IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-529-2

Filed: 31 December 2020

Wake County, No. 17CRS222594

STATE OF NORTH CAROLINA

v.

JEREMY JOHNSON, Defendant.

Appeal by Defendant from judgment entered 17 January 2019 by Judge Carl R. Fox in Wake County Superior Court. Originally heard in the Court of Appeals 4 March 2020, with opinion issued 21 April 2020. On 25 September 2020, the Supreme Court remanded the matter to this Court to consider Defendant's equal protection claim separate and apart from his Fourth Amendment claims.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant.

BROOK, Judge.

Jeremy Johnson ("Defendant") initially appealed from judgment entered upon plea of guilty to felony possession of cocaine and resisting a public officer. Defendant

argued on appeal that the trial court erred in denying his motion to suppress on equal protection grounds and that he received ineffective assistance of counsel. By unpublished opinion issued on 21 April 2020, this Court concluded that the trial court had not erred in denying Defendant's motion to suppress and that he had not demonstrated he was prejudiced by any alleged error of counsel. *State v. Johnson*, ___ N.C. App. ___, 840 S.E.2d 539, 2020 N.C. App. LEXIS 311 (2020) (unpublished) ("*Johnson I*"). The Supreme Court subsequently remanded *Johnson I* to this Court "for an examination of defendant's equal protection claims under the state and federal constitutions separate from its analysis of his Fourth Amendment claims" made before the trial court. Special Order at 2, *State v. Johnson*, 2020 N.C. App. LEXIS 311 (2020) (No. 197P20).

Upon reconsideration, we conclude that the trial court did not err in denying Defendant's motion to suppress for the equal protection violation.

I. Factual Background and Procedural History

A. Factual Background

On 22 November 2017 around 12:30 a.m., Officer B.A. Kuchen of the Raleigh Police Department ("RPD") was patrolling Raleigh North Apartments in southeast Raleigh—the district he had been assigned to patrol since 10 October 2017. Officer Kuchen testified that a trespass agreement between the City of Raleigh and Raleigh North Apartments authorized RPD "to identify subjects who are hanging out in their

parking lots after dark, especially not with a person that is on the lease to Raleigh North Apartments." As Officer Kuchen was driving through the Raleigh North Apartments parking lot, he drove past Defendant, who was parked in a parking space approximately five feet away from a non-functioning light pole and a no trespassing sign. Officer Kuchen testified that Defendant slid under the steering wheel as he was driving by.

Officer Kuchen stopped his marked patrol car in the lane of travel just past Defendant's car, stepped out of his vehicle, and began to shine his flashlight at Defendant's car. As Officer Kuchen approached Defendant's car, Defendant exited from the driver side, and Officer Kuchen "began to smell the odor of raw marijuana." Officer Kuchen did not "observe any odor of marijuana" until the door was opened.

After smelling marijuana, Officer Kuchen ordered Defendant to stay in his vehicle, but Defendant proceeded to step out of the car and started to shut the door. As Defendant was shutting the door, Officer Kuchen saw him reach into the driver side door pocket of the car. Officer Kuchen continued to approach Defendant, who then shut his car door and moved to the back of the car "in a hurried fashion . . . less than a jog, but . . . faster than a walk." Officer Kuchen again commanded Defendant to stop, and, though Defendant stopped at the back of the car "for a second[,]" he ran about 15 to 20 feet when Officer Kuchen tried to put him in handcuffs. Officer Kuchen and his partner, Officer Wescoe, were able to detain Defendant and placed him in

handcuffs. Officers found a small amount of cocaine in Defendant's pocket and less than one half an ounce of marijuana upon the search incident to arrest.

Defendant was charged with felony possession of cocaine, misdemeanor possession of marijuana, and resisting a public officer.

B. Motion to Suppress

On 21 May 2018, Defendant filed a motion to suppress evidence for a Fourth Amendment violation, and a motion to suppress or dismiss due to violations of the Equal Protection Clause. Defendant, a Black man, argued that Officer Kuchen was influenced by racial bias in investigating Defendant, and he was thus denied equal protection under the law as guaranteed by the Fourteenth Amendment.

