State of North Carolina v. Kathy Kaye Rider

2011 | Cited 0 times | Court of Appeals of North Carolina | July 5, 2011

Defendant Kathy Kaye Rider appeals from judgments entered 30 October 2009 based upon her convictions for conspiring to traffic in opium by sale, attempting to traffic in opium by sale, possession of alprazolam with the intent to sell and deliver, sale of alprazolam, possession of oxycodone with the intent to sell and deliver, sale of oxycodone, aiding and abetting trafficking in opium by possession, and aiding and abetting trafficking in opium by sale. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that (1) Defendant is entitled to a new trial in connection with her convictions for attempting to traffic in opium, selling alprazolam, selling oxycodone, possession of alprazolam with the intent to sell and deliver, and possession of oxycodone with the intent to sell and deliver; (2) Defendant's convictions for conspiracy to traffic in opium by sale, aiding and abetting trafficking in opium by possession, and aiding and abetting trafficking in opium by sale should remain undisturbed; and (3) Defendant should be resentenced in the cases in which we have concluded that her convictions should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

In August 2008, Special Agent James Schandevel of the State Bureau of Investigation received information indicating that Defendant was selling prescription medications. According to information developed during the ensuing investigation, Defendant was being prescribed various controlled substances, including hydrocodone, OxyContin, Ambien, Lunesta, and alprazolam, and was selling OxyContin and hydrocodone. Special Agent Schandeval passed this information along to Agent Tamara Styles of the Buncombe County Anti-Crime Task Force, which serves as the narcotics unit of the Buncombe County Sheriff's Department. On 22 August 2008, Special Agent Schandevel met with Agent Styles, Agent Matt Kiser of the Buncombe County Anti-Crime Task Force, a confidential informant, and other law enforcement officers. As a result of the plan developed at that meeting, Agent Styles asked Agent Kiser to purchase prescription medications from Defendant while working in an undercover capacity.

Subsequently, the confidential informant contacted Defendant and told her that an individual, who was actually Agent Kiser, wanted to make a purchase from her. Agent Kiser and the confidential informant went to Defendant's residence, where Agent Kiser introduced himself as "Darren Matthews," on 27 August 2008. Prior to visiting Defendant's residence, Agent Kiser had been given $1,000.00 and directed to purchase 100 Oxycontin tablets from Defendant. Although Defendant claimed on several occasions during this visit that the confidential informant owed her money, Agent Kiser stated that the confidential informant's indebtedness to Defendant did not concern him. During the visit, Defendant agreed to sell Agent Kiser 100 Oxycontin pills for $900.00. In addition, Defendant gave the confidential informant a Xanax pill. After exchanging $900.00 for an unlabeled prescription bottle, Agent Kiser left Defendant's residence. Agent Kiser turned over the pills that he purchased from Defendant on 27 August 2008 to Agent Styles, who submitted them to the State Bureau of Investigation for analysis. Subsequently, Agent Kiser "discovered that [some of] the OxyContins were fake." When Agent Kiser called Defendant to complain, she attributed the problem to a "pharmacy error" and agreed to make it up to him at the time of his next purchase.

On 5 September 2008, Agent Kiser telephoned Defendant and arranged to make another drug purchase from her. More particularly, Agent Kiser agreed to purchase 120 hydrocodone tablets from Defendant on that date for $1,000.00. Although Defendant reiterated her complaint that the confidential informant owed her money, Agent Kiser disclaimed any intention of becoming involved in that dispute. According to the plan that Defendant and Agent Kiser developed during this conversation, Elizabeth Rider, Defendant's sister, would pick up Defendant's prescription medications and immediately sell them to Agent Kiser. Agent Kiser was provided with money to purchase the pills and equipped with a listening device, which enabled nearby officers to hear his conversations.

After Agent Kiser made these arrangements with Defendant, investigating officers followed Elizabeth Rider from a Kmart pharmacy in Asheville to a prearranged meeting spot, where they observed Agent Kiser enter Elizabeth Rider's car and heard him discuss the drug sale with her. At that time, Agent Kiser paid Elizabeth Rider $1,000.00 in exchange for 120 pills. The pills that Elizabeth Rider sold Agent Kiser "were wrapped in a cellophane-type baggie and placed into a pill bottle where the label of the patient name was ripped off so that the patient cannot be identified by looking at the bottle." After this exchange and in response to a signal given by Agent Kiser, the investigating officers immediately arrested Elizabeth Rider and seized a cigarette case and various unlabeled prescription bottles from her car.

