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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-300

Filed: 6 February 2018

Durham County, Nos. 15 CRS 59165, 15 CRS 3817

STATE OF NORTH CAROLINA

v.

DEMARCUS WAYNE FERRELL

Appeal by defendant from judgments entered 28 October 2016 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 19 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas W. Yates, for the State.

Marilyn G. Ozer for defendant-appellant.

DAVIS, Judge.

Demarcus Wayne Ferrell ("Defendant") appeals from his convictions for trafficking in cocaine by possession, trafficking in cocaine by transportation, possession with intent to sell or deliver cocaine, possession of drug paraphernalia, possession of marijuana up to one-half ounce, and attaining the status of a habitual felon. On appeal, he argues that the trial court erred by admitting (1) video footage

from a law enforcement vehicle's in-car camera; and (2) evidence discovered as a result of a warrantless search of Defendant's cell phone. After careful review, we conclude Defendant has failed to show prejudicial error.

Factual and Procedural Background

The State presented evidence tending to establish the following facts: On 16 October 2015, Corporal J.R. Salmon and Officer Jonathan Hitchings with the Durham Police Department were traveling eastbound on Camden Avenue in Durham, North Carolina in a patrol vehicle. Officer Hitchings was driving the vehicle, and Corporal Salmon was sitting in the front passenger seat. As the vehicle was driving eastbound on Camden Avenue, the officers observed a white Ford Fiesta traveling westbound cross over the double yellow line into the eastbound lane in order to pass another vehicle. As the Fiesta passed the officers' vehicle, Corporal Salmon observed that the driver was "a dark-skinned black male with a dark-colored hat on in a white vehicle."

Corporal Salmon instructed Officer Hitchings to activate the vehicle's blue lights, and Officer Hitchings made a U-turn. As the officers were following the Fiesta, Corporal Salmon noticed the vehicle was "speeding up to get away from us." Corporal Salmon then observed the Fiesta make a right turn into the parking lot of an apartment complex. As Officer Hitchings was turning into the parking lot, Corporal Salmon saw the driver jump out of the vehicle. As he did so, Corporal Salmon noticed

that the driver was "wearing a . . . light gray sweatshirt, light gray pants, and a dark-colored hat." Corporal Salmon saw the suspect "look[ ] at us for a second and then . . . take[ ] off running" into a nearby wooded area.

Corporal Salmon jumped out of the patrol vehicle before it came to a stop but was unable to catch up with the suspect. He radioed several other officers, including a K-9 unit, while Officer Hitchings ran around the edge of the wooded area. As Corporal Salmon approached the Fiesta, he smelled an "overwhelming odor of marijuana."

Officer B.K. Johnson with the Durham Police Department arrived with his police dog, Ulix. Corporal Salmon informed Officer Johnson that the suspect had run between apartment buildings 1221 and 1223 on Camden Avenue. Officer Johnson directed Ulix to locate and track the suspect, and Ulix tracked along a divider-fence between I-85 and Camden Avenue. As Officer Johnson was walking by the fence, he "smelled the odor of marijuana" and "made a mental note of, okay, yeah, I smell dope here, we'll come back and get it later." After walking approximately one hundred yards through the wooded area, Ulix turned toward Camden Avenue.

As Officer Johnson followed Ulix toward Camden Avenue, he observed a man standing outside of his back porch "adamantly pointing towards the street down his driveway, which was the direction that [the officers] were tracking, as [they] went." As Officer Johnson approached the street, Ulix stuck his nose deep into a holly bush,

signaling that he had discovered a human scent. Upon investigation, Officer Johnson discovered a gray sweatshirt that had been pushed into the ground at the foot of the holly bush. Officer Johnson observed that although the ground was damp from recent rain, the sweatshirt was "very dry" and "didn't look dirty . . . ."

Ulix continued to track and made a right turn on the sidewalk. At this point, Officer Johnson observed "a male ahead of us wearing gray sweatpants and a long-sleeved black shirt walking away from us, about 50 yards ahead of us." Officer Johnson later testified that the distance from the point where Ulix began tracking to the point where the man — Defendant — was walking on the sidewalk was 256 yards.

