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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-408

Filed 5 February 2025

Mecklenburg County, Nos. 19CRS228105, 20CRS002479

STATE OF NORTH CAROLINA

v.

ISIAH LOUIS DAVIS

Appeal by defendant from judgment entered 13 April 2023 by Judge Louis A. Trosch, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 November 2024.

Attorney General Jeff Jackson, by Assistant Attorney General Sage A. Boyd, for the State.

Office of the Public Defender, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

ZACHARY, Judge.

Defendant Isiah Louis Davis appeals from the trial court's judgment entered upon a jury's verdicts finding him guilty of possession of a firearm by a felon and attaining habitual-felon status. Defendant argues that the court erred in denying his motion to suppress and, alternatively, that he received ineffective assistance of counsel. After careful review, we conclude that Defendant has waived any argument

concerning the trial court's denial of his motion to suppress and that his ineffective assistance of counsel claim is premature. We dismiss Defendant's appeal as to the court's denial of his motion to suppress and dismiss his ineffective assistance of counsel claim without prejudice to his right to pursue the claim by filing a motion for appropriate relief in the trial court.

I. Background

On 24 July 2019, Officer Benjamin West of the Charlotte-Mecklenburg Police Department responded to a call for service at Carla Mumford's residence. Mumford told Officer West that "somebody kept ringing and trying her door handle, and . . . messing with her front screen." She also reported that "she could hear somebody in the kitchen area" and she saw the perpetrator through the blinds trying to gain entry to the home. Officer West "observed there was damage to that front screen[,] "the kitchen window was up" and something had been knocked into the sink, and "the blinds were all messed up." He "realized it was a break-in, and not just a suspicious person."

Officer West broadcast a "be on the lookout" ("BOLO") for the suspect, whom Mumford described as "a dark-skinned black male wearing a white t-shirt Blue jeans. Had on a [Charlotte] Hornets ball cap, and had something around that - - had something on [his] head."

The evidence offered at a pretrial hearing tended to show as follows: Officer Nicholas Luiz "encountered [Defendant] walking . . . approximately 300 yards away

from . . . Mumford’s residence.” Officer Luiz observed that Defendant matched the description of the suspect in the BOLO, including the fact that he “had a t-shirt covering [his] hat.” Officer Luiz “drove up next to” Defendant, “rolled down [his] window, . . . and . . . asked if he could remove the shirt from his head.” Defendant “remove[d] the t-shirt,” and underneath, he “was wearing a Charlotte [Hornets] hat.”

“Officer Luiz then exited his vehicle in an attempt to detain . . . Defendant for further investigation.” “He did this based on the totality of the circumstances, including the proximity of . . . Defendant in time and location to the reported crime, and the fact that . . . Defendant matched the physical description of the suspect[.]” “Defendant refused to comply with Officer Luiz’s request to put his hands behind his back, and . . . attempted to flee.” Then, “Defendant engaged in a brief physical struggle with Officer Luiz until other officers arrived and assisted in taking . . . Defendant into custody.”

After handcuffing Defendant, Officer Luiz “frisked [him] for weapons[.]” He “felt what was immediately apparent . . . to be a firearm that was concealed down [Defendant’s] right pant leg, just below his groin.” Officer Luiz then discovered that “[i]nside [Defendant’s] pocket, he had a magazine containing - - or 10 live 9 millimeters rounds and a magazine for that specific firearm.”

On 28 October 2019, a Mecklenburg County grand jury indicted Defendant for possession of a firearm by a felon. On 3 February 2020, a Mecklenburg County grand jury also indicted Defendant for attaining habitual-felon status.

On 3 March 2023, Defendant filed a motion to suppress physical evidence seized as a result of his “unlawful detention and ‘pat down[.]’ ” Defendant’s motion came on for hearing in Mecklenburg County Superior Court on 6 and 7 March 2023; during the suppression hearing, defense counsel made a second, oral motion to suppress evidence related to the identification of Defendant, which the State did not object to hearing. The court denied both motions.

This matter came on for jury trial on 10 April 2023. On 13 April 2023, the jury returned its verdicts, finding Defendant guilty of both possession of a firearm by a felon and attaining habitual-felon status. That same day, the trial court consolidated the convictions and entered judgment, sentencing Defendant to a term of 96 to 128 months’ imprisonment in the custody of the North Carolina Department of Adult Correction.

Defendant gave oral notice of appeal.

II. Motion to Suppress

A. Preservation

Defendant contends that the trial court erred in denying his motion to suppress the physical evidence seized during the investigatory stop.¹ However, Defendant has

¹ Defendant advances no argument regarding the trial court’s denial of his motion to suppress his identification. “This Court is not permitted to address arguments not raised on appeal.” *State v. Lynch*, 254 N.C. App. 334, 340, 803 S.E.2d 190, 194 (2017); *see also* N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”). Accordingly, any argument Defendant might have raised regarding this motion to suppress is abandoned and will not be addressed.

waived any arguments based on the trial court's denial of his motion to suppress.

