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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-159

Filed: 3 October 2017

Mecklenburg County, No. 13 CRS 236146

STATE OF NORTH CAROLINA

v.

ANDWELE WILLIE EAVES

Appeal by defendant from judgment entered 14 July 2016 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Marc X. Sneed, for the State.

The Law Offices of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

BRYANT, Judge.

Where the officer was permitted to restrain defendant with the use of handcuffs during an investigatory stop on the basis of officer safety and subsequently frisk defendant for weapons and contraband, the trial court did not err in admitting

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into evidence marijuana discovered on defendant's person. Accordingly, we affirm the judgment of the trial court.

On 24 February 2014, defendant Andwele Willie Eaves was indicted in Mecklenburg County Superior Court on charges of possession with intent to sell or deliver a controlled substance, possession of drug paraphernalia, and resisting a public officer. On 4 August 2014, a superseding indictment was entered against defendant on the charges of possession with intent to sell or deliver a controlled substance and felony possession of a schedule VI controlled substance. All charges stemmed from an arrest that was made during the night of 7 September 2013, at an apartment complex on Coliseum Drive, in Charlotte. Defendant made a motion to suppress marijuana recovered from him that night, arguing that law enforcement officers stopped and searched him in violation of his constitutional rights. Following a hearing before the Honorable Hugh B. Lewis, Superior Court Judge presiding, the court entered a 3 February 2015 order denying the motion. The matter came on for trial during the 4 July 2015 session of Mecklenburg County Superior Court, the Honorable Carla N. Archie, Judge presiding.

At trial, the evidence tended to show that at 1:00 a.m. during the morning of 8 September 2013, five law enforcement officers responded to a 9-1-1 call reporting a crowd of fifteen to twenty people using drugs and displaying firearms in the common area of an apartment complex on Coliseum Drive. Officer Martin McGee met with

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the other four officers at a staging area where they devised a plan to approach the apartment complex. Officer McGee testified that as he approached the complex, he observed four people moving toward the common area. One person “[hung] back and [then] tr[ie]d] to catch up” to the others. Officer McGee radioed Officer Jose Aguirre, who was approaching from the other direction and directed him to stop “the gentleman wearing a white shirt and olive drab shorts.”

Officer Aguirre testified that he observed a group of three people and a fourth person—defendant—walking behind them. Officer Aguirre approached defendant, the only individual wearing a white t-shirt, and observed defendant carrying a drinking glass in his right hand. Officer Aguirre asked defendant, “what's that right here? He indicated, ah, just a little alcohol.”

Q. What happened next?

A. I then asked him for ID. He started reaching into his pockets. I patted his clothing down for him. I said, do you have any weapons? And he said no. But he continued to reach in his left hand with his pocket [sic]. And at that point I reached out and grabbed his left hand to stop it so he knows don't reach anymore. And then at that point I felt him pull. And I also smelled an odor of marijuana about him. When he pulled he started yelling leave me alone and pulled away from me. At that point I tried to grab him and put him in handcuffs. And then we struggled. And then I threw him to the ground and put handcuffs on him.

....

Because of the nature of the call I was concerned he might have a weapon. So I didn't want him reaching in his

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pockets.

After placing defendant in handcuffs, Officer Aguirre searched defendant and discovered marijuana and \$1,156.00 in cash in his pockets. When officers later investigated the location defendant had moved to when he separated from the group, they found a digital scale, plastic baggies, and marijuana. Defendant did not present any evidence at trial.

The jury returned verdicts finding defendant not guilty of possession with intent to sell and deliver, possession of drug paraphernalia, and resisting, obstructing, or delaying a public officer. Defendant was found guilty only of misdemeanor possession of marijuana. The trial court sentenced defendant to an active term of fifteen days but suspended the sentence and placed defendant on supervised probation for a period of twelve months. Defendant appeals.

On appeal, defendant argues that the trial court committed plain error by admitting evidence obtained as a result of a search of his person in violation of his constitutional rights.

We reiterate that defendant filed a pre-trial motion to suppress the marijuana obtained during the search by Officer Aguirre. Judge Lewis denied the motion in an order entered 3 February 2015, and defendant failed to object at the time the evidence was introduced at trial.

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“[A] pretrial motion to suppress evidence is not sufficient to preserve for appellate review the issue of whether the evidence was properly admitted if the defendant fails to object at the time the evidence is introduced at trial.” *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120 (2002) (citations omitted), *cert. denied*, 538 U.S. 1040, 123 S. Ct. 2087, 155 L.Ed.2d 1074 (2003). In view of the fact that Defendant’s counsel failed to object to the admission of the challenged evidence at trial, Defendant did not preserve his challenge to the denial of his suppression motion for appellate review. *State v. Jackson*, ___ N.C. App. ___, ___, 710 S.E.2d 414, 418 (2011) (holding that the defendant waived his right to appellate review of the denial of his suppression motion by failing to object to the admission of the challenged evidence when it was offered at trial).

