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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-513

No. COA20-383

Filed 21 September 2021

Mecklenburg County, Nos. 18 CRS 206824–26

STATE OF NORTH CAROLINA

v.

JON-ALEXANDER KWIAGAYE, III

Appeal by defendant from judgment entered 26 August 2019 by Judge George Cooper Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott K. Beaver, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Jon-Alexander Kwiagaye, III, appeals from a judgment entered upon a jury's verdicts finding him guilty of conspiracy to commit robbery with a dangerous weapon, second-degree kidnapping, and misdemeanor simple assault. After careful review, we remand to the trial court for entry of an order with adequate findings of fact to resolve the material conflict in the evidence presented by

Defendant's motion to suppress.

Background

¶ 2 On 28 February 2018, Defendant was arrested by Charlotte-Mecklenburg Police Department officers pursuant to warrants alleging that on 23 February he committed the offenses of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, first-degree kidnapping, and misdemeanor simple assault. Charlotte-Mecklenburg Police Detective Edward Barbour interviewed Defendant while he was in custody at the police station. Detective Barbour informed Defendant of his *Miranda* rights and had Defendant sign a waiver of those rights, but at no point did Defendant have an attorney present.

¶ 3 On 12 March 2018, a Mecklenburg County grand jury returned true bills of indictment charging Defendant with robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, first-degree kidnapping, and simple assault. On 22 October 2018, the State filed notice of its intent to introduce at trial evidence of Defendant's statements to Detective Barbour. On 20 August 2019, Defendant filed a motion to suppress all statements made during the custodial interrogation. Later that morning, Defendant's motion to suppress came on for hearing before the Honorable George C. Bell in Mecklenburg County Superior Court.

¶ 4 After reviewing the State's video recording of Defendant's custodial interrogation, and hearing testimony and the arguments of counsel, the trial court

delivered its findings of fact from the bench:

> That on February 23rd, 2018, it is alleged by the victim . . . that an individual by the FaceBook name of Johnny LeFlare and an unknown individual robbed him by trying to take his car and money. Charlotte[-]Mecklenburg Police Department, CMPD, received a report on said date and investigated, which lead to an identification of [Defendant] as, quote, Johnny LeFlare.
>
> On February 28th, 2018, [Defendant] was arrested by Charlotte[-]Mecklenburg Police Department Officer, CMPD Officer, J.B. Carter, after said officer was dispatched to a call for service, alleging four teenage males hanging near the address, smoking marijuana, and causing a disturbance.
>
> This officer made contact with [Defendant] when responding to the scene and radioed his information dispatch, who advised that he had multiple outstanding warrants.
>
> [Defendant]'s multiple outstanding warrants weren't for the charges in this matter. And CMPD Officer J.B. Carter was also the reporting officer on the charges in this matter.
>
> CMPD Officer J.B. Carter arrested [Defendant] and took him into custody on the outstanding warrants for this matter and transported him to intake at CMPD.
>
> . . . .
>
> After [Defendant]'s arrest and transportation to CMPD intake, CMPD [Detective] Edward H. Barbour met with [Defendant] at the division office and began a custodial interrogation of [Defendant]. Said custodial interrogation was recorded and provided in discovery, which indicated that [Defendant] was present from, approximately, 20:45 hours to 22:24:49 hours in an interview room.

. . . .

CMPD [Detective] Edward H. Barbour went over the Miranda rights with [Defendant] after collecting some basic background information about [Defendant].

After [Defendant] indicated that he understood his Miranda rights when speaking with CMPD [Detective] Edward H. Barbour, *it is unclear what* [*Defendant*] *says to* [*Detective*] *Barbour. There is no transcription of the statement or video recording. There is no testimony from an expert witness to discern what* [*Defendant*] *said*. And there was no evidence presented by the defense in the motion to suppress to explain what the Defendant stated to [Detective] Barbour.

[*Detective*] *Barbour was sworn and took the stand and testified that he could not make out the Defendant's statements, other than he heard the word, attorney*.

CMPD [Detective] Edward H. Barbour referenced [Defendant]'s statement and stated that he would continue and said, quote, let me get to it in a minute and I'll let you decide, period, quote. This is at, approximately, 21:10:10, according to the video recording of the custodial interrogation.

CMPD [Detective] Edward H. Barbour continued the custodial interrogation thereafter for quite sometime [sic] in which [Defendant] made several statements.

At, approximately, 21:58:37, according to the recording of the custodial interrogation, [Defendant] says to CMPD [Detective] Barbour, quote, like I said, I don't know nothing about no situation that occurred like that, I said I needed a lawyer, but, quote.

