Now Where Are We with Drug ID?

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Several earlier posts (here, here, here and here) and this article discuss the North Carolina Supreme Court's ruling in State v. Ward, 364 N.C. 133 (2010), that the identification of a controlled substance based upon mere visual inspection is insufficiently reliable to serve as the basis for an expert's opinion pursuant to Rule 702 of the North Carolina Rules of Evidence. Though *Ward*'s holding was "limited to North Carolina Rule of Evidence 702," the court pronounced in broad terms that "[u]nless the State establishes before trial that another method of identification is sufficient to establish the identity of the alleged controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." *Id.* at 147. Thus, though the issue was not before the court, *Ward*'s dicta questioned the State's ability to establish the identity of a controlled substance beyond a reasonable doubt without a chemical analysis. Court of appeals opinions in *Ward*'s wake have treated the sufficiency pronouncement as a new rule, explaining that expert testimony based on a scientifically valid chemical analysis generally is required to identify a controlled substance beyond a reasonable doubt.

Among these opinions is State v. Nabors, ___ N.C. App. ___, 700 S.E.2d 153 (2010), a case arising from a undercover drug transaction in which the defendant allegedly sold crack cocaine to an informant while being monitored by police. At the defendant's trial, the informant testified that he "knew" the substance he bought "to be crack cocaine," a drug with which he had significant personal experience. A police officer who was part of the take-down team also testified that the substance the informant purchased was crack cocaine. The defendant did not object to this testimony.

During his case in chief defendant called as a witness Quinton Smith, who was in the car with the defendant when the crack cocaine was sold. Smith testified that he, not the defendant, sold the drugs to the informant.

On appeal, defendant argued that the trial court committed plain error by admitting into evidence the officer's testimony that the substance the informant bought from the defendant was "crack cocaine." He also argued that the trial court erred in denying his motion to dismiss for insufficiency of the evidence, contending there was "no properly admitted evidence" that proved the existence of the substance defendant sold.

Relying on *Ward*, a unanimous panel of the court of appeals vacated the defendant's convictions on the basis that the sole evidence that the substance was crack cocaine consisted of lay opinion testimony from the charging police officer and an informant based on their visual observation of the substance. The appellate court concluded that the absence of a scientifically valid chemical analysis of the substance sold rendered the evidence insufficient as a matter of law to establish its identity.

The state supreme court granted discretionary review and, in an opinion issued earlier this month, reversed. State v. Nabors, ___ N.C. ___, ___ S.E.2d ___ (December 9, 2011). In considering defendant's challenge to the sufficiency of the evidence, the court noted the well-established rule that both competent and incompetent evidence that is favorable to the State must be considered by the trial court in ruling on the motion. Furthermore, the court noted that evidence proffered by the defendant may be used to explain or clarify State's evidence when it is consistent therewith.

The court determined that Smith's testimony that he, rather than the defendant, sold "cocaine" to the informant "provided substantial evidence that the substance . . . sold . . . was cocaine." Slip op. at 9. Noting that defendant's

defense at trial was that Smith, not he, orchestrated the drug transaction, the high court held that "when a defense witness's testimony characterizes a putative controlled substance as a controlled substance, the defendant cannot on appeal escape the consequences of the testimony in arguing that his motion to dismiss should have been allowed." Slip op. at 10.

Nabors is tough to square with post-*Ward* progeny deeming a defendant's admission that a substance was a controlled substance insufficient to establish that fact. *See* State v. Williams, ___ N.C. App. ___, 702 S.E.2d 233, *temp. stay allowed*, ___ N.C. ___, 705 S.E.2d 382 (2010) (rejecting State's argument that officers' and defendant's identification of the substance as cocaine rendered the error harmless; explaining that State is required to "present evidence as to the chemical makeup of the substance"). Indeed, the high court's opinion casts doubt on whether *Ward* in fact established a new rule governing evaluation of the sufficiency of the evidence in drug prosecutions. After all, if visual identification of a controlled substance by a witness for the State is insufficient as a matter of law to establish the chemical makeup of the substance, how can testimony from a witness for the defendant identifying a substance as cocaine, without further explanation of the basis for the identification, shore up the State's evidence? If Smith had testified for the State, fingering the defendant as the purveyor of the cocaine, then his testimony identifying the substance sold as crack cocaine, even when combined with that of the officer and informant, presumably would have been deemed insufficient under the general "rule" thought to have been minted in *Ward* dicta. Perhaps *Nabors* signals the state supreme court's retreat from the sufficiency analysis it ostensibly sanctioned in *Ward*.