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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-92

Filed 2 July 2024

Henderson County, Nos. 20 CRS 52211–12, 265

STATE OF NORTH CAROLINA

v.

JUSTIN KIRK STRAUSS III, Defendant.

Appeal by Defendant from judgment entered 3 June 2022 by Judge William H. Coward in Henderson County Superior Court. Heard in the Court of Appeals 19 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Grace R. Linthicum, for the State.

Reid Cater for the defendant-appellant

STADING, Judge.

Defendant Kurt Justin Strauss III appeals from a judgment after he was convicted of one count of possession of a firearm by a felon, one count of possession of a gun with an altered serial number and having attained habitual felon status. After careful review, we find no error.

I. Background

On 19 June 2020, Henderson County Deputy Sheriff Staggs was patrolling U.S. Highway 25 when he noticed Defendant driving a motorcycle without a license plate. Deputy Staggs initiated a traffic stop, and Defendant pulled over. Upon approaching Defendant, Deputy Staggs explained the reason for the stop and instructed Defendant to turn off the motorcycle and step away. After multiple requests, Defendant became agitated and confrontational. Deputy Staggs, a narcotics detective by training, was concerned about Defendant's restless behavior and how he was holding his backpack closely.

Thereafter, Deputy Staggs returned to the patrol car, checked Defendant's identification card with dispatch, and confirmed that Defendant's driver's license was suspended. Deputy Staggs also reviewed Defendant's criminal record, which revealed that he was a felon. Upon returning to Defendant, Deputy Staggs asked whether his backpack contained "anything illegal." Defendant responded that a friend of his "may have" left something "not good" inside while making a "classic gesture imitating a handgun." Deputy Staggs calmly removed the backpack from Defendant's possession and placed it on the grass several feet away from them, which further aggravated Defendant. Deputy Staggs returned to his patrol car to consider his next steps while another deputy sheriff stayed with Defendant.

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After considering “the gun gesture, the felony criminal record, and Defendant’s odd behavior,” Deputy Staggs called a K-9 Unit to sniff Defendant’s bag for illegal drugs. The drug dog displayed a “positive final alert” as to the backpack’s contents, which led to the discovery of a loaded .22 revolver with a defaced serial number and thirteen bullets of the same caliber. In addition, Deputy Staggs found three more .22 bullets in Defendant’s right-front pants pocket after patting him down. Further analysis of the gun showed that it did not have a serial number anywhere on it.

Before trial, Defendant moved to suppress the evidence seized during his arrest. Defendant argued that Deputy Staggs lacked the reasonable suspicion necessary to extend the traffic stop by calling for a drug dog. The trial court denied Defendant’s motion, concluding that “the detention . . . pending arrival of a drug dog was lawful based on reasonable suspicion of criminal activity.” Defendant renewed his motion to suppress at trial, but the trial court again denied the motion.

At trial, Defendant called his half-brother, Matthew Burgess, to testify in his defense. Burgess claimed ownership of the gun but denied defacing or otherwise altering its serial number. Burgess also testified that Defendant “normally goes by Justin.”

At the close of evidence, the trial court instructed the jury to analyze whether the State met its burden in proving the intentional defacement of the gun. The trial court also gave pattern jury instructions under N.C.P.I.—Crim. 105.21 due to

inconsistencies between Defendant’s statements and trial testimony.¹ Defendant objected to the inclusion of N.C.P.I.—Crim. 105.21. After deliberation, the jury found Defendant guilty of both possession of a firearm by a felon and possession of a gun with an altered serial number.

The trial court proceeded to the habitual felon phase of the trial. Defendant testified to his previous convictions of felony drug possession twice under his birth name, “Kurt Justin Strauss III,” and felony forgery under the alleged alias, “Justin Kirk Strauss III.” After the jury found him guilty, Defendant moved to dismiss the conviction for a fatal defect, alleging the indictment misidentified his name. The trial court denied the motion to dismiss. Defendant timely entered his notice of appeal.

