IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-610

No. COA21-801

Filed 6 September 2022

Pender County, Nos. 19 CRS 051910, 19 CRS 051911, 19 CRS 051912, 20 CRS 000131

STATE OF NORTH CAROLINA

v.

ANTONIO GONCALVES

Appeal by defendant from judgments entered 4 June 2021 by Judge Frank Jones in Pender County Superior Court. Heard in the Court of Appeals 8 June 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher R. McLennan, for the State.

Ellis & Winters, L.L.P., by Michelle A. Liguori and Matthew B. Gibbons, for defendant-appellant.

TYSON, Judge.

¶ 1 Antonio Goncalves ("Defendant") appeals from judgments entered upon a jury's verdicts finding him guilty of knowingly maintaining a vehicle to keep or sell controlled substances, possession of methamphetamine, possession of drug paraphernalia, trafficking in methamphetamine by manufacturing, trafficking in methamphetamine by transportation, trafficking in methamphetamine by

possession, and possession of a firearm by a felon. We find no plain error.

I. Background

¶ 2 Defendant drove a white Cadillac around a bend on Maple Hill School Road on 25 November 2019 at approximately 11:00 p.m. He continued about 100 yards and executed a U-turn. Other than driving while his license was revoked, Defendant did not commit any other traffic violations or other crimes when making the U-turn.

¶ 3 Pender County Sheriff's Deputy Jordan Simpson ("Deputy Simpson") was approaching his patrol vehicle about a half mile from the bend. Deputy Simpson's emergency lights on his vehicle were engaged from an unrelated traffic stop and visible. Another deputy was present at the scene with his vehicle's lights activated.

¶ 4 Deputy Simpson observed the approaching vehicle turn around. He testified to becoming suspicious the vehicle was trying to avoid contact with law enforcement by making the sudden U-turn. Deputy Simpson had to turn his vehicle around to travel in the opposite direction and lost sight of the vehicle. Deputy Simpson does not remember turning off his blue emergency lights.

¶ 5 Deputy Simpson entered his patrol vehicle and followed the direction that Defendant's vehicle had taken. Deputy Simpson came upon a vehicle parked on the side of the road with its lights turned off. Deputy Simpson stopped and approached the vehicle. Defendant was present in the driver's seat with the vehicle's engine running. Defendant's brother was in the passenger seat, and a woman was present

in the back seat with her ten-month-old child.

¶ 6 Deputy Simpson asked for identification and determined Defendant was driving with a revoked license. Defendant was asked to exit the vehicle. Defendant complied and was placed under arrest for driving while license revoked. Another officer arrived to assist with the arrest.

¶ 7 The officer smelled marijuana in the course of checking the identifications of the passengers after Defendant's arrest and initiated a search. The search revealed a "half-smoked" marijuana cigarette, a .22 caliber pistol, and a personal safe. The keys to the safe were located on Defendant's key ring. The safe contained a digital scale, hypodermic needles, multi-colored plastic bags, a silver spoon with methamphetamine residue, and a plastic bag containing methamphetamine.

¶ 8 On 24 February 2020, a grand jury indicted Defendant on charges of: felony maintaining a vehicle for the keeping or selling of a controlled substance; possession of methamphetamine; possession of marijuana up to one-half ounce; possession of drug paraphernalia; three counts of trafficking in methamphetamine, including by manufacturing, transportation, and possession; possession of a firearm by convicted felon; and, two counts of conspiracy to traffic methamphetamine.

¶ 9 On 23 June 2020, Defendant moved to suppress evidence obtained from the vehicle after his arrest. The trial court held a hearing and denied the motion at the conclusion of the hearing. The State presented pre-trial motions on the admissibility

of certain text messages recovered from the Defendant's cell phone related to his trafficking of narcotics and firearms. The court ruled the text messages were admissible under Rule 404(b) and the evidence rules governing exceptions to hearsay.

¶ 10 The jury found the Defendant was guilty of knowingly maintaining a vehicle to keep or sell controlled substances, possession of methamphetamine, possession of drug paraphernalia, trafficking in methamphetamine by manufacturing, trafficking in methamphetamine by transportation, trafficking in methamphetamine by possession, and possession of a firearm by a felon. Defendant was found not guilty of possession of marijuana up to one-half ounce and of conspiracy to traffic methamphetamine. Defendant was sentenced as a prior Level III offender to active terms of 17 to 30 months, which were suspended. Defendant was placed on supervised probation for 36 months. Defendant appeals.

II. Jurisdiction

¶ 11 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1), 15A-1444(a) (2021).