"It has long been the rule that in order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Adams*, 250 N.C. App. 664, 667, 794 S.E.2d 357, 360 (2016) (cleaned up), *cert. dismissed*, 369 N.C. 562, 799 S.E.2d 48 (2017); *see* N.C.R. App. P. 10(a)(1). "[T]he law in this State is now well settled that a trial court's evidentiary ruling on a pretrial motion to suppress is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *Adams*, 250 N.C. App. at 668, 794 S.E.2d at 360 (cleaned up).

During pretrial motions, defense counsel explicitly recognized his need to object on the record in order to preserve appellate review of this issue, properly noting with regard to the court's denial of his motion to suppress, "I do have to object to it during the trial." In response, the trial court agreed with counsel's assessment while noting counsel's continued objections to the court's ruling, "as is [his] right," and his intent to "raise those again at trial, again, to preserve the record."

Nonetheless, evidence of the firearm—and Defendant's possession thereof—was admitted absent any objection by defense counsel during several points of the State's case-in-chief. The State's first witness, Officer Lindsey Basulto, testified without objection that she witnessed "Officer Luiz and two other officers detaining" Defendant and that she "stood there while Officer Luiz retrieved a firearm once

[Defendant] was standing up on his feet.” This encounter was captured on her body-worn camera, and the video footage was introduced and published to the jury without defense counsel’s objection. The State’s next witness, Officer Michael Travis, similarly testified without objection that when he arrived on the scene, he observed Officer Luiz and another officer “trying to retrieve the weapon from [Defendant’s] pants.” According to Officer Travis, the on-scene officers “ran the serial number on the weapon . . . and then they told [the officers] on the radio that it was actually showing up as a stolen [firearm].” Footage from Officer Travis’s body-worn camera was also introduced and published to the jury without objection. Officer Luiz then took the witness stand, testifying without objection to, *inter alia*, his initial detainment of Defendant; Defendant’s refusal to comply, creation of a physical struggle, and brief flight; and Officer Luiz’s discovery of the firearm. As with the other officers, Officer Luiz’s body-worn camera footage was introduced and published to the jury without objection.

Indeed, defense counsel objected but once to the relevant evidence, when Officer Luiz began to testify about his encounter with Defendant, stating: “I’d object, for the record, to [the] officer’s testimony about the” encounter with Defendant. The trial court overruled this objection and noted that it “was based on the motion to suppress that [was] denied previously[.]” However, by this time, the challenged evidence had been repeatedly admitted without objection by Defendant.

Defendant’s pretrial motion to suppress evidence is insufficient to preserve for

appeal the question of the admissibility of the challenged evidence, where he failed to renew the objection during trial. *See id.* And although Defendant seeks plain error review of this issue, he has waived all appellate review due to invited error. *See State v. Harper*, 285 N.C. App. 507, 518–19, 877 S.E.2d 771, 781 (2022), *disc. review denied*, 384 N.C. 37, 883 S.E.2d 612, *cert. denied*, ___ U.S. ___, 217 L. Ed. 2d 171 (2023).

B. Invited Error

It is well settled that “[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.” N.C. Gen. Stat. § 15A-1443(c) (2023). “A defendant is therefore precluded from obtaining relief when the error was invited by his own conduct.” *State v. Thompson*, 359 N.C. 77, 103, 604 S.E.2d 850, 869 (2004) (cleaned up), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). More specifically, as our Supreme Court recently reiterated, “a defendant cannot raise the issue of plain error on appeal for evidence which he elicited during cross-examination of the witness.” *State v. Gillard*, ___ N.C. ___, ___, 909 S.Ed.2d 226, 254 (2024).

In the case at bar, Defendant’s attorney elicited testimony about the firearm found on Defendant during cross-examination of Officer Travis:

[Defense Counsel:] And we can also hear from the [body-worn camera footage] that’s mentioned, I’m not sure if it was you or another officer said that *a gun slid down [Defendant’s] pants*. Was that - - is that being said when he was standing up?

[Officer Travis:] I don’t know when exactly that was. I do

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remember there being something said *about the gun sliding down his pants*, yes.

[Defense Counsel:] . . . when you seize an item for evidence, do you request - - as the officer, arresting officer, do you request that they do a DNA analysis?

. . . .

[Defense Counsel:] *When a gun is seized, you request DNA analysis*; isn't that true?

[Officer Travis:] I honestly don't know if that's true or not for a weapon. I do know we have to do the ATF trace form. I can't recall or can't say for sure if we're supposed to do the DNA on that.

This testimony was elicited by defense counsel, who neither objected nor moved to have it stricken. Defendant may not prompt testimony regarding the firearm while arguing that “the evidence obtained . . . should have been excluded.” *See State v. Crane*, 269 N.C. App. 341, 345, 837 S.E.2d 607, 610 (2020) (concluding that where defense counsel elicited testimony on cross-examination and the defendant subsequently challenged it on appeal, “the error was invited by [the d]efendant, and thus [the d]efendant cannot be prejudiced as a matter of law”).