On 5 September 2018, Judge A. Graham Shirley, II, conducted separate suppression hearings for each alleged violation. Before doing so, Judge Shirley inquired into the burden for each violation in the following exchange:

> THE COURT: . . . So on the motion to suppress, the burden is on the State, correct?
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: And the motion on the equal protection claim, the burden is on whom?
>
> [DEFENSE COUNSEL]: Your Honor, it's on the defense.

During the hearing on the equal protection violation, defense counsel first called Ian Mance, an attorney with the Southern Coalition for Social Justice ("SCSJ").

Mr. Mance administered the open data policing initiative for SCSJ, a program that publicizes data pertaining to traffic stops in North Carolina. By statute, law enforcement is required to report certain information for each traffic stop to the State Bureau of Investigations ("SBI"), which SCSJ then makes publicly available on its website. Officers' names are not made public; they are instead assigned a unique identification number. To identify specific officers, Mr. Mance testified that he cross-references the SBI data with citations associated with a particular officer in ACIS, the Automated Criminal Information System.

Mr. Mance testified that based on that methodology, he determined with "a high degree of confidence" that Officer Kuchen's likely ID number is 00009161. For that ID number, he found a total of 299 traffic stops, 245, or 82%, of which were of Black drivers, while 37 were of white drivers. However, he could not identify the geographic location of those stops, other than that they occurred in Raleigh.[1] Mr. Mance also testified that since 2002, RPD has stopped just under one million drivers, and of those, 46% were Black drivers. He further testified that the 2016 rolling American Community Survey population estimate listed the Black population of

[1] Officer Kuchen graduated from the police academy in May 2017, and after graduating he began "field training" with RPD and alternated between northwest and southeast Raleigh until he was assigned to southeast Raleigh in October 2017. Between May and October 2017, when he was alternating between districts, Officer Kuchen was permitted to initiate traffic stops, and the ACIS data referenced below reveals that he was charging defendants during this time.

Raleigh at 28%. He did not know the racial demographics of southeast Raleigh, the area that Officer Kuchen patrols.

Mark Taylor, an intern with the Wake County Public Defender's Office, testified next. He testified that he had compiled all of the cases in ACIS in which Officer Kuchen was listed as a "complainant" and found that of those 204 people, 166, or 81.4%, were Black, 26 were white, and the remaining 12 were listed as either Hispanic, Asian, or unknown. The ACIS data was not particularized, meaning it did not differentiate between officer-initiated encounters, like traffic stops or checkpoints, and non-officer-initiated encounters, like voluntary encounters or serving warrants for arrest, and Mr. Taylor did not testify as to whether that information was available or not. Mr. Taylor also did not know the racial demographics of southeast Raleigh.

Officer Kuchen testified last and did not know the racial demographics of southeast Raleigh.

The trial court denied Defendant's motion to suppress or dismiss on equal protection grounds in court that same day and entered a written order on 14 November 2018. The trial court concluded as follows:

> To succeed on his equal protection claim, the Defendant has the burden of proving that: (1) Officer Kuchen's actions had a discriminatory effect; and (2) Officer Kuchen's actions were motivated by a discriminatory purpose. *Chavez v. Ill. State Police*, 251 F.3d 612, 635 (7th Cir. 2001).

. . .

DISCRIMINATORY EFFECT

To prove [ ] discriminatory effect, the Defendant must prove that he: (1) is a member of the protected class; (2) is otherwise similarly situated to members of the unprotected class; and (3) was treated differently from members of the unprotected class. *Chavez*, at 630.

. . .

There are two ways a Defendant may prove discriminatory effect: the first, and most direct route, is to identify similarly situated individuals of a different race who were treated differently by Officer Kuchen. The second method is through the use of statistical evidence which demonstrates that similarly situated individuals of a different race were treated differently by Officer Kuchen. *Hubbard vs. Holmes*, 2018 U.S. Dist. Lexis 67278, 7 (W.D. Va. 2018).

. . .

Defendant has failed to identify a similarly situated individual who was treated differently by Officer Kuchen, but instead relies on statistical evidence.

. . .

While the statistical evidence shows that Officer Kuchen initiated traffic stops of more African Americans than whites, it does not provide a basis for determining whether the data represents similarly situated individuals.