State v. Harwood, 221 N.C. App. 451, 455, 727 S.E.2d 891, 896 (2012); *see also State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (“Rulings on motions *in limine* are preliminary in nature and subject to change at trial, depending on the evidence offered, and thus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.” (citations omitted)). However, as defendant has on appeal distinctly challenged the admission of the evidence as amounting to plain error, we will review the admission of the evidence for plain error. *See* N.C. R. App. P. 10(a)(4) (2017) (“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.”).

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For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations omitted).

Defendant argues that he entered into a consensual stop with Officer Aguirre and that Officer Aguirre did not have reasonable suspicion of criminal activity sufficient to detain and search him. As explained below, we disagree and hold that Officer Aguirre had a reasonable articulable suspicion sufficient to stop defendant.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. “The touchstone of the Fourth Amendment is reasonableness.” *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 1803 (1991) (citation omitted).

State v. Grice, 367 N.C. 753, 756, 767 S.E.2d 312, 315, *cert. denied*, 135 S. Ct. 2846, 192 L. Ed. 2d 882 (2015). “What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *State v. Battle*, 202 N.C. App. 376, 383, 688 S.E.2d 805, 812 (2010) (citation omitted). “[T]here are generally two ways in which a person can be ‘seized’ for Fourth Amendment purposes: (1) by arrest, which requires a showing of probable

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cause; or (2) by investigatory detention, which must rest on a reasonable, articulable suspicion of criminal activity.” *State v. Carrouters*, 213 N.C. App. 384, 388, 714 S.E.2d 460, 463 (2011) (citation omitted).

While law enforcement officers do not violate the Fourth Amendment’s prohibition against unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen, such officers do effectuate a seizure for Fourth Amendment purposes when, by means of physical force or show of authority, [they] terminate[] or restrain[] [a person’s] freedom of movement[.]

Harwood, 221 N.C. App. at 456–57, 727 S.E.2d at 897 (alterations in original) (citations omitted).

During an investigative stop, the investigative methods employed by police should be the least intrusive means reasonably available to effectuate the purpose of the stop. *See State v. Allison*, 148 N.C. App. 702, 706, 559 S.E.2d 828, 831 (2002) (citing *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983)). Nevertheless, when conducting investigative stops, police officers are “authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.” [*United States v. Hensley*, 469 U.S. 221, 235, 105 S.Ct. 675, 683–84, 83 L. Ed. 2d 604, 616 (1985)]. As Maryland’s high court recently noted,

the permissible scope of a *Terry* stop has expanded in the past few decades, allowing police officers to neutralize dangerous suspects during an investigatory detention using measures of force such as placing handcuffs on suspects, placing the suspect in the back of police cruisers, drawing weapons,

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and other forms of force typically used during an arrest.

Longshore v. State, 924 A.2d 1129, 1142 (Md. 2007); *see, e.g., United States v. Martinez*, 462 F.3d 903, 907 (8th Cir. 2006) (listing examples from the Eighth Circuit when handcuffs were permitted in investigative detentions)[.]

State v. Campbell, 188 N.C. App. 701, 708–09, 656 S.E.2d 721, 727 (2008).

Here, it is uncontested that law enforcement officers were responding to a 9-1-1 call reporting fifteen to twenty people in the common area of an apartment complex using drugs and displaying firearms. Officer McGee radioed Officer Aguirre and identified defendant as a person of interest after observing defendant’s action of briefly separating from the group. Based on these facts, we conclude that Officer Aguirre had a reasonable articulable suspicion that criminal activity was afoot and that defendant was a participant.

When Officer Aguirre asked defendant for identification, defendant reached into his pocket. Officer Aguirre’s conduct in grabbing defendant’s arm to prevent him from removing his hand from his pocket was authorized as reasonably necessary to protect his personal safety and that of the other officers and to maintain the status quo during the course of the stop. *See id.* (citing *Hensley*, 469 U.S. at 235, 83 L.Ed.2d at 616). Furthermore, the subsequent frisk of defendant and search of the pockets wherein Officer Aguirre discovered marijuana and \$1,156.00 in cash was permissible as “[t]hese circumstances presented a possible threat of physical violence—despite

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the fact that no weapon was discovered on Defendant's person during the pat down—as courts have often 'encountered . . . links between drugs and violence.'” *Carrouthers*, 213 N.C. App. at 391, 714 S.E.2d at 465 (alteration in original) (citation omitted).

Therefore, we hold the trial court's admission of the marijuana seized from defendant's pocket was not error, and thus, there was no plain error. Accordingly, defendant's argument is overruled.

AFFIRMED.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).