II. Jurisdiction

This Court has jurisdiction to consider Defendant’s appeal under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Analysis

Defendant asserts three issues on appeal: (1) whether the trial court erred by denying his motion to suppress the evidence seized after the traffic stop was

¹ The jury instructions given read as follows: “The State contends and the defendant denies that the defendant made false, contradictory or conflicting statements. If you find that the defendant made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience, seeking to divert suspicion and to exculpate the person. And you should consider that evidence along with all of the other believable evidence in this case. However, if you find that the defendant made such statements, they do not create a presumption of guilt, and such evidence standing alone is not sufficient to establish guilt.”

extended; (2) whether the trial court erred by giving jury instructions with respect to his pretrial statements; and (3) whether the trial court erred by denying his motion to dismiss the habitual felon status indictment in light of a defect to his name in the indictment. Defendant properly preserved the asserted issues for appellate review by raising and renewing objections at trial. *State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (“To preserve an issue for appeal, the defendant must make an objection . . . during the trial.”).

A. Motion to Suppress

Defendant first contends that the trial court erred by denying his motion to suppress because Deputy Staggs lacked the reasonable suspicion necessary to extend the traffic stop and request a K-9 Unit to search for drugs. Under North Carolina law, “[w]hen reviewing a motion to suppress evidence, this Court determines whether the trial court’s findings of fact are supported by competent evidence and whether the findings of fact support the conclusions of law.” *State v. Jarrett*, 203 N.C. App. 675, 677, 692 S.E.2d 420, 423 (2010). “The trial court’s findings of fact . . . are conclusive and binding on appeal if supported by competent evidence.” *State v. Ladd*, 246 N.C. App. 295, 298, 782 S.E.2d 397, 400 (2016). The trial court’s conclusions of law are subject to a *de novo* review. *Id.* at 298-299, 782 S.E.2d at 400. “Under a *de novo* review, the court considers the matter anew and freely substitutes its own

judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and quotations omitted).

A traffic stop by a police officer implicates the “protect[ions] . . . against unreasonable searches and seizures” guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quotations and citations omitted). “An officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop. But [the officer] may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” *Rodriguez v. United States*, 575 U.S. 348, 355, 135 S. Ct. 1609, 1615 (2015). Post-*Rodriguez*, our State Supreme Court held that the length of time in which a traffic stop may last is limited to a “time that is reasonably necessary to accomplish the mission of the stop . . . unless reasonable suspicion of another crime arose before that mission was completed[.]” *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017) (citation omitted). Reasonable suspicion is present “whe[n] an officer possesses ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’” *Id.* at 301, 812 S.E.2d 681, 688 (citations omitted). “The reasonableness of such suspicion is measured by determining whether a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable

facts, as well as the rational inferences from those facts.” *Id.* at 301, 812 S.E.2d at 689 (citation omitted). Reasonable suspicion requires “a minimal level of objective justification, something more than an unparticularized suspicion or hunch.” *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994). “A court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion . . . exists.” *State v. Campbell*, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (cleaned up).

Here, Deputy Staggs initiated a traffic stop due to Defendant operating a motor vehicle without a license plate. After making initial contact, Deputy Staggs testified that he developed reasonable suspicion of further criminal activity outside the scope of the traffic violation because Defendant: (1) insisted on keeping his bookbag close to him, (2) became agitated and confrontational when asked to step off his motorcycle, (3) was a convicted felon, and (4) indicated the presence of a firearm. The trial court concluded that “the detention of defendant pending the arrival of a drug dog was lawful based on reasonable suspicion of criminal activity.” Considering Deputy Staggs’ narcotics experience and nine years of law enforcement training, a similarly situated officer would reasonably infer that Defendant was in possession of a firearm, drugs, or both at this point in the mission. Thus, Deputy Staggs’ extension of the traffic stop was lawful as he possessed concurrent reasonable suspicion of both drugs

and a firearm being present in Defendant's backpack. As a result, the trial court did not err in denying Defendant's motion to suppress.