The Court first notes that Defendant presented no evidence at the hearing concerning the nature of the stop that led to Defendant's arrest. While Officer Kuchen was called to testify by Defendant during the hearing on his

equal protection claim he was not asked about the circumstances of the stop nor was he questioned about whether he had observed members of an unprotected class engage in the same behavior and, if so, whether they were stopped. Such lack of evidence makes it impossible to make a similarly situated determination.

. . .

Moreover, the Defendant has failed to present what is exactly included in the statistics he presented at the hearing. What the Court does know is that the statistics represent the City of Raleigh as a whole and are not limited to the Southeast District where Officer Kuchen regularly patrols. What the Court does not know is, among other things: (1) the racial breakdown of the Southeast District versus other districts in Raleigh; (2) whether the officers represented by the statistics have similar assignments or whether some were tasked with targeting certain crimes; or (3) whether the listed stops only include inter[a]ctions instigated by Officer Kuchen or whether they also include responses to dispatcher calls.

. . .

DISCRIMINATORY INTENT

. . .

. . . Defendant relies on statistical evidence to satisfy this prong. However, "absent an appropriate basis for comparison, statistical evidence alone cannot establish any element of a discrimination claim." *Olvis*, 97 F.3d at 745, *citing U.S. v. Armstrong*, 517 U.S. 456, 467-70, 116 S.Ct. 1480, 1488-89 (1996). Moreover, statistical evidence that allegedly shows a discriminatory effect is insufficient alone to demonstrate discriminatory intent. See *Chavez*, 251 F.3d 647-648. As such, Defendant has failed to produce evidence to prove any discriminatory intent on the part of Officer Kuchen.

C. Procedural History

Defendant pleaded guilty to felony possession of cocaine and resisting a public officer before Judge Carl R. Fox on 17 January 2019 and was sentenced to an intermediate sentence of 6 to 17 months' imprisonment suspended upon 24 months of supervised probation. Defendant noticed appeal in open court.

This Court heard Defendant's appeal on 21 April 2020. Defendant argued on appeal that the trial court erred in denying Defendant's motion to suppress or dismiss for an alleged equal protection violation and that he was denied effective assistance of counsel. *Johnson I*, 2020 N.C. App. LEXIS 311, at *5. Specifically, Defendant argued that the trial court erred in placing the burden on Defendant in his motion to suppress and that his trial counsel erred in telling the trial court that the burden was on Defendant. Defendant also argued that "the trial court's assertion of the relevant legal principle regarding statistics [was] in conflict with controlling law from the United States Supreme Court."

We unanimously concluded that the trial court did not err in denying his motion because "[b]y the time the encounter [between Officer Kuchen and Defendant] lost its consensual nature and implicated Defendant's constitutional rights, Officer Kuchen had a valid basis for the stop in question, wholly divorced from the suspect's race." *Id.* at *10. Accordingly, we held that "[r]egardless of whether Defendant's trial counsel erred in advising the trial court that the defense bore the burden on his

motion to suppress on equal protection grounds, Defendant cannot succeed in making the required showing of prejudice for his ineffective assistance of counsel claim." *Id.* at *11.

Defendant petitioned for discretionary review to our Supreme Court pursuant to N.C. Gen. Stat. § 7A-31. Defendant's Petition for Discretionary Review Under N.C. Gen. Stat. § 7A-31, *State v. Johnson*, 2020 N.C. App. LEXIS 311 (2020) (No. 197P20). On 25 September 2020, the Supreme Court, by special order, remanded the matter to our Court "for an examination of defendant's equal protection claims under the state and federal constitutions separate from its analysis of his Fourth Amendment claims" made before the trial court. Special Order at 2, *State v. Johnson*, 2020 N.C. App. LEXIS 311 (2020) (No. 197P20).

Having examined Defendant's equal protection claim separate and apart from his Fourth Amendment claim, we again conclude that the trial court did not err in denying Defendant's motion to suppress for an equal protection violation and, relatedly, that Defendant did not receive ineffective assistance of counsel.

II. Analysis

A. Equal Protection Overview

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution mandate equal protection under the law for all persons. U.S. Const. amend. XIV;

N.C. Const. art. I, § 19. Both prohibit "selective enforcement of the law based on considerations such as race[.]" *State v. Ivey*, 360 N.C. 562, 564, 633 S.E.2d 459, 461 (2006) (citing *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774, 135 L. Ed. 2d 89, 98 (1996) ("[T]his Court will not tolerate discriminatory application of the law based upon a citizen's race.")), *abrogated on other grounds by State v. Styles*, 362 N.C. 412, 665 S.E.2d 438 (2008).

