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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-442-2

Filed: 20 September 2016

Iredell County, No. 13 CRS 53209

STATE OF NORTH CAROLINA

v.

JAMES EDWARD JOYNER, Defendant.

Appeal by defendant from Judgment entered 16 December 2014 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 5 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Matthew Tulchin, for the State.

Meghan A. Jones for defendant.

ELMORE, Judge.

On 16 December 2014, a jury found James Edward Joyner (defendant) guilty of possession of a firearm by a felon. Defendant appealed to this Court by petition for writ of *certiorari*, which we allowed, arguing that the trial court erred in denying his motion to dismiss the charge of possession of a firearm by a felon, and committed plain error by failing *sua sponte* to exclude the revolver from evidence as the fruit of an unconstitutional seizure. In *State v. Joyner*, ____ N.C. App. ____, ____ S.E.2d ____

(Nov. 17, 2015) (COA15-442), we held that the State's evidence was sufficient to withstand defendant's motion to dismiss, but because defendant did not move to suppress the revolver or object to its admission at trial, we did not address his constitutional argument which he raised for the first time on appeal.

Upon defendant's petition for discretionary review, the North Carolina Supreme Court remanded for "reconsideration and review for plain error." We now conclude that because the arresting officer's testimony shows that he had reasonable suspicion to extend the stop, the trial court did not commit plain error by failing to intervene and exclude the revolver from evidence at trial.

I. Background

On the evening of 10 June 2013, Sergeant Michael Mitchell was patrolling the south side of Statesville in a marked patrol car when he observed a Honda Civic parked in front of a house that had been involved in prior narcotics investigations. As soon as the vehicle left the house, Sergeant Mitchell noticed that its tag lights were out. He followed the vehicle for several miles, initiated his lights and siren, and pulled the vehicle over.

Sergeant Mitchell approached the driver's side of the Honda and instructed the driver, William Elam, to step out and accompany him to the rear of the vehicle. Defendant, sitting in the passenger's seat, remained in the car. Sergeant Mitchell explained to Mr. Elam that he had been stopped for a tag light violation and asked

Mr. Elam for his license and registration. Sergeant Mitchell noted that Mr. Elam appeared nervous: Mr. Elam had trouble getting his license out of his wallet and his hands were shaking. Sergeant Mitchell began asking Mr. Elam a few routine questions, including how he knew defendant. At that point, defendant opened the passenger door and stepped out. Sergeant Mitchell immediately ordered defendant to get back inside the vehicle and called for backup before he resumed questioning.

Sergeant Mitchell asked Mr. Elam, the registered owner of the Honda, if there was anything illegal inside of the vehicle that he should know about or that should concern him. Mr. Elam responded, "No." Sergeant Mitchell then asked for permission to search his vehicle. Mr. Elam consented. Sergeant Mitchell proceeded toward the front passenger side of the Honda, asked defendant to step out of the vehicle, and informed defendant that Mr. Elam had consented to a search of the vehicle. After defendant exited the car, Sergeant Mitchell asked defendant if there was anything illegal in the car that he should know about. Defendant replied, "There was a firearm, a pistol on the seat between his leg and the front passenger's door of the vehicle."

Sergeant Mitchell immediately instructed defendant and Mr. Elam to move to the rear of the Honda, away from the firearm, and detained them in handcuffs until backup arrived. Sergeant Mitchell then walked back to the Honda, opened the passenger door, and saw a black, snub-nosed .32 revolver laying on the rocker panel

between the front passenger seat and the passenger door. He testified that the revolver was a "couple of inches" from where defendant had been seated, "right beside where his leg was" and "within hand's length." Sergeant Mitchell picked up the revolver, determined it was not loaded, and locked it in his patrol car.