III. Issues

¶ 12 Defendant raises two issues on appeal: (1) whether the trial court erred in denying Defendant's motion to suppress; and, (2) whether the trial court erred by admitting text messages as "prior acts" evidence under Rule 404(b) of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021).

IV. Motion to Suppress

¶ 13 Defendant failed to include all indictments and verdicts in the record for appeal in violation of N.C. R. App. P. 9(a)(3)(c) for 19 CRS 051910 and 19 CRS 051912 concerning the following charges: maintaining a vehicle for the keeping or selling of a controlled substance; (3) counts of trafficking methamphetamine by manufacturing, transportation, and possession; and, (2) counts of conspiracy to traffic methamphetamine by transportation and possession. Defendant has waived the right to appeal the verdicts on these charges.

¶ 14 This Court will review Defendant's arguments concerning the indictments, verdicts, and judgments in 19 CRS 051911 and 20 CRS 000131 included in the record on appeal, concerning the following charges: possession of methamphetamine, possession of drug paraphernalia, and possession of a firearm by convicted felon.

A. Standard of Review

¶ 15 If properly presented, this Court reviews the denial of a motion to suppress to determine whether the trial court's findings are supported by competent evidence and whether the findings support the trial court's ultimate conclusion. *State v. Jackson*, 199 N.C. App. 236, 241, 681 S.E.2d 492, 496 (2009). The trial court's conclusions of law are reviewed *de novo*. *Id.*

B. Analysis

¶ 16 "In order to preserve an issue for appellate review, a party must have

presented to the trial court a timely request, objection, or motion stating the specific grounds for the ruling the party desired the court to make[.]" N.C. R. App. P. 10(a)(1). "A motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *State v. Anthony*, 271 N.C. App. 749, 752, 845 S.E.2d 452, 455 (2020) (internal quotations and citations omitted). "Failure to object at trial waives appellate review, when evidence is tendered after counsel sought to exclude the evidence in a pre-trial motion to suppress or a motion *in limine*." *Id.* (citation omitted). "A motion *in limine* will not preserve for appeal the issue of the admissibility of evidence if the defendant fails to further object to that evidence *at the time it is offered* at trial." *State v. McClary*, 157 N.C. App. 70, 74, 577 S.E.2d 690, 692-93 (2003) (citations and internal quotation marks omitted).

¶ 17 "When the question does not indicate the inadmissibility of the answer, [the] defendant should move to strike as soon as the inadmissibility becomes known. Failure to so move constitutes a waiver." *State v. Adcock*, 310 N.C. 1, 19, 310 S.E.2d 587, 598 (1984) (citation omitted). Where a defendant does not move to strike an admissible answer, his objection is waived. *Id.*

¶ 18 Defendant failed to object after Deputy Simpson testified he became suspicious of a vehicle that made a U-turn or when he approached the vehicle. Neither did Defendant move to strike Deputy Simpson's testimony after the answers were given.

Defendant failed to preserve this issue for appellate review. *Id.*

¶ 19 Our appellate rules provide:

> 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) (emphasis supplied).

¶ 20 Defendant only argues the unobjected denial of his pre-trial motion to suppress amounted to plain error. Defendant does not argue the admission of Deputy Simpson's testimony, after his failure to object or to move to strike concerning the events leading to Deputy Simpson approaching the car amounted to plain error.

¶ 21 Defendant has failed to "specifically and distinctly contend[]. . . plain error" and is not entitled to plain error review on this issue. *Id.* His brief did not "specifically and distinctly" allege the admission of evidence from the now-challenged stop amounted to plain error, only the denial of the pre-trial motion to suppress, which was not preserved for appellate review. *See State v. Smith*, 269 N.C. App. 100, 105, 837 S.E.2d 166, 169 (2019) (citation omitted). Defendant's arguments concerning the admission of the stop are unpreserved and waived. *Id.*

V. Admitting Text Messages as Evidence

A. Standard of Review

¶ 22 As noted above, for unpreserved error to constitute plain error, the defendant

must demonstrate that a fundamental error occurred at trial and "the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). This Court's task is limited to assess whether the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotations omitted).

B. Analysis

¶ 23 Under North Carolina Rules of Evidence 404(b), evidence may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b). Evidence of prior criminal activity must be: (1) relevant to the crime charged, and, (2) sufficiently similar and temporally proximate to the crime charged. *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007).