While "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation[,]" *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 506, 7 L. Ed. 2d 446, 453 (1962), "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race[,]" *Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 2048, 48 L. Ed. 2d 597, 608 (1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 1073, 30 L. Ed. 220, 227 (1886)); *see also United States v. Avery*, 137 F.3d 343, 354 (6th Cir. 1997) ("A person cannot become the target of a police investigation solely on the basis of skin color.").[2]

[2] The outcome of a Fourth Amendment challenge does not dictate the outcome of an equal protection challenge since the former is concerned with objective reasonableness and the latter with subjective intentions. *See Whren*, 517 U.S. at 813, 116 S. Ct. at 1774 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *see also Nieves v. Bartlett*, ___ U.S. ___, ___, 139 S. Ct. 1715, 1731, 204 L. Ed. 2d 1, 20 (2019) (Gorsuch, J., concurring in part, dissenting in part) ("Everyone accepts that a detention based on race, *even one otherwise authorized by law*, violates the Fourteenth Amendment's Equal Protection Clause. In *Yick Wo v. Hopkins*, for example, San Francisco jailed many Chinese immigrants for operating laundries without permits but took no action against white persons guilty of the same infraction. Even if probable cause existed to believe the Chinese immigrants had broken a valid law—even if they had *in fact* violated the law—this Court held that the city's discriminatory enforcement

It is a "basic principle that a defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination." *McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767, 95 L. Ed. 2d 262, 278 (1987) (citation and internal marks omitted). This is so because "actual discrimination is not presumed[; i]t must be proved or admitted." *Tarrance v. Florida*, 188 U.S. 519, 520, 23 S. Ct. 402, 403, 47 L. Ed. 572, 573 (1903); *see also S. S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971) ("[D]iscriminatory purpose is not presumed. . . . The good faith of the officers is presumed[.]" (internal citations omitted)). "With a prima facie case [of discriminatory purpose] made out, the burden of proof shifts to the State to rebut the presumption of unconstitutional action[.]" *Davis*, 426 U.S. at 241, 96 S. Ct. at 2048 (internal marks and citation omitted).

In order to establish a prima facie case of selective enforcement, a defendant bears the "initial burden of producing sufficient evidence to raise a reasonable inference of impermissible discrimination." *Commonwealth v. Lora*, 451 Mass. 425,

---

violated the Fourteenth Amendment.") (internal citation omitted). And, while the Fourth Amendment only protects individuals once they have been seized, *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389, 398 (1991),

> [a] citizen's right to equal protection of the laws [ ] does not magically materialize when he is approached by police. Citizens are cloaked at all times with the right to have the laws applied to them in an equal fashion—undeniably, the right not to be exposed to the unfair application of the laws based on their race[,]

Avery, 137 F.3d at 353.

442, 886 N.E.2d 688, 701 (2008). To do so a defendant must show (1) discriminatory effect and (2) discriminatory intent or purpose. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450, 464 (1976) ("[R]acially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *McCleskey*, 481 U.S. at 292, 107 S. Ct. at 1767 ("A corollary to this principle is that a criminal defendant must [show] that the purposeful discrimination 'had a discriminatory effect' on him.") (citation omitted).

The element of discriminatory effect is met when the defendant shows that an otherwise neutral law or valid action has an "adverse effect upon a racial minority[.]" *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 99 S. Ct. 2282, 2293, 60 L. Ed. 2d 870, 883 (1979). Courts frequently rely on statistical evidence to establish this prong. *See Yick Wo*, 118 U.S. at 374, 6 S. Ct. at 1073 (all but one white applicant, but none of the more than 200 hundred Chinese applicants, obtained a laundry permit); *Hunter v. Underwood*, 471 U.S. 222, 227, 105 S. Ct. 1916, 1919-20, 85 L. Ed. 2d 222, 227-28 (1985) (Black voters 1.7 times as likely as white voters to suffer disenfranchisement under statute at issue); *Schweiker v. Wilson*, 450 U.S. 221, 233, 101 S. Ct. 1074, 1082, 67 L. Ed. 2d 186, 197 (1981) (noting record contained "no statistical support for [the] contention that the mentally ill as a class are burdened disproportionately to any other class").