CMPD [Detective] Edward H. Barbour continued the custodial interrogation in which [Defendant] continued to make several statements. At, approximately, 22:00:20,

> according to the video recording of the custodial interrogation, it seemed -- strike that. [Detective] Barbour makes a statement, quote, okey-dokey, I'm going to go ahead and send you downtown to serve these, end quote.
>
> At, approximately, 22:00:23, according to the video recording of the custodial interrogation, [Defendant] says to CMPD [Detective] Edward H. Barbour, quote, so when is my lawyer going to see me, question mark, end quote.
>
> CMPD [Detective] Edward H. Barbour responds saying, quote, you can call when you get downtown, end quote. [Defendant] responds and says, quote, all right, end quote.
>
> CMPD [Detective] Edward H. Barbour continues to ask questions of [Defendant], and even further questions [Defendant] as to what he was doing Saturday night, approximately, 22:02 hours, according to the video recording of the custodial interrogation.
>
> CMPD [Detective] Edward H. Barbour continued a line of questioning -- excuse me. Continued a line of questioning and continued a custodial interrogation of [Defendant] in which [Defendant] made several statements until the custodial interrogation was concluded.

(Emphases added).

¶ 5 The trial court then rendered the following conclusions of law from the bench:

> That the Defendant did not unambiguously and unequivocally invoke his right to counsel under the Sixth Amendment at the 21:10:06 time stamp portion of the video.
>
> Number two, that the Defendant did invoke his right to counsel at the 21:58:37 time stamped portion of the video by unambiguously and unequivocally stating, quote, I said I needed a lawyer, end quote.

¶ 6 Thus, the trial court ordered that "any statements made by the Defendant after the 21:58:37 time stamp portion of the video are hereby suppressed and are in violation of the Defendant's Sixth Amendment right to counsel. And, therefore, will be excluded from evidence in this trial." The trial court did not exclude Defendant's statements prior to the 21:58:37 time stamp, and it did not enter a written order.

¶ 7 The parties then proceeded to trial. During the charge conference, Defendant requested that the trial court instruct the jury on false imprisonment as a lesser-included offense of second-degree kidnapping. The trial court denied the request, over Defendant's objection. With respect to the conspiracy charge, the trial court granted the State's request for an acting-in-concert instruction, over Defendant's objection.

¶ 8 On 26 August 2019, the jury returned its verdicts, finding Defendant guilty of conspiracy to commit robbery with a deadly weapon, second-degree kidnapping, and simple assault, but not guilty of robbery with a deadly weapon. The trial court sentenced Defendant as a Prior Record Level III offender to 33 to 52 months in the custody of the North Carolina Division of Adult Correction for the conspiracy conviction and to 33 to 52 months for the kidnapping conviction, together with 30 days for the simple assault conviction; the court ordered that the sentences run concurrently, and consolidated the three sentences into a single judgment. Defendant gave his notice of appeal in open court.

Discussion

¶ 9 Defendant raises three issues on appeal. First, he argues that the trial court erred by denying his motion to suppress certain statements that he made to Detective Barbour during his custodial interrogation, because he asserts that those statements were obtained in violation of his constitutional right to counsel. Second, he argues that the trial court erred by instructing the jury that it could convict him of conspiracy to commit robbery with a dangerous weapon based upon the theory of acting in concert. Lastly, he argues that the trial court erred by denying his request for a jury instruction on false imprisonment, a lesser-included offense of kidnapping.

¶ 10 In that we conclude that the trial court did not make sufficient findings of fact to resolve the material conflict in the evidence presented by Defendant's motion to suppress, we remand to the trial court on that issue and decline to reach Defendant's remaining arguments.

I. Standard of Review

¶ 11 On review of a trial court's denial of a defendant's motion to suppress, the court's "findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) (citations and internal quotation marks omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

II. Motion to Suppress

¶ 12 Defendant moved to suppress statements that he made during a custodial

interrogation pursuant to N.C. Gen. Stat. § 15A-971 *et seq*. and the United States and North Carolina Constitutions. A trial court considering a motion to suppress unlawfully obtained evidence "shall make findings of fact and conclusions of law which shall be included in the record[.]" N.C. Gen. Stat. § 15A-974(b) (2019). Our Supreme Court has explained that "[t]he general rule is that the trial court should make findings of fact to show the bases of its ruling. If there is a material conflict in the evidence the trial court *must* do so in order to resolve the conflict." *State v. Salinas*, 366 N.C. 119, 123–24, 729 S.E.2d 63, 66 (2012) (citations and internal quotation marks omitted). In this context, a material conflict in the evidence is "one that potentially affects the outcome of the suppression motion[.]" *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015). "Findings and conclusions are required in order that there may be a meaningful appellate review of the decision on a motion to suppress." *Salinas*, 366 N.C. at 124, 729 S.E.2d at 66 (citation and internal quotation marks omitted).

¶ 13 In the instant case, there was a material conflict in the evidence over which the parties argued at the suppression hearing. There was significant debate, and an evident conflict in the evidence, as to the actual words stated by Defendant during his interrogation, particularly at the 21:10:06 and 21:58:37 time stamps. Defendant argued below that the evidence showed that he unambiguously invoked his right to counsel in his statements at 21:10:06 and 21:58:37. The State argued that Defendant

did not unambiguously invoke his right to counsel at any point during the custodial interrogation. The trial court ultimately rejected both parties' principal arguments and instead adopted the intermediate position that Defendant did not unambiguously invoke his right to counsel in the first statement at 21:10:06, but did unambiguously invoke the right in a later statement at 21:58:37.