On the same date, investigating officers arrested Defendant. After her arrest, Defendant told Agent Styles "that she had gotten in a financial bind and that she had only sold drugs a couple times because of the financial bind that she had gotten in." According to Defendant, her financial difficulties stemmed from the fact that a man named Thomas Whitmore had given her a worthless check.

2. Identification of Medications

Special Agent Elizabeth Reagan of the State Bureau of Investigation, testifying as an expert in forensic chemistry, examined two clear plastic bags and a pill bottle, each of which contained various medications, pursuant to a request from Agent Styles. The documentation accompanying this evidence indicated that the bottle contained 99 pills and had been taken "from [Defendant's] hand." Agent Reagan "performed an identification based on the tablet markings and the physical characteristics" of one tablet marked with G3722 and twenty-six tablets marked OC/10. On the basis of her visual examination of these tablets, Agent Reagan testified that (1) the pill marked G3722 weighed .2 grams and was alprazolam, a Schedule IV controlled substance marketed as Xanax, and that (2) the twenty-six pills marked OC/10 weighed 3.4 grams and were oxycodone, a Schedule II controlled substance and opium derivative marketed as OxyContin. On cross-examination, Agent Reagan testified that none of the pills contained in State's Exhibit No. 2 were dihydrocodeinone.

Former Special Agent Jay Pintacuda of the State Bureau of Investigation, who also testified as an expert in forensic chemistry, examined a collection of evidence consisting of: (1) a plastic bag containing three pills marked M367, allegedly taken from a cigarette case, and two marked G3722; (2) a plastic bag containing 120 pills marked M367 allegedly taken from a bottle received by an undercover officer; and (3) a plastic bottle containing 117 pills marked M367, 118 pills marked G3722, and thirty other capsules at the request of Agent Styles. Special Agent Pintacuda testified that:

[o]nce I opened [this first item] up I looked at the tablets. In this particular case the items were examined microscopically, with a microscope. I looked for markings to aid in the identification. I recorded those markings on each of the tablets, two different types. I also determined the weight of the tablets, and then I was able to do a search, a computer search for the identification of these tablets after looking at the consistency of the tablets, whether they were uniform in size, shape and the markings were a legitimate marking based on my training and experience. And also I was able to identify these tablets by a visual examination technique.

Based upon this visual examination, Special Agent Pintacuda concluded that three of the tablets contained in Item 1 were "hydrocodeinone or dihydrocodeinone, a Schedule III preparation," and that the other two tablets were alprazolam. With respect to the contents of the second item that he examined, Special Agent Pintacuda testified that:

A: . . There were a hundred and twenty tablets contained in [the second item]. Sixty were in the plastic pouch and another sixty in an unmarked, unlabeled prescription bottle which is amber in color that contained other dosage units or tablets of the same tablet. I had occasion to examine the tablets contained both in the unmarked prescription bottle, counted them and weighed them, examined them microscopically, visually and also a visual identification of the markings of the tablets, and also did a gas chromatograph, mass photometric examination of the active ingredients of the tablets after I had extracted them using a solvent technique. That was done on both of the

preparations, the loose tablets and also the one from the unmarked prescription vial.

Q: . . . . [D]id you reach a conclusion to a scientific certainty what was in the pill bottle and also the ones not in the pill bottle?

A: Both the tablets, the sixty loosely contained in the plastic pouch and also the tablets contained in the prescription bottle, had the markings "M367." They were the identical preparation. They were consistent in color, texture, weight, size, both microscopically and visually with a computer search as being hydrocodone or dihydrocodeinone, [acetaminophen] manufactured by Mallinckrodt Company manufacturing preparations as this pain killer or analgesic preparation. Also, having identified them instrumentally, I was able to reach a conclusion as to the fact that these were, in fact, hydrocodone, dihydrocodeinone tablets, [a] Schedule III preparation.

