess the functioning of the machine).

C. Prejudice

The erroneous admission of Officer Bass’ opinion testimony prejudiced Mr. Holder because without the fingerprint evidence, there is a reasonable possibility that the jury would not have convicted him. See N.C. Gen. Stat. § 15A-1443; see also State v. Babich, 252 N.C. App. 165 (2017). Officer Bass’s opinion testimony, which he based on the database results and visual comparison, was the only evidence that tied Mr. Holder to the crime. Absent Officer Bass’ testimony, there was a reasonable probability that the jury would have found Mr. Holder not guilty, because the witnesses could not identify him as the robber, and the fingerprint testimony was the only evidence that tied Mr. Holder to the crime. (T pp 41,74,89).

As described above, Mr. Holder preserved this error for review by objecting at trial. (T pp 49,53,56). However, in the unlikely event that this Court determines that he did not preserve this challenge, Mr. Holder can demonstrate plain error. “[A]n unpreserved challenge to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review in North Carolina state courts.” State v. Hunt, 250 N.C. App. 238, 246 (2016).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. State v. Lawrence, 365 N.C. 506, 518 (2012).

Mr. Holder’s case is an unusual one, in that the State presented no other evidence tying him to the crime besides Mr. Bass’ erroneously admitted testimony. Accordingly, prior cases before this Court finding error, but upholding the convictions, are distinguished.

In McPhaul, the defendant was charged with attempted murder and related crimes after he and his friends allegedly ordered pizzas and then attacked, robbed, and assaulted the pizza delivery person when he arrived at the house. State v. McPhaul, 256 N.C. App. at 304-05. In addition to the erroneously admitted expert fingerprint testimony, there were several other pieces of “evidence pointing to defendant’s guilt”, and the Court found no prejudice. Id., 256 N.C. App. at 316-17. For example, the State presented evidence of stolen property seized from the defendant’s home that matched the description of the victim’s stolen property. Id. The State presented evidence of an aluminum bat seized from an adjacent home, evidence of close proximity between the defendant’s home and the unsecured wireless network used to place the pizza order, and evidence that the descriptions two parties provided were similar. Id.

In Koiyan, the defendant was charged with robbery with a dangerous weapon after he allegedly entered a Boost Mobile store, pulled out a gun, jumped over the counter, and ordered an employee to open the cash registers. State v. Koiyan, 882 S.E. 2d at 793. In addition to the erroneously admitted expert fingerprint testimony, the State presented evidence that the Boost Mobile employee identified the defendant, and said she was “a hundred percent” certain that defendant was the person who robbed her and that she would not “forget his face”. Id., 882 S.E.2d at 798. The court found no plain error because the employee’s testimony identifying the defendant with certainty, combined with surveillance video, constituted overwhelming evidence of his guilt. Id.

In Graham, the defendant was charged with felony breaking and entering and other related crimes after he allegedly broke into the victim’s home while her child was home alone, shattering glass and stealing gaming equipment. State v. Graham, 882 S.E.2d at 722. In addition to the erroneously admitted expert fingerprint testimony, the State presented properly admitted evidence that the defendant’s DNA matched DNA from blood left at the crime scene Id., 882 S.E.2d at 727-31. The DNA evidence, combined with other evidence, constituted overwhelming evidence; and thus there was no plain error. Id.

Unlike in those cases, here the State did not present any evidence tying Mr. Holder to the crime charged other than Officer Bass’ erroneously admitted expert fingerprint testimony. There was no DNA evidence as there was in Graham. There was no evidence that any witness identified Mr. Holder either from memory or from surveillance video, as there was in Koiyan. There was no evidence of stolen property found in the defendant’s possession as in McPhaul. Other than Officer Bass’ erroneously admitted testimony, there was no other evidence of Mr. Holder’s guilt. Accordingly, Mr. Holder demonstrates both prejudicial error and plain error, because without the erroneously admitted evidence, the jury could not have found him guilty.

# Conclusion

For all the foregoing reasons, Mr. Holder respectfully asks this Court to vacate his convictions.

Respectfully submitted this the 30th day of May, 2023.

/s/ ELECTRONICALLY SUBMITTED

Danielle Blass

Attorney for Defendant-Appellant

BLASS LAW, PLLC

308 W Rosemary St.

Suite 301

Chapel Hill, NC 27516

(919) 414-9053

DanielleBlass@Gmail.com

NC Bar # 35641

**CERTIFICATE OF COMPLIANCE**

Undersigned counsel hereby certifies that this brief complies with N.C. R. App. P. 28(j)(2), in that it is printed in 13-point Century Schoolbook, a

proportionally-spaced font with serifs, and contains no more than 8,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare the brief.

This the 30th day of May, 2023.

/s/ ELECTRONICALLY SUBMITTED

Danielle Blass

Attorney for Defendant-Appellant

BLASS LAW, PLLC

308 W ROSEMARY St.

Suite 301

Chapel Hill, NC 27516

(919) 414-9053

DanielleBlass@Gmail.com

NC Bar # 35641

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that the original Defendant-Appellant’s Brief has been filed by uploading a copy of the same to the Court of Appeals electronic filing website.

I further hereby certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Tom Campbell, Special Deputy Attorney General, Department of Justice, P.O. Box 629, Raleigh, NC 27602 at tcampbell@ncdoj.gov.

This the 30th day of May, 2023.

/s/ ELECTRONICALLY SUBMITTED

Danielle Blass

Attorney for Defendant-Appellant

BLASS LAW, PLLC

308 W Rosemary St.

Suite 301

Chapel Hill, NC 27516

(919) 414-9053

DanielleBlass@Gmail.com

NC Bar # 35641