¶ 24 The State filed pre-trial motions to admit text messages into evidence recovered from Defendant's phone. The text messages concerned the .22 caliber pistol found inside Defendant's vehicle and references to "rocket fuel," a slang term for methamphetamine. The text messages were dated July 2019. This Court has held a fourteen-month time period elapsing between the respective incidents was temporally proximate. *State v. Mangum*, 242 N.C. App. 202, 212, 773 S.E.2d 555, 564 (2015). The text messages meet the temporal proximity requirements under Rule 404(b) to be admitted as evidence. *Id.*

¶ 25 Even if the text messages had not been admitted, the jury would likely have reached the same results because of the overwhelming incriminating evidence recovered from the search of Defendant's vehicle. Defendant has failed to demonstrate the admission of text messages into evidence under Rule 404(b) had a probable impact on the jury's findings or "the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 510, 723 S.E.2d at 334. Defendant has failed to demonstrate plain error. His argument is overruled.

VI. Conclusion

¶ 26 Defendant failed to include the indictments on several charges in the record on appeal: 19 CRS 051910 and 19 CRS 051912. Those arguments and appeal of these charges are dismissed. N.C. R. App. P. 9(a)(3)(c).

¶ 27 Without timely objection or a motion to strike, the trial court did not err in admitting Deputy Simpson's testimony or the items seized. The text messages were properly admitted under North Carolina Rules of Evidence Rule 404(b). Defendant failed to object and to demonstrate a fundamental error occurred that would have a probable impact on the jury's finding that Defendant was guilty.

¶ 28 The state produced overwhelming evidence of Defendant's guilt. Defendant's failure to include the indictments in the record on appeal and to object or move to strike Deputy Simpson's testimony and admission of the items seized waives appellate review. *Smith*, 269 N.C. App. at 105, 837 S.E.2d at 169. Defendant failed

to argue plain error in Deputy Simpson's testimony and admission of the items seized and failed to demonstrate plain error in the admission of incriminating text messages recovered from his phone under Rule 404(b). *It is so ordered*.

NO PLAIN ERROR

Judge DILLON concurs with separate opinion.

Judge JACKSON concurs in the result only with separate opinion.

DILLON, Judge, concurring writing separately.

¶ 29 Defendant received a fair trial, free from reversible error. I write separately to address Defendant's plain error argument and express my view that Defendant has failed to show plain error.

¶ 30 The trial court could not have committed plain error at the trial during the officer's testimony, as the trial court had no duty to intervene *ex mero motu* when the officer testified. There can be no plain error by the trial court where there is no error by the trial court. Therefore, the basis of Defendant's plain error argument concerns the action the trial court took prior to trial in denying his motion to suppress.

¶ 31 Defendant argues that the "traffic stop" was not supported by reasonable suspicion. There was technically no "traffic stop" in that Defendant was not pulled over but was already stopped on the side of the road when the officer arrived. The officer was, therefore, free to approach Defendant and initiate conversation.

¶ 32 However, Defendant may have been "seized" by the time the officer was in his patrol car running a check on Defendant's license and determining that Defendant's license was revoked. For instance, there is a strong possibility that Defendant did not feel free to decline the officer's request to hand over his license if the officer's emergency lights where still activated when the request was made. But even if the encounter was still consensual at that point, there is nothing in the record to indicate that Defendant consented to the officer taking his license back to the patrol car and

running a check. At that point, Defendant would not have felt free to drive away without his license.

¶ 33 Notwithstanding, this "seizure" was supported by reasonable suspicion. Defendant cites cases to argue that his U-turn alone did not create sufficient reasonable suspicion to justify the stop since he was some distance from the officer when he made this maneuver. However, even if the U-turn *alone* was not enough, the U-turn *coupled with* an objectively reasonable belief that Defendant had engaged in another evasive action – turning off his lights and pulling off the side of the road in a rural area in response to the officer's pursuit with the patrol car's emergency lights on – created reasonable suspicion sufficient to justify a seizure.

¶ 34 Defendant makes no argument concerning the propriety of the search itself, and therefore the sufficiency of an odor of marijuana to justify the search is not before us. One might argue that the odor of marijuana *alone* may not suffice a search, given the legality of industrial hemp. But it could also be argued that the odor alone would provide the requisite probable cause to believe a further search would reveal a criminal amount of marijuana. But the facts of our case do not concern an officer's search based on the odor of marijuana/hemp alone. Rather, here, the suspicious odor was coupled with the suspicion arising from Defendant's evasive driving/parking behavior.

JACKSON, Judge, concurring in the result only.