Special Agent Pintacuda testified with respect to the medications contained in the third item that he examined:

Q: Item No. 3, did you analyze No. 3 sent to you by the BCAT agency?

A: I did not do a GC mass spec because they had the "M367" and labels on them.

Q: And Item 3 which is listed on State's Exhibit 4, where was it found?

A: This was found in the back passenger area of a vehicle.

As a result, the record clearly indicates that some of the medications obtained as a result of the investigation into Defendant's activities were identified solely on the basis of a visual examination of the items in question and that some of these medications were subjected to an "instrumental examination" as well.

3. Defendant's Evidence

Defendant was born in 1963. In 1991, she was severely injured in an automobile accident, which left her disabled. As a result of her injuries, Defendant was prescribed various medications for chronic pain, including the medications she was accused of trafficking in or selling at trial. Defendant had no criminal record and had never been in legal trouble before.

Defendant had known the confidential informant, Thomas Whitmore, for over ten years. Mr. Whitmore, his girlfriend, and their four children lived with Defendant from June until December 2007. During that interval, Mr. Whitmore talked about selling pills. Defendant often noticed that some of her pills were missing.

Defendant testified that Mr. Whitmore brought Agent Kiser, whom he introduced as "Darren," to her house. According to Defendant, a check drawn by Mr. Whitmore to her in the amount of $445.00 had been returned for insufficient funds. The check represented money that Defendant had loaned Mr. Whitmore, who told her that he owed "Darren" money. At the time that Mr. Whitmore arrived at her house with Agent Kiser, Mr. Whitmore took a bottle of Defendant's medication and gave it to Agent Kiser, who, in turn gave $900.00 to Mr. Whitmore. At that point, Mr. Whitmore handed Defendant the money and told Defendant that it constituted repayment of the money that she had loaned to Mr. Whitmore and associated dishonored check fees. Elizabeth Rider picked up Defendant's prescriptions on 5 September 2008 because Defendant's injuries prevented her from driving.

B. Procedural History

On 5 September 2008, warrants for arrest charging Defendant with conspiring with Elizabeth Rider to traffic in more than 28 grams of heroin on 5 September 2008 and trafficking in heroin by selling between four and fourteen grams of heroin on 27 August 2008 were issued in File Nos. 08 CR 60879 and 08 CR 60880. On 1 December 2008, the Buncombe County grand jury returned a bill of indictment charging Defendant with conspiring with Elizabeth Rider to traffic in opium by selling in excess of 28 grams of dihydrocodeinone on 5 September 2008 in File No. 08 CRS 60879. On 1 December 2008, the Buncombe County grand jury returned a bill of indictment charging Defendant with trafficking in opium by selling in excess of 28 grams of dihydrocodeinone on 5 September 2008 in File No. 08 CRS 60880. On 6 April 2009, the Buncombe County grand jury returned bills of indictment charging Defendant with conspiring with Elizabeth Rider to traffic in opium by selling in excess of 28 grams of dihydrocodeinone to Agent Kiser on 5 September 2008 in File No. 09 CRS 60879 and with trafficking in opium by selling in excess of 28 grams of dihyrodcodeinone to Agent Kiser on 27 August 2008 in File No. 08 CRS 60880. On 5 October 2009, the Buncombe County grand jury returned superseding indictments charging Defendant with attempting to traffic in opium by selling what she represented to be in excess of 28 grams of a mixture containing Oxycodone to Agent Kiser on 27 August 2008 in File No. 08 CRS 60880 and with conspiring with Elizabeth Rider to traffic in opium by possessing and selling in excess of 28 grams of a mixture containing dihydrocodeinone to Agent Kiser on 5 September 2008 in File No. 08 CRS 60879.

