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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1293

Filed: 21 August 2018

Watauga County, Nos. 16 CRS 000576, 050232

STATE OF NORTH CAROLINA

v.

MARK LEON CONNER

Appeal by defendant from judgments entered 5 June 2017 by Judge Marvin P. Pope, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 7 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Douglas W. Corkhill, for the State.

Joseph P. Lattimore, for defendant-appellant.

CALABRIA, Judge.

Where the trial court entered detailed conclusions of law sufficiently explaining its reasoning, meaningful appellate review of the trial court's denial of defendant's motion to suppress was possible. Where an officer's testimony as to what he heard in a conversation between an informant and others was not offered for the truth of the matter asserted, but to explain his subsequent behavior, that testimony

was non-hearsay and did not violate defendant's right to confront the witnesses against him. The admission of this testimony was not error, let alone plain error. Where the trial court's decision was not "manifestly unsupported by reason," the trial court did not err in denying defendant's motion to continue.

I. Factual and Procedural Background

On 11 February 2016, an unnamed person ("the confidential informant") was arrested in possession of 21 grams of methamphetamine. This individual met with Sergeant Jason Zaragosa ("Sergeant Zaragosa"), an officer with the Watauga County Sheriff's Office, in hopes of mitigating the charges against him by sharing information with law enforcement. The confidential informant stated that he could arrange for a controlled purchase of methamphetamine from a "middleman" named Heather Conner ("Conner"). Supervised by Sergeant Zaragosa, the confidential informant contacted Conner and agreed to purchase one and one-half ounces of methamphetamine for $2,300. Sergeant Zaragosa and the confidential informant arrived at the agreed-upon time and place. When Conner contacted the confidential informant, it was not to confirm the amount of methamphetamine, but to indicate that she would arrive later than agreed. In addition to Conner, Sergeant Zaragosa heard another voice on the phone, identified as Danny Pinkerton ("Pinkerton").

Sergeant Zaragosa learned from the confidential informant that Pinkerton and Conner would be driving was a burgundy Lincoln Aviator with 24-inch tire rims. He

contacted detective John Holler ("Det. Holler"), detective Carolyn Cragg ("Det. Cragg"), and two other deputies, William Gilliam ("Dep. Gilliam") and Preston Russell ("Dep. Russell"), who were traveling in the same area as the Aviator. Sergeant Zaragosa described to them the car, its occupants, and the route he expected the car to travel. Sergeant Zaragosa also contacted Rick Ruppert ("Dep. Ruppert"), a deputy with the K-9 unit, to assist with the stop of the vehicle. Finally, Sergeant Zaragosa released the confidential informant.

The officers arrived at the meeting site and, after roughly 15 minutes, they observed a male driving a "maroon Lincoln Aviator with large rims[,]" and two passengers, one male and one female. The officers followed the Aviator and observed that it was traveling 40 to 45 miles per hour, that it was following the car in front of it very closely, and that the stickers on its license plate for the month and year were in the wrong positions. After following the vehicle for some time, the officers conducted a stop. Det. Holler asked all three passengers for identification: Pinkerton was the driver, and the other male passenger, seated in the front passenger seat, was identified as Mark Conner ("defendant").

The passengers exited the vehicle. Dep. Ruppert then walked his police dog around the exterior of the vehicle to conduct an "air sniff." When the dog reached the open front passenger door, his breathing and sniffing changed, and he sat while

staring at the front passenger door. This indicated a "positive alert for the presence of narcotics."

At this point, the remaining officers searched the occupants of the vehicle. In defendant's right sweatshirt pocket, they found a "golf-ball-size amount of a crystal-like substance[.]" When the officers searched the vehicle, they found a set of scales and syringes.