B. Jury Instructions

Defendant next maintains that the trial court erred by suggesting to the jury in its instructions that Defendant "made false, contradictory, or conflicting statements." N.C.P.I.–Crim. 105.21. Defendant asserts that this instruction impermissibly compared Defendant's pretrial testimony at the suppression hearing against the trial testimony of Deputy Staggs regarding Defendant's statements. Defendant relies on this comparison to argue prejudicial error requiring a new trial. Although we agree with Defendant that the trial court erred by instructing the jury of Defendant's "conflicting" statements, we hold that the error committed was harmless.

This Court reviews challenges to a trial court's jury instructions *de novo*. *State v. Clapp*, 235 N.C. App. 351, 359, 761 S.E.2d 710, 717 (2014) (quotations omitted). "[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.'" *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009). Both the United States and North Carolina Constitutions protect defendants from compulsory self-incrimination. *State v. Ray*, 336 N.C. 463, 468, 444 S.E.2d 918, 922 (1994)

(aligning testimonial-privilege standards of U.S. Const. amend. VI and N.C. Const. art. I, § 23). With few exceptions, a defendant’s pretrial testimony “on a motion to suppress [cannot] be used against him in the guilt phase of his trial.” *State v. Diaz*, 372 N.C. 493, 500, 831 S.E.2d 532, 537 (2019) (citation omitted); *but see State v. Bracey*, 303 N.C. 112, 120, 277 S.E.2d 390, 395 (1981) (allowing “defendant’s testimony during a suppression hearing” only in the context of taking the stand in his own defense).

Here, the trial court erred only by partially relying on Defendant’s pretrial statement that his “brother do[es not] do drugs” when giving jury instructions. N.C.P.I. 105.21’s NOTE WELL states, “[t]his instruction is ONLY proper where the defendant’s statements and/or trial testimony is contradictory to highly relevant facts proven at trial.” Outside of his pretrial statements, Defendant never expressly contradicted his half-brother, Burgess’s, admission of drug use during his arrest or “at trial.” *Id.* And unless he had chosen to take the stand in his own defense, Defendant’s statements would have been inadmissible as substantive evidence. *See Diaz*, 372 N.C. at 500, 831 S.E.2d at 537. However, neither the record nor the transcript indicates any further material procedural issues—this includes the pretrial hearing. As noted above, we also find no error in the trial court’s findings of fact and conclusions of law promulgated based on that hearing. But to the extent that the trial court based N.C.P.I. 105.21’s usage on seemingly contradictory

statements with respect to Burgess’s drug use, we believe the trial court committed harmless error.

In our review of the trial court’s decision to use N.C.P.I. 105.21’s pattern jury instruction, we apply the harmless-error standard because Defendant objected to the instruction at trial. *State v. Lawrence*, 365 N.C. 506, 512-13, 723 S.E.2d 326, 330-31 (2012) (citations omitted) (“Because our courts operate using the adversarial model, we treat preserved and unpreserved error differently. Preserved legal error is reviewed under the harmless error standard of review.”) This standard requires a defendant to show a “reasonable possibility” that, but for the error in question, a “different result would have been reached at the trial.” *Id.* at 513, 723 S.E.2d at 331 (quoting N.C. Gen. Stat. § 15A-1443(a)) (2023). A trial court may commit error by instructing a jury on “issues . . . not supported by the evidence” adduced at trial. *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970). But such error is “harmless beyond a reasonable doubt” if the evidence demonstrates that it “did not contribute to the defendant’s conviction.” *State v. Bunch*, 363 N.C. 841, 846, 689 S.E.2d 866, 869 (2010) (citations and quotations omitted). Litigants are constitutionally entitled to a “fair trial . . . free of prejudicial error,” though not a “perfect” one. *State v. Ligon*, 332 N.C. 224, 243, 420 S.E.2d 136, 147 (1992).

Even though the trial court’s instructions were erroneous through its use of N.C.P.I. 105.21, this error was harmless. This is because the State provided sufficient

evidence at trial to support the jury's guilty verdict on both gun charges despite its introduction. Here, the trial court properly instructed the jury as to whether the State met its burden in proving the intentional defacement of the gun. *See* N.C. Gen. Stat. § 14-160.2(a) (2023); *see also* N.C.P.I. 120.10 (intent is "seldom provable by direct evidence.").