The Buncombe County grand jury returned additional bills of indictment on 5 October 2009 charging Defendant with selling alprazolam to Agent Kiser on 27 August 2009 in File No. 09 CRS 611, with selling eszopiclone to Agent Kiser on 27 August 2008 in File No. 09 CRS 612, with selling oxycodone to Agent Kiser on 27 August 2008 in File No. 09 CRS 613, with possessing alprazolam with the intent to sell or deliver on 27 August 2008 in File No. 09 CRS 614, with possessing eszopiclone with the intent to sell or deliver on 27 August 2008 in File No. 09 CRS 615, with possessing oxycodone with the intent to sell or deliver on 27 August 2008 in File No. 09 CRS 616, with aiding and abetting Elizabeth Rider to traffic in opium by possessing in excess of 28 grams of dihydrocodeinone on 5 September 2008 in File No. 09 CRS 617, and with aiding and abetting Elizabeth Rider to traffic in opium by selling in excess of 28 grams of dihydrocodeinone to Agent Kiser on 5 September 2008 in

File No. 09 CRS 618. On 29 October 2009, the State voluntarily dismissed the indictments charging Defendant with selling eszopiclone to Agent Kiser in File No. 09 CRS 612 and with possessing eszopiclone with the intent to sell or deliver in File No. 09 CRS 615 on the grounds that eszopiclone was not a controlled substance.

The remaining charges returned against Defendant came on for trial before the trial court and a jury at the 26 October 2009 criminal session of the Buncombe County Superior Court. On 30 October 2009, the jury returned verdicts finding Defendant guilty of conspiring to traffic in opium by sale in File No. 08 CRS 60879, attempting to traffic in opium by sale in File No. 08 CRS 60880, selling alprazolam in File No. 09 CRS 611, selling oxycodone in File No 09 CRS 613, possession of alprazolam with the intent to sell or deliver in File No. 09 CRS 614, possession of oxycodone with the intent to sell or deliver in File No. 09 CRS 616, aiding and abetting trafficking in opium by possession in File No. 09 CRS 617, and aiding and abetting trafficking in opium by sale in File No. 09 CRS 618. At the ensuing sentencing hearing, the trial court determined that Defendant had no prior criminal convictions and should be sentenced as a Level I offender. Based upon these determinations, the trial court sentenced Defendant to a minimum term of sixteen months and a maximum term of twenty months imprisonment in the custody of the North Carolina Department of Correction based upon her conviction for attempting to traffic in opium by sale in File No. 08 CRS 60880. The trial court consolidated Defendant's remaining convictions for judgment and sentenced Defendant to a minimum term of 225 months and a maximum term of 279 months imprisonment in the custody of the North Carolina Department of Correction, with this sentence to be served at the expiration of Defendant's sentence for attempting to traffic in opium by sale. In addition, the trial court ordered Defendant to pay a $500,000.00 fine and the costs. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Agent Schandevel's Testimony

In her first challenge to the trial court's judgments, Defendant argues that the trial court erred by allowing Special Agent Schandevel to testify that he was told by a confidential informant that Defendant was selling prescription drugs on the grounds that this testimony constituted inadmissible hearsay and that its admission "violated the Defendant's rights under the Sixth Amendment to the United States Constitution."[1] More specifically, Special Agent Schandevel testified that:

Q: What[] information, if any, did you gain about someone by the name of Kathy Rider distributing her medications unlawfully?

[DEFENSE COUNSEL]: Objection.

[TRIAL COURT]: Overruled.

A: After speaking to her I contacted the confidential source of information and spoke to him on the phone and arranged a meeting.

Q: What name did you get from the information from the two people that you spoke to?

[DEFENSE COUNSEL]: Objection. [TRIAL COURT]: Overruled.

A: Our meeting revealed the name of Kathy Rider.

Defendant's argument lacks merit.

According to well-established North Carolina law, "'[w]here evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.'" State v. Anthony, 354 N.C. 372, 409, 555 S.E.2d 557, 582 (2001) (quoting State v. Alford, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995)), cert. denied, 536 U.S. 930, 153 L. Ed. 2d 791, 122 S. Ct. 2605 (2002). On redirect examination, Special Agent Schandevel testified without objection that:

Q: Mr. Clontz asked you about the confidential source of information and the discussions you had with the confidential source of information. Who was identified as the person selling the hydrocodone and/or oxycodone?

A: Kathy Rider.

As a result, by failing to object to Special Agent Schandevel's testimony on redirect examination, Defendant has "lost the benefit" of her earlier objection and is not entitled to appellate relief based upon the trial court's decision to overrule her earlier objections.