Defendant was indicted for trafficking in methamphetamine by possession, trafficking in methamphetamine by transportation, conspiracy to traffic in methamphetamine by possession, and conspiracy to traffic in methamphetamine by transportation. Prior to trial, defendant filed a written motion to suppress the stop, contending that the officers had no reasonable and articulable suspicion to seize the vehicle, and that the K-9 search was a violation of defendant's rights. The trial court conducted a hearing on this motion to suppress, and on 24 February 2017, entered a written order denying the motion.

On 5 May 2017, defendant filed a written motion for a continuance, alleging that his prior attorney had withdrawn, and that his newly-appointed counsel required time to prepare for the case. This motion was denied at the outset of trial.

The matter proceeded to jury selection on 30 May 2017, and trial on 31 May 2017. Defendant was present for the first two days of the proceedings, and after the State rested its case on 31 May 2017, defendant expressed his intent to testify.

However, on 1 June 2017, defendant was not present in court. Defense counsel explained that defendant was admitted to the hospital, and presented to the court hospital intake documents showing that defendant had been admitted for expressing suicidal tendencies. Counsel moved to continue the trial, or alternatively for mistrial. The trial court denied this motion.

On 1 June 2017, the jury returned verdicts finding defendant guilty of conspiracy to traffic in methamphetamine by transportation, trafficking in methamphetamine by possession, and trafficking in methamphetamine by transportation.[1] On 5 June 2017, the trial court sentenced defendant to a minimum of 70 and a maximum of 93 months on the conspiracy charge, and a minimum of 70 and a maximum of 93 months on the two trafficking charges, to be served consecutively in the custody of the North Carolina Department of Adult Correction. That same day, the trial court entered a written order denying defendant's oral motion to continue, made at trial due to defendant's alleged hospitalization.

Defendant appeals.

II. Meaningful Appellate Review

[1] It is unclear from the record what happened to the separate charge of conspiracy to traffic by possession. However, as the parties do not dispute that issue, we deem any such argument abandoned. N.C.R. App. P. 28(b)(6).

In his first argument, defendant contends that the trial court's written order denying his motion to suppress contained insufficient legal reasoning to permit meaningful appellate review, requiring remand. We disagree.

A. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). "[W]hen the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court." *State v. Salinas*, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012).

B. Analysis

After a hearing on defendant's motion to suppress, the trial court entered a written order denying the motion. On appeal, defendant contends that the conclusions of law in the order "provided inadequate reasoning to support the determination that there was probable cause for the challenged search[,]" that this

error precludes meaningful appellate review, and that the matter should therefore be "remanded to the trial court for the entry of sufficient conclusions of law."

Defendant's argument relies upon this Court's decision in *State v. Faulk*, ___ N.C. App. ___, 807 S.E.2d 623 (2017). In *Faulk*, the trial court denied the defendant's motion to suppress, with only one conclusion of law in its written order. On appeal, this Court held that this lone conclusion "does not provide the trial court's rationale regarding why Defendant's warrantless arrest while in a private home—an act that was held unconstitutional by the United States Supreme Court in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L. Ed. 2d 639 (1980)—did not violate Defendant's Fourth and Fourteenth Amendments rights." *Id.* at ___, 807 S.E.2d at 630. We therefore held that it was insufficient to permit meaningful appellate review, and remanded.

In the instant case, after roughly five pages of findings of fact, the trial court entered not one, but eleven conclusions of law. The court concluded, *inter alia*, that the statements of the confidential informant to Sergeant Zaragosa created reasonable suspicion of criminal activity and conduct. The court further determined that when the officers observed the Lincoln Aviator, they conducted a stop because there were two motor vehicle violations, namely a license plate tag violation and following too closely. The officers verified the confidential informant's identity, and his information was credible. Furthermore, Sergeant Zaragosa had reasonable grounds

to believe that criminal activity was likely to occur, in that the confidential informant's evidence identified defendant's vehicle with specificity. The court therefore concluded that probable cause existed to search defendant based upon information that defendant was the supplier of the controlled substances.