¶ 35 I concur in the result of this case but do not agree with the majority's contention that Defendant failed to preserve plain error review of the trial court's denial of the motion to suppress because Defendant did not specifically and distinctly argue that the trial court's admission of the evidence at trial amounted to plain error. I disagree and would hold that Defendant sufficiently preserved this issue for appeal. I would therefore proceed to review Defendant's argument that the trial court plainly erred in denying his motion to suppress because Deputy Simpson did not have the necessary reasonable suspicion to conduct a traffic stop. Ultimately, I would hold that Deputy Simpson did have the necessary reasonable suspicion to stop the defendant's vehicle and would therefore affirm the denial of Defendant's motion to suppress on that basis.

I. Defendant Sufficiently Preserved the Issue for Appellate Review

¶ 36 As the majority notes, the North Carolina Rules of Appellate Procedure stipulate that

> [i]n 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). While the level of specificity and distinction required is not defined in the rules, our Court has previously determined that where a "[d]efendant

does not contend that the trial court committed plain error, but merely states that [the defendant] was prejudiced by the trial court's purported error[,]" the defendant has failed to "'specifically and distinctly' argue that the purported error amounted to plain error [and has thereby] waived plain error review." *State v. Dawkins*, 265 N.C. App. 519, 525, 827 S.E.2d 551, 555 (2019).

¶ 37 In his brief, Defendant included the following statements alleging the trial court plainly erred:

> - As shown below, the trial court committed not just one, *but two plain errors here*, and, based on either or both of them, Mr. Goncalves's convictions should be vacated and the matter remanded for a new trial.
>
> - I. The Trial Court *Plainly Erred* by Denying the Motion to Suppress.
>
> - The trial court denied Mr. Goncalves's motion to suppress based on an oral finding that his conduct was evasive, but that finding was unsupported by the evidence. The court's written findings, some of which were not only unsupported but contradicted by the evidence, also fail to support a determination of reasonable suspicion. The trial court therefore erred in denying Mr. Goncalves's motion to suppress. *That error was plain*, because most of the evidence later introduced at trial was subject to the motion.
>
> - D. Denial of the motion to suppress *was plain error*.
>
> - Whether the denial of a motion to suppress "had a probable impact on the jury's determination that the Defendant was guilty" is a "straightforward"

> question in cases where "all incriminating evidence was gathered . . . as a result of [a vehicle] stop." *State v. Cabbagestalk*, 266 N.C. App. 106, 114-15, 830 S.E.2d 5, 11 (2019). Here, all the evidence against Mr. Goncalves was obtained as a result of the unconstitutional investigatory stop. Thus, the denial of his motion to suppress caused the jury to consider all the evidence against him, and therefore had a probable impact on the guilty verdicts. Denial of the motion to suppress *was therefore plain error*.

(Emphasis added.)

¶ 38 The majority contends that because Defendant did not argue the trial court plainly erred by admitting the evidence and only argued the trial court plainly erred by denying his motion to suppress, that Defendant has therefore failed to argue plain error and thus did not satisfy the requirement under Rule 10(a)(4). In doing so the majority draws a distinct line—splits the thinnest of hairs—between the evidence subject to a motion to suppress and the admissibility of that same evidence at trial when the issues are ultimately two sides of the same coin. Substantively, appealing from a denial of a motion to suppress, which can only be done *after* a judgment of conviction is entered, *see* N.C. Gen. Stat. § 15A-979(b) (2021), is the same as appealing from the admission of that evidence at trial. While there are numerous bases to contest the admissibility of evidence at trial, in a case like the one before us the main argument for inadmissibility is that the evidence should never have been admitted in the first place: in other words, the evidence should have been suppressed.

¶ 39 Our Court has not made the distinction the majority draws in previous cases when reviewing the denial of a motion to suppress for plain error. For example, in *State v. Holley*, 267 N.C. App. 333, 336, 833 S.E.2d 63, 68 (2019), a defendant's pretrial motion to suppress was denied and the defendant later failed to object to the introduction of the evidence at trial. The Court delineated the standard of review as:

> Generally, when a defendant fails to object to the admission of evidence at trial, he or she completely waives appellate review of his or her Fourth Amendment claims regarding that evidence. *See State v. Miller*, 371 N.C. 266, 273, 814 S.E.2d 81, 85 (2018). However, where a defendant has moved to suppress evidence and "both sides have fully litigated the suppression issue at the trial court stage," but the defendant fails to object to its admission at trial, we apply plain error review. *Id.* at 272, 814 S.E.2d at 85; *State v. Grice*, 367 N.C. 753, 755, 764, 767 S.E.2d 312, 315, 320, *cert. denied*, 576 U.S. 1025 (2015). Here, Defendant filed a motion to suppress the firearm but failed to object to its admission at trial. Accordingly, we review for plain error.