Moreover, in order "for [a] defendant to obtain relief [as a result of the] erroneous admission of evidence, defendant must show prejudice" by demonstrating that "'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.'" State v. Johnson, __ N.C. App. __, __, 693 S.E.2d 145, 148 (2010) (quoting N.C. Gen. Stat. § 15A-1443(a)). A careful review of the record developed at trial satisfies us that, if the challenged testimony had not been admitted, there is no reasonable possibility that the outcome at Defendant's trial would have been different.

At trial, Special Agent Schandevel testified, without objection, that he had obtained records indicating that Defendant had filled prescriptions for more than 3400 hydrocodone tablets and 360 OxyCodone tablets between 31 July 2007 and 18 August 2008. [2]

Moreover, Special Agent Schandevel, Agent Kiser and Agent Styles testified concerning two separate drug purchases involving Defendant, one of which took place on 27 August 2008 and the otherof which occurred on 5 September 2008. In light of the overwhelming evidence tending to show Defendant's involvement in these two drug transactions, we are unable to conclude that there is any reasonable possibility that the admission of the challenged testimony had any effect on the jury's decision to convict Defendant.

In seeking to persuade us to reach a contrary result, Defendant argues that, "because the defendant offered a defense of entrapment, the hearsay evidence had the effect of defeating the entrapment defense." We conclude, however, that Defendant did not properly raise an entrapment defense.

The decisions of the Supreme Court and this Court clearly establish that:

"The law . . . forbids convictions that rest upon entrapment." "Entrapment is a complete defense to the crime charged." In general: "the defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities."

State v. Redmon, 164 N.C. App. 658, 662, 596 S.E.2d 854, 858 (2004) (quoting United States v. Jimenez Recio, 537 U.S. 270, 276, 154 L. Ed. 2d 744, 750, 123 S. Ct. 819, 823 (2003); State v. Branham, 153 N.C. App. 91, 99-100, 569 S.E.2d 24, 29 (2002), and State v. Walker, 295 N.C. 510, 513, 246 S.E.2d 748, 749-50 (1978)). However: . . . North Carolina follows the majority rule which precludes the assertion of the defense of entrapment when the defendant denies one of the essential elements of the offense charged. . . . [T]he rationale of that rule "is that the law will not countenance a claim that defendant did not commit the offense and a claim that he was entrapped into the commission of the very offense which he denied committing." . . . . In our opinion, it is inconsistent for defendant to assert on the one hand that he did not do certain acts and then to insist that the government induced him to do the very acts which he disavows doing.

State v. Neville, 302 N.C. 623, 625, 276 S.E.2d 373, 374-75 (1981) (citing State v. Swaney, 277 N.C. 602, 178 S.E. 2d 399 (1971), State v. Boles, 246 N.C. 83, 97 S.E. 2d 476 (1957), and quoting State v. Neville, 49 N.C. App. 684, 686, 272 S.E.2d 164, 166 (1980), aff'd, 302 N.C. 623, 276 S.E.2d 373 (1981)). At trial, Defendant never claimed to have been tricked, persuaded, or coerced into selling prescription drugs to Agent Kiser; instead, she flatly denied having made any drug sales to him at all. As a result, Defendant was not entitled to present an entrapment defense, eliminating any possibility that the admission of the challenged testimony prejudiced Defendant's entrapment defense. Thus, for both of these reasons, Defendant is not entitled to relief from the trial court's judgments as a result of the admission of the challenged testimony.

B. Mr. Whitmore's Statements

Secondly, Defendant argues that the trial court erred by refusing to allow her to testify about the substance of her conversations with Mr. Whitmore. According to Defendant, Mr. Whitmore was the State's confidential informant. Defendant attempted to offer testimony concerning her conversations with Mr. Whitmore in support of her entrapment defense, including evidence that Mr. Whitmore claimed that "Darren Matthews" would break his legs if Defendant did not sell prescription medications to him. As we have already discussed, however, Defendant "must admit to having committed the acts underlying the offense with which he is charged in order to receive an entrapment instruction," since the "Supreme Court has held that when a defendant 'denies the commission of the acts underlying the offense charged, he cannot raise the inconsistent defense of entrapment.'" State v. Sanders, 95 N.C. App. 56, 61, 381 S.E.2d 827, 830 (1989) (quoting Neville, 302 N.C. at 626, 276 S.E.2d at 375). In view of the fact that Defendant denied having sold prescription medications to Agent Kiser, she was not entitled to rely on an entrapment defense. As a result, we conclude that this aspect of Defendant's challenge to the trial court's judgments lacks merit as well.