Notwithstanding defendant's contentions, the issue is whether these conclusions of law were sufficient to permit appellate review. Defendant, tellingly, does not challenge the order itself; he does not contend that the trial court erred in denying his motion to suppress. Rather, he merely contends that the order is insufficient to permit this Court to engage in meaningful review.

Based upon the trial court's extensive findings of fact, as well as its detailed conclusions of law, we hold that the trial court effectively communicated its reasoning. The legal basis for the trial court's decision to deny defendant's motion to suppress is abundantly clear to this Court. We hold that appellate review of the order is indeed possible, and that no remand is necessary.

III. Right to Confront Witnesses

In his second argument, defendant contends that the trial court committed plain error in permitting Sergeant Zaragosa to testify regarding the statements of non-testifying persons. We disagree.

A. Standard of Review

> 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.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

At trial, Sergeant Zaragosa testified regarding the information he learned during the phone conversation between the confidential informant, Conner, and Pinkerton. On appeal, defendant contends that the out-of-court statements of these individuals were inadmissible hearsay, and that the trial court erred in admitting

them. Because defendant failed to object to the introduction of these statements at trial, we review this argument for plain error.

Defendant contends that Sergeant Zaragosa's testimony concerning the statements of parties who were not present to testify was introduced for the truth of the matter asserted, and was therefore hearsay. However, this is not entirely accurate. Our Supreme Court has held that "[o]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (citations omitted), *cert. denied,* 537 U.S. 896, 154 L. Ed. 2d 165 (2002). This Court has further clarified that statements made by an informant to a law enforcement officer, to which the officer later testifies, are non-hearsay, inasmuch as they explain the basis for his investigation or presence at the scene of the crime. *See State v. Wiggins*, 185 N.C. App. 376, 384, 648 S.E.2d 865, 871 (2007); *State v. Leyva*, 181 N.C. App. 491, 500, 640 S.E.2d 394, 399 (2007).

In the instant case, Sergeant Zaragosa's statements explained why he was at the scene of the arranged drug purchase, and how that arrangement came to be, as well as how officers were able to identify and stop defendant's vehicle. These statements were not admitted for the truth of the matter asserted, but rather to

explain Sergeant Zaragosa's subsequent conduct, specifically the cause and nature of his investigation. As such, the trial court did not err, let alone commit plain error, in admitting them.

Defendant nonetheless further contends that the admission of these statements violated his constitutional right to confront the witnesses against him, pursuant to *Crawford v. Washington,* 541 U.S. 36, 158 L. Ed. 2d 177 (2004). However, this too is inaccurate.

> In *Crawford,* the United States Supreme Court held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 158 L. Ed. 2d at 203. However, where nontestimonial evidence is at issue, the ordinary rules of evidence govern admissibility. *Id.* In its analysis, the Court also noted that the Confrontation Clause does not prohibit "the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59, n.9, 158 L. Ed. 2d at 198, n.9.

Wiggins, 185 N.C. App. at 383, 648 S.E.2d at 871 (2007).

This Court has previously held, however, that non-testimonial evidence – that is, evidence offered for purposes other than the truth of the matter asserted – does not trigger Confrontation Clause analysis under *Crawford*. *See Wiggins*, 185 N.C. App. at 384, 648 S.E.2d at 871; *Leyva*, 181 N.C. App. at 500, 640 S.E.2d at 399. In the instant case, we have already held that the testimony at issue was not offered for the truth of the matter asserted, but rather to explain Sergeant Zaragosa's

subsequent conduct. We therefore hold that the admission of this evidence did not violate defendant's right to confront the witnesses against him.

IV. Motion to Continue

In his third argument, defendant contends that the trial court erred in denying his motion to continue. We disagree.

A. Standard of Review

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002). "Abuse of discretion occurs when a trial court's ruling was manifestly unsupported by reason and thus could not have been the result of a reasoned decision." *State v. Jordan*, 149 N.C. App. 838, 842, 562 S.E.2d 465, 467-68 (2002).