Holley, 267 N.C. App. at 336-37, 833 S.E.2d at 68.

¶ 40 The majority relies on *State v. Anthony*, 271 N.C. App. 749, 752, 845 S.E.2d 452, 455 (2020), to outline the principle that a motion *in limine* such as a motion to suppress will not preserve appellate review if a defendant fails to object to the evidence at issue when it is offered at trial. I undoubtedly agree that this principle is binding and Defendant's failure to object to the admission of the evidence gathered from the stop at trial waived *de novo* review of the trial court's conclusions of law regarding his motion to suppress. *See State v. Campbell*, 188 N.C. App. 701, 704, 656

S.E.2d 721, 724 (2008). The Court in *Anthony*, however, ultimately determined the defendant was not entitled to plain error review under Rule 10(a)(4) because "[the defendant] failed to assert or argue plain error in his brief[,]" and "did not specifically and distinctly allege the admission of the now-challenged evidence amounted to plain error[.]" *Id.* at 753, 845 S.E.2d at 456. There was no mention of the distinction between a pretrial motion to suppress and the admissibility of evidence at trial that the majority attempts to draw now. The Court only stated that the defendant failed to argue plain error.

¶ 41 I disagree with this strict distinction. Here, Defendant specifically and distinctly argued plain error in his brief as the aforementioned statements make clear. Defendant never tried to imply we should review this case as if he had objected to the evidence at trial, nor did he simply argue that the trial court purportedly erred as the defendant did in *Dawkins*. *See* 265 N.C. App. at 525, 827 S.E.2d at 555. Defendant's brief adhered to the spirit and purpose of Rule 10(a)(4) via the argument that the trial court plainly erred in denying his motion to suppress. Accordingly, I would find his brief sufficient to trigger appellate review under the plain error standard and would not dismiss Defendant's arguments on the motion to suppress.

¶ 42 Lastly, I note that this conclusion is underpinned by the fact that the State itself did not argue that Defendant failed to preserve the issue for appellate review, unlike the State in *Anthony* where the State did assert that the defendant had waived

his right to appellate review. 271 N.C. App. at 752, 845 S.E.2d at 455. Here the State, like Defendant, only contends we should review Defendant's arguments on the motion to suppress for plain error.

II. The Trial Court Properly Denied Defendant's Motion to Suppress

¶ 43 Defendant argues that Deputy Simpson lacked the necessary reasonable and articulable suspicion to stop him on 26 November 2019. I disagree and would hold, under the totality of the circumstances test, that Deputy Simpson had reasonable suspicion to conduct the stop based on (1) Defendant's abrupt U-turn late at night after the police cars with their emergency lights on became visible around the bend on Maple Hill School Road; (2) Defendant's additional evasive action in pulling his car off the side of the road and turning the lights off once he drove back around the bend; and (3) the fact these actions took place in a high-crime area.

¶ 44 The relevant factual background is as follows:

¶ 45 Deputy Simpson was assisting another officer with a traffic stop at approximately 11:00 or 11:30 p.m. on a clear night in November 2019. Both officers were in uniform and had their marked patrol cars with lights activated at this traffic stop. As the officers were getting ready to clear up from the traffic stop and Deputy Simpson was walking back to his patrol car, he saw a car come around the bend in Maple Hill School Road, which was approximately half a mile from his patrol car. After traveling about 100 yards past the bend, Deputy Simpson observed the car

swerve to the right, and then make an abrupt U-turn across the road. As the car made the U-turn, Deputy Simpson saw it was a white-in-color sedan. Deputy Simpson thought that action was suspicious, so he immediately got in his patrol car, turned it around, and began driving in the same direction as the car.

¶ 46 Shortly after driving around the bend in Maple Hill School Road, Deputy Simpson saw a car, specifically a white Cadillac, matching the description of the car that he saw make the U-turn stopped on the side of the road with its engine running but the lights turned off. Deputy Simpson knew it was the same car because within the time that he lost and regained sight of the car, there were no other cars heading down Maple Hill School Road, the stopped car was still warm, and the stopped car was parked approximately 120 yards from where the U-turn was made. Deputy Simpson pulled in and stopped about ten feet behind the car. Deputy Simpson found it suspicious that the car was parked on the side of the road after the driver made an abrupt U-turn and wondered if the driver was having a medical emergency or car trouble.