C. Confidential Informant's Character

Thirdly, Defendant contends that the trial court erred by excluding the testimony of Bobby Crisp concerning the character and conduct of Mr. Whitmore, which Defendant offered for the purpose of attacking Mr. Whitmore's credibility, demonstrating his propensity to sell drugs, and showing his bias against Defendant. More particularly, Defendant sought to obtain the admission of testimony from Mr. Crisp to the effect that he had fired Mr. Whitmore from his position as the manager of a trailer park that Mr. Crisp owned in Mills River, North Carolina, after hearing that Mr. Whitmore and his wife might have been stealing from him. In essence, Defendant argues that the excluded evidence would have rebutted Special Agent Schandevel's testimony to the effect that an informant had told him that Defendant was selling drugs and bolstered her entrapment defense. Once again, we conclude that Defendant's argument lacks merit.

As is discussed in more detail earlier in this opinion, we have already concluded that Defendant was not prejudiced by the admission of Special Agent Schandevel's testimony that an informant alleged to be Mr. Whitmore told him Defendant was selling drugs. For the same reason, we conclude that Defendant was not prejudiced by the exclusion of evidence that might have impeached this aspect of Special Agent Schandevel's testimony. In addition, since Defendant was not, for the reasons delineated above, entitled to rely on an entrapment defense, she could not have been prejudiced by the exclusion of evidence that tended to support the validity of such a defense. Finally, Mr. Whitmore did not testify at Defendant's trial. As a result, Defendant is not entitled to relief based on the exclusion of evidence concerning Mr. Whitmore's character and conduct.

D. Special Agent Reagan's Testimony

Fourth, Defendant contends that the trial court committed plain error by allowing Special Agent Reagan to opine, based upon her visual examination of certain pills, that one white tablet was alprazolam and that twenty-six other tablets were oxycodone on the grounds that Agent Reagan "failed to perform sufficient analysis and testing of any of the pills to support her opinion." A careful examination of the argument reveals that it has merit.

In view of the fact that Defendant did not object to Agent Reagan's testimony at trial, we review the issue raised by this aspect of Defendant's argument utilizing a "plain error" standard of review. "'[A] reversal for plain error is only appropriate in the most exceptional cases.'" State v. Duke, 360 N.C. 110, 138, 623 S.E.2d 11, 29 (2005), cert. denied, 549 U.S. 855, 166 L. Ed. 2d 96, 127 S. Ct. 130 (2006). The plain error rule: is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or where the error is such as to Aseriously affect the fairness, integrity or public reputation of judicial proceedings" or "had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting United States v. McCaskill, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted).

The Supreme Court held in State v. Ward, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010), that an expert witness' visual identification of an alleged controlled substance "is not sufficiently reliable for criminal prosecutions" so that, "[u]nless the State establishes before the trial court that another method of identification is sufficient to establish the validity of the controlled substance beyond a reasonable doubt, some sort of scientifically valid chemical analysis is required." Moreover, this Court held in State v. Brunson, __ N.C. App. __, __, 693 S.E.2d 390, 393 (2010), that a trial court committed plain error by allowing the admission of drug identification testimony relying upon "visual identification and the use of a Micromedics database of pharmaceutical preparations to determine that the pills found on defendant were an opium derivative . . . ." As a result of the fact that, as in Brunson, the testimony of Special Agent Reagan was based exclusively upon a visual examination of the questioned medications and the fact that, in the absence of testimony identifying the relevant medications on the basis of a chemical analysis or some equally reliable method of identification, State v. Jones, __ N.C. App. __, __, 703 S.E2d 772, 774-75 (2010), disc. review allowed, __ N.C. __, 706 S.E.2d 778 (2011), (stating that "[v]isual identification, even by a trained police officer such as Officer Tucker with four years of experience, is not enough to identify beyond a reasonable doubt a substance chemically defined by our legislature"); State v. Williams, __ N.C. App. __, __, 702 S.E.2d 233, 238 (2010), temporary stay allowed, __ N.C. __, 705 S.E.2d 382 (2010) (stating that "[t]he testimony of defendant and police officers alone, despite both officers' credentials and experience, is insufficient to show that the substance possessed was cocaine"); State v. Nabors, __ N.C. App. __, __, 700 S.E.2d 153, 159 (2010), disc. review allowed, __ N.C. __, 706 S.E.2d 780 (2010) (holding that "Officer Byrd's and Mr. Gendreau's conjecture based on their previous encounters with cocaine and their observation of the substance here was not the 'scientifically valid chemical analysis' of the substance