B. Analysis

On 1 June 2017, defendant did not appear for trial, and his attorney requested a continuance, arguing that defendant was unable to attend because he was a patient at a hospital on lockdown for suicide watch. The trial court denied the motion to continue, and on appeal, defendant contends that this was error.

In North Carolina, a non-capital defendant may waive his right to be present during his trial, and his "voluntary and unexplained absence from court after his trial

begins constitutes a waiver of his right to be present." *State v. Wilson*, 31 N.C. App. 323, 327, 229 S.E.2d 314, 317 (1976). The burden "is on the defendant to explain his absence[.]" *State v. Austin*, 75 N.C. App. 338, 341, 330 S.E.2d 661, 663 (1985).

In its order denying defendant's motion to continue, the trial court found, *inter alia*, that defendant failed to inform the hospital staff that he was in the middle of a criminal trial and had indicated a desire to testify on his own behalf; that the case had been on multiple administrative and trial calendars, and defendant had gone through multiple attorneys to represent him; and that defendant had appeared before the court on multiple occasions "alert, under no apparent physical or mental disability[,]" and able to "converse freely with his attorney, take notes during the trial of this action, and fully participate in the jury selection and the presentation of evidence by the State during the trial of this action." The trial court further found

> That it is highly suspicious and incredulous that the Defendant would be unable to attend court on the morning that he was to testify in the matter and present evidence. The Court has reason to question the credibility of the Defendant's statement to the emergency room physician on June 1st, 2017, concerning his use of controlled substances as disclosed to the Court on February 20, 2017 and his use of alcohol as stated to the physician. In addition, the Court would find that the use of these substances seven days prior to February 20, 2017, and the daily use of alcohol by the Defendant, is totally voluntary on his part. The Court finds the statements of the Defendant to the emergency room physicians to be untrustworthy based on the Court's previous experience with the Defendant.

Defendant contends that his inability to appear before the court was based on his inability to leave the mental health unit of a hospital because of suicidal ideations. Defendant contends that it was the hospital lockdown that prevented him from appearing. But this is an inaccurate framing of the facts.

On the morning that defendant was supposed to testify on his own behalf, he checked himself into the hospital. There is no dispute that this was voluntary on defendant's part. No evidence was presented to the trial court that defendant was forced into the hospital ward against his will or without his knowledge; to the contrary, the exhibits introduced by defense counsel specifically stated that defendant "[p]resented to the emergency department stating he wanted to hurt himself[.]" The court was within its rights to evaluate defendant's statements to medical personnel, as expressed in the exhibits shared by defense counsel. The trial court, in its discretion, determined that defendant had lied to hospital staff in order to be admitted for alleged suicidal ideations, and that these statements were voluntary on defendant's part and constituted "an apparent attempt to delay, postpone or otherwise to conclude this criminal proceeding."

Notwithstanding defendant's arguments concerning his constitutional right to present evidence, we hold that the trial court did not abuse its discretion. The trial court's determination was not "manifestly unsupported by reason," but was in fact clearly premised upon defendant's apparent desire to avoid trial by whatever means

necessary, in this case voluntarily checking himself into a suicide ward. We hold that the trial court did not err in denying defendant's motion to continue.

V. Conclusion

Because the trial court's reasoning in denying defendant's motion to suppress is clear, we decline to remand for further conclusions. Sergeant Zaragosa's testimony was non-hearsay and did not violate defendant's right to confront the witnesses against him; it was neither error nor plain error for the trial court to admit it. The trial court did not abuse its discretion in determining that defendant's conduct in checking himself into a suicide ward was voluntary, and constituted a waiver of his right to be present during non-capital criminal proceedings.

NO ERROR.

Judge ARROWOOD concurs.

Judge MURPHY concurs in result only.

Report per Rule 30(e).