¶ 47 Defendant argues the trial court's findings of fact do not support the conclusion that Deputy Simpson had reasonable, articulable suspicion and that he was stopped only on an unparticularized hunch. Specifically, Defendant argues there was no competent evidence of evasiveness, no competent evidence of a high-crime area, and no other competent evidence supporting a determination of reasonable suspicion.

Defendant, however, fails to acknowledge the test for reasonable suspicion considers the totality of the circumstances.

¶ 48 Reasonable suspicion of criminal activity "need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Reasonable suspicion must be based on objective facts, and a court must consider the totality of the circumstances. *State v. Carver*, 265 N.C. App. 501, 505, 828 S.E.2d 195, 198 (2020). Our Supreme Court held that the question is whether "a reasonably cautious law enforcement officer" would suspect criminal activity based on "[a]ll of the facts, and the reasonable inferences from those facts." *State v. Watkins*, 337 N.C. 437, 443, 446 S.E.2d 67, 70 (1994). Reasonable suspicion requires "a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.'" *Id.* at 442, 446 S.E.2d at 70 (1994) (citation omitted).

¶ 49 Legal driving behavior may arouse reasonable suspicion, depending on the circumstances. *See State v. Griffin*, 366 N.C. 473, 477, 749 S.E.2d 444, 447 (2013) ("[E]ven a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion."); *but see State v. Foreman*, 351 N.C. 627, 631, 527 S.E.2d. 921, 923 (2000) ("[A] legal turn, by itself, is not sufficient to establish a reasonable, articulable suspicion[.]"). Since individuals have the "constitutional freedom" to refrain from engaging with law enforcement, *State v. Horton*, 264 N.C. App. 711, 723,

826 S.E.2d 770, 779 (2019), a lawful turn away from the police must be "evasive" under the facts and circumstances to establish reasonable suspicion, *Holley*, 267 N.C. App. at 343, 833 S.E.2d at 72.

¶ 50 Presence in a high-crime area may contribute to reasonable suspicion. *Id.* Further, "when an individual's presence at a suspected drug area is *coupled* with evasive actions, police may form, from those actions, the quantum of reasonable suspicion necessary to conduct an investigatory stop." *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (emphasis in original). To show evasive action, the State must "'establish a nexus between defendant's flight and the police officer's presence.' That is, the defendant's flight or other evasive actions must be in response to the officer's presence." *Holley*, 267 N.C. App. at 343, 833 S.E.2d at 72 (quoting *State v. White*, 214 N.C. App. 471, 480, 712 S.E.2d 921, 928 (2011)).

C. Defendant's Evasive Actions

¶ 51 In challenging the trial court's conclusion that Deputy Simpson had reasonable suspicion, Defendant attempts to dispose of the fact that, following the abrupt U-turn, Deputy Simpson came across Defendant's car pulled onto the shoulder with its lights off. According to Defendant, he pulled over in response to Deputy Simpson's pursuit, so the car's presence on the side of the road could not be used to establish reasonable suspicion because it was not an evasive action.

¶ 52 Defendant's argument that he pulled onto the shoulder to yield to Deputy Simpson contradicts the trial court's factual findings. If anything, there is conflicting evidence of whether Defendant yielded or not. But on appeal, the trial court's factual findings are binding if they are supported by competent evidence, even if there is conflicting evidence. *State v. Scruggs*, 209 N.C. App. 725, 727, 706 S.E.2d 836, 838 (2011).

¶ 53 Here, there is competent evidence from Deputy Simpson's testimony that Defendant pulling off onto the side of the road was not an attempt to yield to Deputy Simpson's pursuit. During the suppression hearing, Deputy Simpson testified:

> A white-in-color Cadillac came around this corner, the corner of Maple Hill School Road. I was walking back to my patrol car at the time. We were getting ready to clear up from the traffic stop. I noticed the vehicle make an abrupt U-turn and head back towards Webbtown Road on Maple Hill School Road. I thought that was suspicious. I turned my vehicle around, and I noticed -- once coming around the curve, I noticed a vehicle parked on the side of Maple Hill School Road. The car was still running. The lights were off.

Deputy Simpson further testified to the following:

> Q. (By Mr. Smith) So he's parked on the side of the road close to the -- what we call the post office, right?
>
> A. Yes, sir.
>
> Q. And -- but it's on the other side of that bend --
>
> A. Yes, sir.

> Q. -- correct?
>
> So you couldn't see it. When did you first see that vehicle parked on the side of the road?
>
> A. Right as you come into that bend.
>
> Q. Okay. All right. And you said its lights were off?
>
> A. Yes, sir.
>
> Q. And you said that it was still running, correct?
>
> A. Yes, sir.
>
> Q. Tell me, what -- what did it look like out there at that time; like where he was parked, where that vehicle was parked?
>
> A. There were no homes in the area. There's no public businesses that are open at that time of night in the area. There's nothing for anybody to do there.
>
> Q. Okay. It was on a shoulder?
>
> A. Yes, sir.