required 'to establish the identity of the controlled substance beyond a reasonable doubt'") (quoting Ward, 364 N.C. at 147, 694 S.E.2d at 747), we are compelled to conclude that the trial court committed plain error by allowing the admission of Special Agent Reagan's drug identification testimony and to grant Defendant a new trial in those cases in which the State relied upon Special Agent Rider's testimony to identify the controlled substances in which Defendant is alleged to have dealt.

Although the State does not deny that Special Agent Reagan's testimony rested exclusively upon the sort of visual examination held to require an award of plain error relief in Brunson, it argues that "it was reasonable to forego submitting these pills to Gas Chromatography/Mass Spectometry analysis" and that "the record contains sufficient independent circumstantial evidence to convince a fact finder that the pills were oxycodone and alprazolam without an expert opinion based upon actual chemical analysis." More particularly, the State argues that Brunson isdistinguishable from this case because the arresting officers whose testimony was at issue in Brunson were much less qualified to identify controlled substances than Special Agent Reagan; because Defendant had prescriptions for and was known to possess the controlled substances identified by Special Agent Reagan; because Defendant identified the controlled substances that she intended to sell to Agent Kiser; because the medications at issue here, unlike the cocaine at issue in State v. Llamas-Hernandez, 189 N.C. 640, 651, 659 S.E.2d 79, 85 (2008), rev'd on the basis of dissenting opinion, 363 N.C. 8, 673 S.E.2d 658 (2009), did not lack distinguishing characteristics; and because the record contained ample additional evidence tending to show the identity of the substances in which Defendant was alleged to have dealt. The fundamental problem with the State's argument is that our decision in Brunson represented an application of the Supreme Court's decision in Ward, which required the exclusion of testimony that is virtually indistinguishable from that at issue here. Moreover, nothing in Brunson in any way suggests that the Court's decision to find the existence of plain error in connection with the admission of drug identification testimony predicated solely upon a visual inspection in any way hinged upon the fact that challenged testimony was provided by investigating officers instead of an expert in forensic chemistry. Finally, as was the case in Brunson, "[t]here is a significant probability that, had the lower court properly excluded [Special Agent Reagan's] testimony, the jury would have found the defendant not guilty" given the complete absence of any testimony identifying the drugs in question based on a properly-conducted chemical analysis or some equally reliable identification procedure. Brunson, __ N.C. App. at __, 693 S.E.2d at 393. As a result, Defendant is entitled to a new trial in the cases in which she was charged with attempting to traffic in opium by sale in File No. 08 CRS 60880, selling alprazolam in File No. 09 CRS 611, selling oxycodone in File No. 09 CRS 613, possessing alprazolam with the intent to sell or deliver in File No. 09 CRS 614, and possessing oxycodone with the intent to sell and deliver in File No. 09 CRS 615, since each of these convictions stemmed from events alleged to have occurred on 27 August 2008 and rested upon the drug identification testimony provided by Special Agent Reagan.