Corporal Salmon was following shortly behind Officer Johnson. As he passed the fence in the wooded area, he smelled "[t]he overwhelming odor of raw, unburned marijuana[,]" which he later described as "very strong in the air."

Officer Johnson ordered Defendant to stop walking. As several other officers surrounded him, Defendant eventually lay down on the ground. As he approached Defendant, Corporal Salmon noticed that he "had debris in his hair[,] . . . debris on his clothing[, and] . . . seemed overly nervous."

Corporal Salmon handcuffed Defendant and asked him what his name was. He "gave . . . a little smile, kind of a little smirk" while responding that his name was "John Jones" and his date of birth was "8/26/1986." Corporal Salmon ran a search under the name "John Jones" and the date of birth given to him by Defendant. He

was unable to locate any individuals named "John Jones" with that date of birth. He told Defendant several times, "your name is not John Jones . . . who are you?"

Other officers conducted pat-down searches of Defendant to determine whether he possessed weapons or contraband, and he was placed in the back of a police car. During a pat-down search, the officers removed Defendant's outer black shirt and discovered approximately $465 in Defendant's pocket.

While Corporal Salmon was speaking with Defendant, Officer Johnson asked Officer Kimberly Schooley to search the area of the woods through which the driver of the Fiesta had run along with her canine, Kendo. She deployed Kendo to determine whether any items on the ground smelled of human odor in the wooded area. As they neared the fence, Officer Schooley smelled marijuana, and Kendo alerted to two plastic bags containing drugs and a hat lying on the ground near the fence. They kept walking across the wooded area, and as they approached another fence Kendo alerted to a handgun on the ground. Although the ground was wet, Officer Schooley noticed the gun and the plastic bags containing drugs were both dry. She informed Officer Hitchings of the gun, the hat, and the drugs to which Kendo had alerted in the wooded area.

At some point later, Kendo alerted to a car key on the ground near the wooded area. Corporal Salmon placed this key into the ignition of the Fiesta, and the vehicle turned on.

Another officer searched the Ford Fiesta while it was in the apartment parking lot. He discovered a cell phone in the vehicle. While the officer had control of the cell phone, it "start[ed] ringing, [so he] open[ed] up the phone, and in the phone there[ ] [was] a picture of [Defendant] on the phone that [they] found in the vehicle."

While Defendant was sitting in the patrol vehicle, the cell phone emitted a noise indicating that a text message had been received. Corporal Salmon read the text message, which stated, "Hey, cuz, can I get a dub of sand?" After the text message had been received, the officers informed Defendant that they had found his phone in the Fiesta, and he denied that the phone belonged to him. Corporal Salmon responded that if the cell phone did not belong to Defendant then someone must be stalking him because the phone contained several photographs and videos of him.

Eventually, Defendant admitted to Corporal Salmon that his real name was "Demarcus Ferrell," and upon learning his name, Corporal Salmon recognized him from previous encounters. Corporal Salmon asked if Defendant remembered him, and Defendant responded, "Yes."

After Corporal Salmon obtained Defendant's real name, he discovered that there was an outstanding warrant for Defendant's arrest. Defendant also had a prior felony conviction for possession of a stolen motor vehicle. The officers ultimately obtained a search warrant for the cell phone, and officers extracted information off of the device. Upon further inspection of the plastic bags found in the woods, the officers

learned that they contained 11 grams of marijuana and 36.7 grams of powder cocaine and crack cocaine. Additionally, they found three pills containing 10 milligrams of methadone hydrochloride.

Defendant was arrested and subsequently indicted for trafficking in cocaine by possession, trafficking in cocaine by transportation, possession with intent to sell or deliver Schedule II drugs, possession with intent to sell or deliver Schedule VI drugs, possession of drug paraphernalia, and possession of a firearm by a felon.

On 15 June 2016, Defendant filed two motions to suppress. The first motion sought the suppression of "the physical evidence that was seized . . . by law enforcement officers in violation of Defendant's [Fourth Amendment] rights[,]" and the second motion was to suppress statements made to law enforcement officers by Defendant in violation of his rights protected by the Fourth, Fifth, and Sixth Amendments.