“As a result of Defendant’s invited error, he has waived appellate review of this testimony, including plain error review.” *Id.* Therefore, we need not address Defendant’s argument that the trial court erred in denying the motion to suppress.²

² Nor do we address Defendant’s newly asserted grounds for why Officer Luiz’s actions allegedly violated the Fourth Amendment. Our courts have long held that “[w]here a theory argued on

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Additionally, Defendant requests that if we deem the issue unpreserved, then this Court invoke Rule 2 to address its merits. Under Rule 2 of our Rules of Appellate Procedure, “[t]o prevent manifest injustice to a party, . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . upon its own initiative[.]” N.C.R. App. P. 2. An appellate court’s decision to invoke Rule 2 and suspend the Appellate Rules is always an exercise of discretion. *State v. Bursell*, 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019).

As our Supreme Court has explained, “Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*.” *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (citation omitted).

We decline to exercise our discretion under Rule 2 to consider Defendant’s constitutional argument. “Defendant has not convinced this panel that invocation of

appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.” *State v. Womble*, 277 N.C. App. 164, 174, 858 S.E.2d 304, 312 (2021) (citation omitted), *disc. review denied*, 380 N.C. 679, 868 S.E.2d 865 (2022). Consequently, when a defendant presents one argument as a ground for his motion to suppress at trial, he may not assert a different ground before this Court. *See State v. Holliman*, 155 N.C. App. 120, 124, 573 S.E.2d 682, 686 (2002) (“Because [the] defendant impermissibly presents a different theory on appeal than argued at trial, this assignment of error was not properly preserved. Therefore, it is waived by [the] defendant.”).

In the present case, Defendant acknowledges that “[o]n appeal, [he] continues to argue that Officer Luiz’s actions violated the Fourth Amendment, albeit on slightly different grounds[.]” While it is possible that Defendant impermissibly changed theories between the trial court and the appellate court, we conclude that such analysis is unnecessary as Defendant has waived all appellate review due to invited error.

Rule 2 is appropriate here. Accordingly, his appeal is dismissed.” *State v. Hargett*, 241 N.C. App. 121, 128, 772 S.E.2d 115, 121, *appeal dismissed, disc. review and cert. denied*, 368 N.C. 290, 776 S.E.2d 191 (2015).

We turn to the second issue advanced by Defendant.

III. Ineffective Assistance of Counsel

Defendant alternatively maintains that he received ineffective assistance of counsel. He asserts that it was “objectively unreasonable” for defense counsel 1) “not to object at trial to all the instances where the State introduced evidence regarding the discovery of the firearm”; and 2) “to fail to argue that . . . Officer Luiz exceeded the permissible scope of the stop, thereby committing a de facto arrest” without probable cause. (Italics omitted).

Although error that was invited by the defendant may not be reviewed for plain error, it may nonetheless form the basis of a claim of ineffective assistance of counsel if it is determined that defense counsel had no reasonable strategy for making the error and the defendant was prejudiced thereby. *See State v. Lane*, 271 N.C. App. 307, 316, 844 S.E.2d 32, 40, *disc. review denied and cert. dismissed*, 376 N.C. 540, 851 S.E.2d 624 (2020).

“Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal.” *State v. Allen*, 262 N.C. App. 284, 285, 821 S.E.2d 860, 861 (2018). Claims of ineffective assistance of counsel “brought on direct

review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524, *reconsideration denied*, 354 N.C. 576, 558 S.E.2d 862 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). However, “should the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent [motion for appropriate relief] proceeding.” *Id.* at 167, 557 S.E.2d at 525.

Our review of an ineffective assistance of counsel claim is limited to the record before us, “without the benefit of information provided by [the] defendant to trial counsel, as well as [the] defendant’s thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief.” *State v. Stroud*, 147 N.C. App. 549, 554–55, 557 S.E.2d 544, 547 (2001) (cleaned up), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). This Court has noted that “[p]articularly where [the d]efendant’s arguments concern potential questions of trial strategy and counsel’s impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues.” *Allen*, 262 N.C. App. at 286, 821 S.E.2d at 861 (cleaned up); *see also State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017) (determining that the record was insufficient to address a defendant’s ineffective assistance of counsel claim based upon his counsel’s

failure to challenge the sufficiency of the evidence).

Here, we determine that Defendant's claim of ineffective assistance of counsel has been prematurely asserted because Defendant's argument "concern[s] potential questions of trial strategy and counsel's impressions." *Allen*, 262 N.C. App. at 286, 821 S.E.2d at 861 (citation omitted). Accordingly, we dismiss the claim without prejudice to Defendant's right to reassert it during a subsequent proceeding upon a motion for appropriate relief. *See Fair*, 354 N.C. at 167, 557 S.E.2d at 525.

IV. Conclusion

For the reasons stated herein, Defendant waived any argument regarding his pretrial motion to suppress, and his ineffective assistance of counsel claim is premature. Therefore, we dismiss Defendant's challenge to the trial court's denial of his motion to suppress and dismiss his ineffective assistance of counsel claim without prejudice to his right to reassert it before the trial court in a motion for appropriate relief.

DISMISSED IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges STROUD and CARPENTER concur.

Report per Rule 30(e).