The statistics must contain adequate population benchmarks from which a court can determine whether the complained-of law enforcement action has a discriminatory effect. *See* U.S. Bureau of Labor Statistics, *Benchmarking*, https://www.bls.gov/opub/hom/topic/benchmarking.htm (last visited 7 December 2020) ("Benchmarking is a standard or point of reference by which data can be compared."); *see, e.g.*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51, 109 S. Ct. 2115, 2121, 104 L. Ed. 2d 733, 747 (1989) ("It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate-impact case."), *superseded by statute*, Civil Rights Act of 1991, § 2, 105 Stat. 1071. For instance, in *Chavez v. Ill. State Police*, 251 F.3d 612, 620 (7th Cir. 2001), the plaintiffs alleged that the Illinois State Police disproportionately stopped and detained Black and Hispanic drivers as compared to the percentage of white, Black, and Hispanic persons in Illinois. The plaintiffs relied on data from the 1990 Census and the 1990 Nationwide Personal Transportation Survey to establish the demographics of Illinois motorists. *Id.* at 626. The Seventh Circuit concluded that neither the census nor transportation survey accounted for the number of Hispanic and Black drivers on Illinois interstate highways, which was "crucial to determining the population of motorists encountered by [Illinois] officers." *Id.* at 644. These data were "simply insufficient to determine the racial makeup of motorists on Illinois

highways" and thus was not an adequate benchmark from which the Court could determine discriminatory effect. *Id.* at 644-5; *but see State v. Soto*, 324 N.J. Super. 66, 69-70, 734 A.2d 350, 352-53 (N.J. Super. Ct. Law Div. 1996) (study of specific stretch of New Jersey turnpike adequately represented racial composition of motorist population in selective enforcement claim).[3]

"[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact

---

[3] In *United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 1487, 134 L. Ed. 2d 687, 699 (1996), the United States Supreme Court held that establishing discriminatory effect in a selective prosecution claim—where the defendant argues he or she is prosecuted because of his or her race—requires showing "similarly situated individuals of a different race were not prosecuted." Though *Armstrong*'s holding was limited to a claim of selective prosecution, other courts have extended its holding to claims of selective enforcement. *See, e.g.*, *Chavez*, 251 F.3d at 636; *but see Pyke v. Cuomo*, 258 F.3d 107, 108-09 (2d Cir. 2001) (declining to extend *Armstrong*'s holding to selective enforcement claim). In those jurisdictions where there is such a requirement, claimants have used statistical proxies to account for those who are similarly situated, *see, e.g.*, *Johnson v. Holmes*, 782 F. App'x 269, 282 (4th Cir. 2019) (per curiam) ("[T]he percentage of white drivers stopped and ticketed by the other officers patrolling the same locations as [the officer] serves as a proxy to show the general racial composition of drivers on the road that [the officer] could have pulled over but did not."), or named similarly situated individuals of a different race who were treated differently by law enforcement, *see, e.g.*, *Chavez*, 251 F.3d at 637 (white female driver following a Latino motorist similarly situated for purposes of establishing discriminatory effect).

This Court has noted in dicta that there is a similarly situated requirement in selective enforcement claims. *State v. Ward*, 66 N.C. App. 352, 354, 311 S.E.2d 591, 592 (1984) (only selective prosecution claim before the Court). Dicta, however, do not constitute binding precedent. *State v. Mostafavi*, 370 N.C. 681, 686, 811 S.E.2d 138, 142 (2018). We decline to reach this issue now, *see infra*, Section II.B.ii, but note that selective enforcement claims present unique concerns that might make the gathering of such evidence difficult, if not impossible, in some cases, *see Johnson*, 782 F. App'x at 282 ("[Law enforcement] does not (and could not) record the races of specific drivers who could have been stopped but were not, nor does it record the races of drivers who were stopped but not ticketed[.]"). This difficulty would be particularly pronounced if the trial court's exacting "same behavior" conception of similarly situated were to hold sway—surely a forceful argument against its adoption. *Cf. Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting) (critiquing qualified immunity case law, including factual similarity requirement, for, among other things, the "sky-high" evidentiary burden it imposes).