A jury trial was held before the Honorable Beecher R. Gray in Durham County Superior Court beginning on 24 October 2016. Officer Johnson, Corporal Salmon, and Officer Schooley testified for the State along with several evidence technicians and employees of the North Carolina State Crime Lab. Defendant did not testify or present any evidence.

On the first day of trial, Defendant sought to suppress the video footage of his encounter with police officers taken from the in-car camera while he was handcuffed

in the back of the patrol car. The State requested that the trial court deny Defendant's motion based on the inadequacy of the affidavit accompanying the motion.

The trial court summarily denied this motion to suppress,[1] stating as follows:

> Based on what I've heard thus far and having read the documents and the motion and the affidavit that goes to the motion, the motion itself lacks factual support, even taken as true. The facts, such as they are, ended in the affidavit itself. And based on the forecast of what the police officers would say, so forth, I'm going to deny that motion. It's not supported.

During trial, the State sought to introduce the video footage from the patrol vehicle's in-car camera as Exhibit No. 3. Defendant objected to the introduction of Exhibit No. 3 in its entirety, and the trial court held a hearing outside of the presence of the jury to determine the admissibility of the video.

The trial court did not admit the full video but allowed the State to play the majority of a sixteen-minute portion of the video for the jury. During this portion, Defendant was shown seated in the back of the patrol car handcuffed. The video showed Defendant giving a false name and stating that the reason his name was not in the police database was because he had never gotten into trouble. It also contained

[1] The record on appeal contains an order with a file stamp bearing the date 28 October 2016 that contains written findings of fact and conclusions of law relating to this motion to suppress. However, the written order does *not* contain the signature of Judge Gray. As such, we will not consider the written order, and instead we treat the trial court's verbal denial of the motion to suppress on 24 October 2016 as the court's sole ruling on this motion.

his statement to the officers that he had been on his way to visit a woman he knew who lived on Camden Avenue. At one point during the video, Corporal Salmon can be heard informing Defendant that the cell phone contained photographs and videos of him.

The video also contained a muffled conversation between the officers as they were discussing the preceding events. One officer stated that Defendant was "definitely him" because the officers were "fifteen seconds" behind him and he was "shedding his shirt" because the officers were "hot on his heels." The officers also discussed the text message that had been received on the recovered cell phone. During the conversation, one of the officers stated that "sand" might be a reference to "heroin."

On 27 October 2016, the jury returned guilty verdicts as to the charges of trafficking in cocaine by possession, trafficking in cocaine by transportation, attaining the status of a habitual felon, possession with intent to sell or deliver cocaine, possession of marijuana, and possession of drug paraphernalia. The jury found Defendant not guilty of possession of a firearm by a felon.

The trial court sentenced Defendant to (1) 90 to 120 months imprisonment for the trafficking in cocaine by possession charge; (2) a concurrent term of 90 to 120 months imprisonment for the trafficking in cocaine by transportation charge and attaining the status of a habitual felon; (3) a consecutive term of 67 to 93 months

imprisonment for the possession with intent to sell or deliver cocaine charge; and (4) a consecutive term of 120 days imprisonment for the possession of marijuana and possession of drug paraphernalia charges. Defendant gave notice of appeal in open court.

Analysis

I. Admission of Evidence Obtained From Cell Phone

Defendant first argues that the trial court erred in admitting evidence that was obtained as a result of the warrantless search of his cell phone because it violated his Fourth Amendment right to be free from unreasonable searches and seizures. Because Defendant failed to object at trial to the trial court's admission of the evidence obtained as a result of the search of his cell phone, our review of this issue is limited to plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> 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

> affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Even assuming, without deciding, that the trial court erred in admitting evidence from the cell phone, Defendant cannot satisfy the prejudice requirement under plain error review. There was substantial evidence of Defendant's guilt presented by the State apart from his connection to the cell phone found inside the Fiesta: (1) the Fiesta was seen by Corporal Salmon crossing a double yellow line; (2) Corporal Salmon testified that he was sitting in the passenger side of the patrol car when he saw a dark-skinned black male with a dark-colored hat in the driver's seat of the Fiesta pass the patrol car; (3) Officer Hitchings activated his blue lights and instead of pulling over, the Fiesta sped up and eventually stopped in a parking lot where Corporal Salmon observed the driver jump out of the car; (4) Corporal Salmon observed that the driver was wearing a light gray sweatshirt, light gray sweatpants, and a dark colored hat; (5) Officer Johnson and Ulix tracked human scent through nearby woods and eventually followed it to a holly bush located 50 yards away from where Defendant was seen walking; (6) Officer Johnson discovered a light gray sweatshirt that had been found shoved under the holly bush; (7) the total distance between the location of the Fiesta and the area where Defendant was found measured 256 yards; (8) Corporal Salmon observed that Defendant had some debris in his hair

and on his clothing and was acting "overly nervous" upon being stopped on the sidewalk; (9) as Officer Schooley and her canine followed Defendant's scent in the woods, Kendo discovered two plastic bags full of drugs, a dark-colored hat, a car key that matched the Ford Fiesta, and a cell phone in the wooded area; and (10) the items found in the wooded area were dry despite the fact that the ground was damp from recent rain.

Thus, all of this unchallenged evidence establishes that it was Defendant who abandoned the car, attempted to escape from the officers by running through the wooded area, shed his clothing to avoid recognition by the officers, disposed of the drugs in his possession while running through the woods, and was discovered with debris from the woods in his hair and on his clothing a few hundred yards from where his car was abandoned. Given this overwhelming evidence of guilt, we cannot say that any error arising from the admission of evidence obtained from the search of the cell phone had a probable impact on the jury's verdict. *See, e.g.*, *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (holding that inadmissible testimony did not rise to level of plain error because "[t]he overwhelming evidence against defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached").

II. Denial of Motion to Suppress Video Footage

Defendant also argues that Exhibit No. 3 should have been suppressed in its entirety because (1) the officers failed to advise him of his *Miranda* rights prior to conducting a custodial interrogation; (2) the contents of the video footage violated his right to confront witnesses against him pursuant to the Sixth Amendment; and (3) the video was prejudicial to Defendant and in violation of his right to a fair trial.

As an initial matter, we note that Defendant has not preserved his argument based on the Confrontation Clause because it is well settled that constitutional issues "not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 415, 597 S.E.2d 724, 748 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). Defendant did not assert his Confrontation Clause argument at trial, and he has therefore failed to preserve this issue for appellate review. *See State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 709-10 (1998) (holding that defendant's failure to raise constitutional issue at trial waived appellate review of that issue), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999).

As to his remaining challenges, the State contends that even if the trial court's admission of Exhibit No. 3 constituted error, such error was harmless. We agree.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when 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. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2017). Such an error may be rendered "harmless . . . where there is overwhelming evidence of defendant's guilt." *State v. Weldon*, 314 N.C. 401, 411, 333 S.E.2d 701, 707 (1985).

Even excluding both the evidence from the video and the evidence obtained from the cell phone, ample evidence connected Defendant to the narcotics found in the woods. A suspect matching Defendant's description was seen by Corporal Salmon running from the Fiesta into the woods near Camden Avenue. Two canine units tracked human scent near the items found in the woods. The drugs, gun, hat, and sweatshirt found in or near the wooded area were dry despite the ground being damp from recent rain. Defendant was found 256 yards from the Fiesta. Defendant's hair and clothing contained debris, and Corporal Salmon observed him acting overly nervous. This evidence clearly linked Defendant to the plastic bags of marijuana and cocaine found in the wooded area.

Thus, Defendant cannot show that the admission of the video constituted prejudicial error. *See State v. Powell*, 340 N.C. 674, 692, 459 S.E.2d 219, 228 (1995) (holding that defendant was not prejudiced by erroneous exclusion of challenged evidence in light of "all of the other evidence" presented at trial), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges ZACHARY and BERGER concur.

Report per Rule 30(e).