¶ 14 After careful review of the trial court's oral ruling on Defendant's motion to suppress, we conclude that the court did not make sufficient findings of fact "to show the bases of its ruling" or "to resolve the conflict" in evidence concerning Defendant's alleged first invocation of his right to counsel, at 21:10:06. *Id.* at 123–24, 729 S.E.2d at 66 (citations omitted). The trial court made one finding of fact on this issue, stating, *inter alia*, that "it is unclear what [Defendant] says to [Detective] Barbour. There is no transcription of the statement or video recording. There is no testimony from an expert witness to discern what [Defendant] said." This finding reflects the trial court's trouble *discerning* Defendant's statement because of the poor audio quality of the recording; that is, it merely documents the technical difficulty that the trial court encountered in attempting to determine the words that Defendant uttered. The trial court—the finder of fact in this matter—did not make a finding as to what Defendant actually said at that point in the recording, and thus the basis for its conclusion that Defendant did not unambiguously invoke his right to counsel is unclear. As this conflict in evidence is surely "one that potentially affects the outcome of the

suppression motion[,]" it is a material conflict that "must be resolved by explicit factual findings that show the basis for the trial court's ruling." *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. We may not infer findings of fact sufficient to resolve a material conflict in the evidence from a trial court's decision. *See id.* ("When there is no conflict in the evidence, the trial court's findings can be inferred from its decision.").

¶ 15 The trial court did find that Detective Barbour "testified that he could not make out the Defendant's statements, other than he heard the word, attorney." However, this finding does not support the trial court's conclusion that Defendant did not unambiguously invoke his right to counsel at 21:10:06 because it simply summarizes a portion of Detective Barbour's testimony on this issue; it fails to resolve the issue of what Defendant stated during the custodial interrogation. As our Supreme Court has repeatedly explained, although "recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983); *see also Salinas*, 366 N.C. at 124, 729 S.E.2d at 67. And on appeal, "our review is limited to those facts found by the trial court and the conclusions reached in reliance on those facts, not the testimony recited by the trial court in its order." *State v. Derbyshire*, 228 N.C. App. 670, 680, 745 S.E.2d 886, 893 (2013), *disc. review denied*, 367 N.C. 289, 753 S.E.2d 785 (2014).

¶ 16 In addition, the trial court found that "there was no evidence presented by the defense in the motion to suppress to explain what the Defendant stated to [Detective] Barbour." This finding suggests that perhaps the trial court acted under the misapprehension that Defendant bore the burden of proof at this stage of the suppression hearing. To the contrary, "[a]t a hearing to resolve a defendant's motion to suppress, the State carries the burden to prove by a preponderance of the evidence that the challenged evidence is admissible." *State v. Wilson*, 225 N.C. App. 246, 251, 736 S.E.2d 614, 618 (2013) (citation omitted).

¶ 17 Accordingly, we conclude that "[a]lthough [the trial court] did attempt to explain [its] rationale" for denying, in part, Defendant's motion to suppress, "we cannot construe any of [its] statements as a definitive finding of fact that resolved the material conflict in the evidence. Without such a finding, there can be no meaningful appellate review of the [court]'s decision." *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674 (citation omitted). We are therefore constrained by precedent to remand for an order that includes adequate findings of fact resolving the material conflict in the evidence regarding Defendant's alleged first invocation of his right to counsel, at 21:10:06.

> Remand is necessary because it is the trial court that is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.

Salinas, 366 N.C. at 124, 729 S.E.2d at 67 (citation and internal quotation marks omitted).

¶ 18 "[I]f either the State or [D]efendant should request that the trial court allow presentation of further evidence or argument on remand, the trial court may in its sole discretion either allow or deny this request." *State v. Benitez*, 258 N.C. App. 491, 515, 813 S.E.2d 268, 283 (2018). However, in light of Defendant's argument on appeal—that the trial court erred by applying the standard from *Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994) (holding that a criminal suspect under custodial interrogation "must unambiguously request counsel" in order to invoke the *Miranda* right to counsel), rather than the standard enunciated by our Supreme Court in *State v. Torres*, 330 N.C. 517, 529, 412 S.E.2d 20, 27 (1992) ("[W]hen faced with an ambiguous invocation of counsel, interrogation must immediately cease except for narrow questions designed to clarify the person's true intent.")—on remand, the trial court shall also clarify which legal standard it applies when determining whether Defendant properly invoked his right to counsel at 21:10:06. *See Salinas*, 366 N.C. at 124, 729 S.E.2d at 67 ("[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.").

¶ 19 We offer no opinion as to the trial court's ultimate decision on Defendant's motion to suppress, nor on any of the additional substantive issues addressed in

Defendant's brief.

Conclusion

¶ 20 The trial court failed to make sufficient findings of fact to facilitate appellate review of its ruling on Defendant's motion to suppress. Accordingly, we remand to the trial court for further proceedings.

REMANDED.

Judges HAMPSON and JACKSON concur.

Report per Rule 30(e).