can be traced to a discriminatory purpose." *Feeney*, 442 U.S. at 272, 99 S. Ct. at 2293. "Discriminatory purpose implies more than intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte v. United States*, 470 U.S. 598, 610, 105 S. Ct. 1524, 1532, 84 L. Ed. 2d 547, 557-58 (1985) (citations, internal marks, alterations, and ellipses omitted). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266, 97 S. Ct. at 563; *see also Floyd v. City of New York*, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013) ("[Claimants] are not required to prove that race was the sole, predominant, or determinative factor in a police enforcement action. Nor must the discrimination be based on 'ill will, enmity, or hostility.'") (citation omitted).[4] "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Davis*, 426 U.S. at 242, 96 S. Ct. at 2048-49.

"Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation

[4] Such evidence may include an officer's racially derogatory statements, results from an internal affairs investigation of the officer, and statistical evidence of an officer's pattern of targeting racial minorities. *See State v. Villeda*, 165 N.C. App. 431,432-34, 599 S.E.2d 62, 63-63 (2004).

appears neutral on its face." *Arlington Heights*, 429 U.S. at 266, 97 S. Ct. at 564; *see also Feeney*, 442 U.S. at 273, 99 S. Ct. at 2293 ("[W]hen a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work."). However, "statistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent[.]" *McCleskey*, 481 U.S. at 293, 107 S. Ct. at 1767 (citation omitted); *see, e.g.*, *Yick Wo*, 118 U.S. at 374, 6 S. Ct. at 1073 (remanding for discharge of Chinese prisoners incarcerated for operating laundries without permits where all but one white applicant, but none of the more than 200 Chinese applicants, obtained the requisite permit); *Gomillion v. Lightfoot*, 364 U.S. 339, 340, 81 S. Ct. 125, 126, 5 L. Ed. 2d 110, 112 (1960) (holding statute was designed to disenfranchise Black voters where it altered the city boundaries "from a square to an uncouth twenty-eight-sided figure" which excluded 395 to 400 Black voters but not a single white voter).

B. Application

Defendant argues that Officer Kuchen violated Defendant's equal protection rights because Officer Kuchen engaged in selective enforcement of the law against Defendant because he is Black. On remand, we must determine whether (1) the trial court erred in placing the burden on Defendant to establish an equal protection violation where he sought to suppress evidence pursuant to N.C. Gen. Stat. § 15A-974, and, relatedly, whether Defendant's trial counsel was ineffective when she

informed the trial court that the burden was Defendant's, and (2) whether the trial court erred in denying his motion to suppress for an equal protection violation.

i. Burden

We first turn to whether the trial court erred in placing the burden on Defendant for his equal protection claim and whether Defendant received ineffective assistance of counsel. Defendant argues that the burden was on the State to "disprove discriminatory intent" where he sought to suppress the evidence at issue and that his trial counsel was ineffective in telling the trial court otherwise.

Defendant acknowledges that there is no case law applying our suppression statute to an equal protection claim and instead points to our Fourth and Fifth Amendment case law in the suppression context to support his argument. When a defendant, for instance, moves to suppress a warrantless search or a confession, the burden is on the State to establish admissibility. *See, e.g.*, *State v. Powell*, 253 N.C. App. 590, 800 S.E.2d 745 (2017) (warrantless search); *State v. Cheek*, 307 N.C. 552, 299 S.E.2d 633 (1983) (confession). Thus, Defendant argues that the same should hold for a motion to suppress based on the Fourteenth Amendment's guarantee of equal protection.