E. Special Agent Pintacuda's Testimony

Finally, Defendant argues that the trial court committed plain error by allowing Special Agent

Pintacuda to testify that 120 of the pills that he examined at the request of Special Agent Styles consisted of hydrocodeinone on the grounds that Special Agent Pintacuda "failed to perform sufficient analysis and testing of any of the pills to support his opinion." Although the legal principles applicable to our analysis of the admissibility of Special Agent Reagan's testimony are equally applicable to our analysis of the admissibility of Special Agent Pintacuda's testimony, a careful scrutiny of Special Agent Pintacuda's testimony reveals that he did, in fact, perform a chemical analysis of the substances underlying Defendant's convictions for offenses committed on 5 September 2008. As Special Agent Pintacuda testified:

. . . . There were a hundred and twenty tablets contained in [the second item submitted for his analysis]. Sixty were in the plastic pouch and another sixty in an unmarked, unlabeled prescription bottle which is amber in color that contained other dosage units or tablets of the same tablet. I had occasion to examine the tablets contained both in the unmarked prescription bottle, counted them and weighed them, examined them microscopically, visually and also a visual identification of the markings of the tablets, and also did a gas chromatograph, mass photometric examination of the active ingredients of the tablets after I had extracted them using a solvent technique. That was done on both of the preparations, the loose tablets and also the one from the unmarked prescription vial.

Q: . . . [D]id you reach a conclusion to a scientific certainty what was in the pill bottle and also the ones not in the pill bottle?

A: Both the tablets, the sixty loosely contained in the plastic pouch and also the tablets contained in the prescription bottle, had the markings "M367." They were the identical preparation. They were consistent in color, texture, weight, size, both microscopically and visually with a computer search as being hydrocodone or dihydrocodeinone, [acetaminophen] manufactured by Mallinckrodt Company manufacturing preparations as this pain killer or analgesic preparation. Also, having identified them instrumentally, I was able to reach a conclusion as to the fact that these were in fact, hydrocodone, dihydrocodeinone tablets, [a] Schedule III preparation.

Aside from failing to challenge the admission of this evidence at trial, Defendant has not argued on appeal that "a gas chromatograph, mass photometric examination of the active ingredients of the tablets" did not constitute a valid scientific method for determining the identity of the medications in question. As we noted in State v. Dobbs, __ N.C. App. __, __, 702 S.E.2d 349, 351-52 (2010), in which the State's expert identified certain tablets as dihydrocodeinone based on visual examination coupled with the use of a gas chromatograph mass spectrometer, such evidence is sufficient to establish the identity of certain medications and to support a valid conviction in the aftermath of Ward. The fact that Special Agent Pintacuda may not have explicitly described the procedure he utilized as a chemical analysis does not in any way change the fact that the approach he utilized was exactly the sort of approach contemplated in Ward. As a result, the premise of this aspect of Defendant's challenge to her convictions for conspiring to traffic in opium in File No. 08 CRS 60879, aiding and abetting trafficking in opium by possession in File No. 09 CRS 617, and aiding and abetting

trafficking in opium by sale in File No. 09 CRS 618, lacks adequate record support. As a result, we conclude that Defendant's final challenge to her convictions for offenses arising from events that occurred on 5 September 2008 is without merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant is entitled to a new trial in connection with her convictions for attempting to traffic in opium in File No. 08 CRS 60880, selling alprazolam in File No. 09 CRS 611, selling OxyCodone in File No. 09 CRS 613, possessing alprazolam with the intent to sell or deliver in File No. 09 CRS 614, and possessing oxycodone with the intent to sell or deliver in File No. 09 CRS 616. Although we find no error in Defendant's convictions for conspiracy to traffic in opium in File No. 08 CRS 60879, aiding and abetting trafficking in opium by possession in File No. 09 CRS 617, and aiding and abetting trafficking in opium by sale in File No. 09 CRS 618, the fact that each of these convictions was consolidated for judgment with convictions which have been overturned on appeal requires us to remand these convictions to the Buncombe County Superior Court for resentencing.

NO ERROR IN PART; NEW TRIAL IN PART; REMANDED FOR RESENTENCING. Chief Judge MARTIN and Judge MCGEE concur.

Report per Rule 30(e).

1. As a preliminary matter, we note that Defendant did not raise her constitutional challenge to the admission of the challenged testimony before the trial court. "'Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.'" State v. Ellis, __ N.C. App. __, __, 696 S.E.2d 536, 539 (2010) (quoting State v. Lloyd, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001)). As a result, Defendant's confrontation-based challenge to the admission of Special Agent Schandevel's testimony has not been properly preserved for appellate review.

2. Defendant conceded the accuracy of this information on cross-examination.