¶ 54 Defendant argues the seizure occurred "when he pulled over, yielding to Deputy Simpson's authority." But this is a mischaracterization of both competent evidence from the record and the trial court's findings of fact.

¶ 55 The trial court's findings of fact include the following:

> 8. As deputy Simpson rounded the bend on Maple Hill School Road he saw that the white Cadillac had pulled over on the shoulder of the right hand side of the road opposite the Post Office and turned off its lights.
>
> 9. Deputy Simpson again became suspicious based on

> his training and experience that the Cadillac was trying to avoid law enforcement by executing a U-turn, upon approaching law enforcement, and then when out of sight of law enforcement pulling off the side of the road and turning off its lights.

Deputy Simpson did not believe Defendant pulled over to yield to his pursuit, nor did the trial court find this as a fact. Since these findings are supported by competent evidence, they are binding on appeal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

¶ 56 In its written order, the trial court found as fact that Defendant "executed a U-turn, approximately ½ mile away from the Deputies, in the middle of the road. When the vehicle was out of sight from the deputies it pulled over on the shoulder of the road it [sic] turned off its lights." Since the test for reasonable suspicion considers the totality of the circumstances, the trial court appropriately weighed these evasive actions as a whole when concluding, as a matter of law, that "Deputy Simpson had reasonable articulable suspicion to believe Defendant was avoiding law enforcement and violating the law and was justified in stopping the Defendant for further investigation." While the U-turn on its own may not have been enough to establish a nexus between Defendant's evasive action and the police officer's presence, it is hard to imagine why Defendant would have pulled onto the shoulder, without any homes or businesses nearby, and turned off the lights if not to evade law enforcement. *Holley*, 267 N.C. App. at 343, 833 S.E.2d at 72.

D. Other Circumstances Contributing to Reasonable Suspicion

¶ 57 Defendant further argues the trial court erred in finding reasonable suspicion by challenging the conclusion that the activity occurred in a high-drug crime area and by discrediting Deputy Simpson's experience and training, namely the fact Deputy Simpson had never observed a U-turn made for the purpose of avoiding law enforcement. Neither of these arguments, however, lead to the conclusion that Deputy Simpson lacked reasonable suspicion.

¶ 58 First, Defendant challenges the trial court's conclusion that the activity took place in a high-crime area. In doing so, Defendant draws a distinction between the Maple Hill area generally, where Deputy Simpson patrols, and Maple Hill School Road specifically, contending that Deputy Simpson was required to articulate particularized facts of criminal activity on Maple Hill School Road for the trial court to consider a high crime area circumstance in its analysis.

¶ 59 While our courts have not precisely defined what constitutes a high-crime area, *State v. Johnson*, 378 N.C. 236, 254, 2021-NCSC-85, ¶36 (Earls, J., dissenting), or even the geographic scope of an "area,"[1] we have reversed a finding of reasonable

[1] For example, in one case, this Court pointed to a shopping center "in an area targeted by law enforcement as a high crime area" as a circumstance that could contribute to reasonable suspicion. *State v. Blackstock*, 165 N.C. App. 50, 59, 598 S.E.2d 412, 418 (2004). The Court did not specify whether the actual shopping center itself or the area surrounding and including the shopping center constituted the "high crime area."

suspicion because "the trial court's findings of fact concerning [the officer's] knowledge about criminal activity refer[ed] to the area in general and refer[ed] to no particularized facts[,]" *Horton*, 264 N.C. App. at 720, 826 S.E.2d at 777.

¶ 60 Deputy Simpson testified to his work as a patrol deputy in the Maple Hill area, where Maple Hill School Road is located, to his knowledge of Maple Hill as a high-drug, high-weapon trafficking area, and to the fact a large drug seizure had taken place in Maple Hill earlier that day. In evaluating this testimony, on one hand, Defendant is correct that Deputy Simpson is referring to the Maple Hill area generally as a high crime area. On the other hand, Deputy Simpson did offer a few particulars such as his patrol experience in the area and his knowledge of a large drug bust occurring in the Maple Hill area that day. While Defendant is also correct in pointing out that Deputy Simpson did not offer any testimony tying Defendant's car to the drug bust or that the drug bust occurred on Maple Hill School Road, such testimony was not strictly necessary.