A review of the governing statutory provisions and case law does not support this view. First, the suppression statutory regime does not enumerate who bears the burden of proof when a defendant seeks to suppress evidence. Instead, the key

statutory provision instructs, in pertinent part, that "evidence must be suppressed if . . . [i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina[.]" N.C. Gen. Stat. § 15A-974(a)(1) (2019). And, while it is true that the State bears the burden to show probable cause or voluntariness of a confession, it is also a "basic principle that a defendant who alleges an equal protection violation has the burden of pro[of]." *McCleskey*, 481 U.S. at 292, 107 S. Ct. at 1767; *see also Davis*, 426 U.S. at 241, 96 S. Ct. at 2048; *Arlington Heights*, 429 U.S. at 265, 97 S. Ct. at 563; *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995); *State v. Howard*, 78 N.C. App. 262, 266-67, 337 S.E.2d 598, 601-02 (1985); *State v. Mendez*, 216 N.C. App. 587, 718 S.E.2d 423, 2011 N.C. App. LEXIS 2302, at *10-11 (2011) (unpublished) (noting burden on the defendant when seeking suppression in equal protection context); *Lora*, 451 Mass. at 437-38, 886 N.E.2d at 698 (holding defendant bears the burden in a motion to suppress for an equal protection violation). Put another way, neither probable cause, confession voluntariness, nor discriminatory law enforcement are presumed; each must be proved or admitted, and the case law—not our suppression statute—has established who bears the burden in each context.

Therefore, we hold that the trial court did not err in placing the initial burden on Defendant for his motion to suppress for an equal protection violation. This holding also resolves Defendant's claim of ineffective assistance of counsel. Since

Defendant bore the burden to make out a prima facie case of purposeful discrimination, his defense counsel was not ineffective in telling the trial court the burden was "on the defense" for the equal protection motion.

ii. Discriminatory Effect and Discriminatory Intent or Purpose

We next turn to whether Defendant made out a prima facie case of selective enforcement by bringing forth evidence of discriminatory effect and discriminatory purpose.[5] In support of both elements of his claim, Defendant offered statistical evidence that tended to show the following:

- Out of 299 traffic stops initiated by Officer Kuchen, 245, or 82%, were of Black drivers, while 37 were of white drivers.
- Out of the 205 cases in ACIS in which Officer Kuchen was listed as a "witness," 166, or 81.4%, were Black and 26 were white.
- Between 2002 and 2018, RPD has stopped just under one million drivers, and of those, 46% were Black drivers.
- The 2016 rolling American Community Survey population estimate listed the Black population of Raleigh at 28%.

Defendant argues these statistics show that Officer Kuchen stops Black people at a significantly higher rate than white people, based upon the representation of these

[5] It is indisputable that Defendant belonged to "a racial minority[.]" *Feeney*, 442 U.S. at 272, 99 S. Ct. at 2293. Though the trial court "assume[d]" that Defendant was "a member of a protected class" after asserting that "there [was] scant evidence" to that effect, the charging document and the motion to dismiss or suppress for equal protection violations both established that Defendant is a Black man. In fact, Defendant's race was so beyond dispute that it was not at issue in the suppression hearing. This is more than sufficient to establish that Defendant is a member of a protected class. *See State v. Bennett*, 374 N.C. 579, 594-95, 843 S.E.2d 222, 233 (2020) (holding racial identity of jurors sufficiently established in *Batson* case where "defendant's trial counsel, the prosecutor, and the trial court each agreed that [the jurors struck by peremptory challenges] were African American").

groups both in the Raleigh and RPD stop populations. He also argues that these statistics are sufficient to make an inference of discriminatory intent. We disagree.

While these statistics certainly appear "stark" at first glance, there are not appropriate benchmarks from which we can determine discriminatory effect or purpose. Without knowing the demographics of southeast Raleigh—the district Officer Kuchen was assigned and where this stop occurred—there is no adequate population benchmark from which we can assess the racial composition of individuals and motorists "faced by" Officer Kuchen. *See Chavez*, 251 F.3d at 643; *see also Soto*, 324 N.J. Super. at 69-70, 734 A.2d at 352. Nor is the ACIS data particularized enough to demonstrate the location and nature of Officer Kuchen's involvement in those cases—left undetermined is where these encounters occurred and whether they represent traffic stops, calls for service, or something else. Simply put, without reliable data indicating the population and demographics in southeast Raleigh and further details on Officer Kuchen's patrol history, these statistics do not establish a prima facie case that Officer Kuchen's actions had a discriminatory effect or evinced a discriminatory purpose.

III. Conclusion

For the reasons stated above, we affirm the trial court's order denying Defendant's motion to suppress for equal protection violations and reject Defendant's ineffective assistance of counsel claim.

AFFIRMED.

Judges DIETZ and BERGER concur in result only.

Report per Rule 30(e).