Moreover, during the traffic stop, Defendant volunteered to Deputy Staggs the high likelihood of a deadly weapon by making a "classic gesture imitating a handgun." As noted above, the K9 Unit's positive alert to the backpack revealed thirteen loose .22 caliber rounds and a loaded .22 revolver with the serial number defaced. Staggs followed this discovery with one of his own—three more .22 rounds in Defendant's pocket. Forensic analysis failed to identify the gun's serial number anywhere else. And although Burgess admitted owning the gun, he denied ever touching its serial number.

From these facts, a jury could make the "just and reasonable deductions" necessary to find beyond a reasonable doubt that Defendant both possessed the gun and defaced its serial number. *See* N.C.P.I. 120.10. In addition, the trial court properly limited the instruction by noting the following: "[I]f you find that the defendant made such statements, they do not create a presumption of guilt. And such evidence standing alone is not sufficient to establish guilt." Therefore, even though the trial court's instructions were erroneous with respect to using N.C.P.I. 105.21,

such an error was harmless given that it did not contribute to Defendant's conviction. *Bunch*, 363 N.C. at 846, 689 S.E.2d at 869.

C. Motion to Dismiss

Defendant last argues that the trial court erred by denying his motion to dismiss the habitual felon status indictment because it was fatally defective in that it did not accurately state his name. "We review the issue of insufficiency of an indictment under a *de novo* standard of review." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). Article I, Section 22 of the North Carolina Constitution requires a "valid bill of indictment" to bring a felony accusation in accordance with due process. *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). "An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution of the same offense." *State v. Stroud*, 259 N.C. App. 411, 414-15, 815 S.E.2d 705, 709 (2018) (citations and internal quotations omitted). That being said, "minor mistakes in the spelling of a defendant's name in an indictment do not—without more—render the indictment defective." *Id.* at 415, 815 S.E.2d at 709 (citation omitted).

Here, Defendant was convicted in the past for felony drug possession twice under his birth name "Kurt Justin Strauss III" and once for felony forgery under the alleged alias "Justin Kirk Strauss III." We disagree with Defendant that his 3 August

2020 indictments failed to meet the required constitutional standards merely because they identified him by this latter moniker. At the habitual felon status phase of the trial, Defendant admitted to all three of those prior felony convictions on the stand despite the alleged name discrepancy. Burgess also testified that Defendant “normally goes by [the name] Justin.” Defendant’s compliance with every procedural facet of the trial, his own admissions under oath, and the testimony of his close relative support that the name in the indictment was sufficient.

Moreover, *State v. Stroud* notes that “minor spelling errors do not render an indictment defective absent a showing that the defendant was prejudiced by the error in preparing his defense.” 259 N.C. App. at 415, 815 S.E.2d at 709. In *Stroud*, the defendant made a challenge to the sufficiency of the indictment on the grounds that his middle name was misspelled, his birth date was incorrect, and his race was incorrect. *Id.* at 416, 815 S.E.2d at 710. The *Stroud* Court acknowledged that the indictment was “not a model of precision,” but that errors of this type do not rise to the level of prejudice because they do not impact the defendant’s ability to prepare a defense. *Id.* Here, much like *Stroud*, Defendant raises no meritorious arguments for how the alleged error prejudiced him in the preparation of his defense. Defendant solely contends that because “[p]reparing a defense to habitual felon status involves . . . verifying that [the convictions] are authentic to the defendant and not others with similar names,” that he was prejudiced. However, Defendant himself admitted to the

previous conviction under the name Justin Kirk Strauss III on cross-examination. Thus, our *de novo* review of the indictment's sufficiency leads us to hold that the trial court did not err by denying Defendant's motion to dismiss.

IV. Conclusion

For the above reasons, we hold that the trial court did not err when it denied Defendant's motions to (1) suppress the evidence seized following the traffic stop extension and (2) dismiss his habitual felon status indictment. We also hold that the trial court committed harmless error when it instructed the jury on contradictory statements made by Defendant.

NO ERROR.

Judges HAMPSON and THOMPSON concur.

Report per Rule 30(e).