¶ 61 The trial court found as fact that "Deputy Simpson believed Maple Hill to be a high drug crime area and heard of [a] large drug bust earlier in the evening in the Maple Hill area." This finding was supported by competent evidence and therefore could be used by the trial court as one circumstance when coupled with other circumstances, specifically the multiple evasive actions, to support a conclusion that reasonable suspicion existed.

¶ 62 This is not a case like *Holley*, where there was neither competent evidence of a high-crime area nor competent evidence of evasion. In that case, "the evidence established that [the defendant] was walking down the sidewalk and continued on his path[,]" and there was no evidence that the defendant "changed his actions" or "altered his course" in the presence of law enforcement. 267 N.C. App. at 344, 833 S.E.2d at 73. Here, as Defendant made a U-turn shortly after law enforcement came into view and then pulled onto a dark shoulder once out of sight, there is competent evidence of evasion. Even if the record lacked competent evidence to support the trial court's finding that the activity occurred in a high crime area, this does not mean there were no grounds for reasonable suspicion. Unlike in *Holley* where there was no evidence of "evasive actions or other incriminating circumstances," 267 N.C. App. at 344, 833 S.E.2d at 73, Deputy Simpson witnessed both and had something more than an unparticularized suspicion or hunch.

¶ 63 Notably, legal or evasive behavior does not have to occur in a high crime area to arouse reasonable suspicion. In *State v. Foreman*, our Supreme Court upheld a finding of reasonable suspicion when an officer followed a vehicle after observing a "quick left turn" away from a DWI checkpoint. 351 N.C. 627, 630, 527 S.E.2d 921, 923 (2000). After tracking the vehicle, the officer came upon it parked in a residential driveway with the lights off and conducted an investigatory stop. *Id.* While this is not a checkpoint case, *Foreman* illustrates that a legal turn away from the presence

of law enforcement may be grounds for reasonable suspicion when coupled with other suspicious behavior and circumstances, such as a pulling over and turning off the lights.

¶ 64 Lastly, contrary to Defendant's argument, nowhere in the caselaw does it suggest an officer must have witnessed specific behavior in the past to find it suspicious. It is a reasonable inference that making a U-turn away from law enforcement may be an effort to evade law enforcement. While individuals do have a right to avoid consensual encounters with the police, considering the totality of circumstances, including the U-turn, the conduct afterwards, and the drug bust that happened earlier in the day, Deputy Simpson had the "minimal level of objective justification[,]" *Watkins*, 337 N.C. at 443, 446 S.E.2d at 70, necessary to form a "quantum of reasonable suspicion[,]" *Willis*, 125 N.C. App. at 542, 481 S.E.2d at 411.

¶ 65 Since the trial court properly concluded Deputy Simpson had reasonable, articulable suspicion to conduct the investigatory traffic stop, the trial court did not commit plain error by denying Defendant's motion to suppress evidence on the basis of the stop.

¶ 66 A tougher question for the Court's consideration perhaps would concern the constitutionality of the search after Defendant's arrest. During the trial, the arresting officer testified that he searched incident to arrest. Also on the body cam footage from the evening of Defendant's arrest, the officer states that he is searching

the vehicle "cause I am arresting him and I kinda think there are some kind of narcotics in here."

¶ 67 The United States Supreme Court held in *Arizona v. Gant*:

> [p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

556 U.S. 332, 351 (2009).

¶ 68 This Court has applied *Gant* to prohibit the search of a car merely because the driver was arrested for driving while license suspended or revoked. *State v. Johnson*, 204 N.C. App. 259, 267-68, 693 S.E.2d 711, 717-18 (2010). However, Defendant failed to file a Motion to Suppress regarding the constitutionality of the search of the vehicle after Defendant's arrest. At trial, he failed to object when evidence of the search was introduced. Finally, as noted by the additional concurring opinion, Defendant makes no argument in his brief concerning the propriety of the search. As Defendant has "failed to specifically and distinctly contend" that the search itself was unconstitutional and therefore plain error, he is not entitled to plain error review on the search.

III. Conclusion

¶ 69 Because I disagree with the distinction the majority draws between arguing a trial court plainly erred in denying a motion to suppress and arguing a trial court plainly erred by admitting the evidence subject to the motion to suppress at trial, I would conclude that Defendant preserved the motion to suppress issue for appellate review. In proceeding with review of the issue, I would conclude that Deputy Simpson had reasonable suspicion to stop Defendant and would therefore hold that the trial court did not plainly err in denying Defendant's motion to suppress on the basis of the stop. Any other plain error argument has been waived.