Soon thereafter, three other police officers arrived to assist Sergeant Mitchell. Two of the officers remained with defendant and Mr. Elam while Sergeant Mitchell and the other officer searched the Honda. The officers found no other contraband in the vehicle. Sergeant Mitchell had dispatch run a background check on Mr. Elam and defendant, which revealed that defendant was a convicted felon. As a result, Sergeant Mitchell placed defendant under arrest for possession of a firearm by a felon.

II. Discussion

Where a defendant raises an unpreserved evidentiary issue on appeal, our Court has declined to review for plain error where the substantive argument is constitutional. In *State v. Canty*, 224 N.C. App. 514, 736 S.E.2d 532 (2012), *writ of supersedeas and disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013), the defendant argued that the trial court committed plain error in admitting evidence he claimed was a result of an unlawful traffic stop. *Id.* at 516, 736 S.E.2d at 535. Because the defendant "did not file a motion to suppress nor did he argue his Fourth Amendment claim to the trial court," the Court dismissed his constitutional

argument, concluding that it was not preserved for appeal. *Id.* (citing *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856 (2001)); *see also State v. Cousin*, 233 N.C. App. 523, 529, 757 S.E.2d 332, 338 (declining to review for plain error whether exclusion of certain evidence violated the defendant's constitutional rights where he conceded no constitutional argument was raised at trial), *disc. review denied*, 367 N.C. 521, 762 S.E.2d 446 (2014).

In other cases, our Court has applied plain error review to evidentiary matters despite the fact that they involve constitutional issues. In *State v. Jones*, 216 N.C. App. 225, 715 S.E.2d 896 (2011), *appeal dismissed and disc. review denied*, 365 N.C. 559, 723 S.E.2d 767 (2012), the defendant claimed that a pretrial identification procedure was impermissibly suggestive, in violation of his right to due process, and therefore, the results of the identification should have been excluded from evidence. *Id.* at 229–30, 715 S.E.2d at 900. The Court first recognized that the defendant had failed to preserve this issue for appellate review since it was not raised at trial. *Id.* at 230, 715 S.E.2d at 900–01. Nevertheless, we reviewed for plain error "because the constitutional right at issue involves the admissibility of evidence, and because defendant has also raised the issue of ineffective assistance of counsel." *Id.* at 230, 715 S.E.2d at 901; *see also State v. Mohamed*, 205 N.C. App. 470, 474–76, 696 S.E.2d 724, 729–30 (2010) (reviewing for plain error the admission of post-arrest statements,

where the defendant challenged substance of *Miranda* warnings and voluntariness of waiver, though no motion to suppress or objection was raised at trial).

Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . .' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)).

> 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) (quotation marks, alterations, and citations omitted).

Evidentiary and instructional issues typically involve questions of law which, if preserved, would be reviewed *de novo* on appeal. *See State v. McLean*, 205 N.C. App. 247, 249, 695 S.E.2d 813, 815 (2010) ("The admissibility of evidence at trial is a question of law and is reviewed *de novo*." (citation omitted)); *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) ("Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." (citations omitted)). Because error is a prerequisite to plain error analysis, *State v.*

Torain, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986), we have essentially employed the same *de novo* standard to first review for error before deciding whether the error, if any, was "fundamental," *see, e.g.*, *State v. Towe*, 366 N.C. 56, 61–62, 732 S.E.2d 564, 567–68 (2012); *see also State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000) ("[T]his Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now."), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

When a defendant challenges the denial of a motion to suppress, our review is limited to whether "the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). Our appellate courts have applied this standard in conjunction with plain error review where a defendant files a motion to suppress evidence but fails to object to its admission at trial. *See State v. Williams*, ____ N.C. App. ____, ____, 786 S.E.2d 419, 424–25 (June 21, 2016) (COA15-1004); *see also State v. Grice*, 367 N.C. 753, 755, 764, 767 S.E.2d 312, 315, 320, *cert. denied*, ____ U.S. ____, 192 L. Ed. 2d 882 (2015).

Because defendant filed no motion to suppress, however, we have no findings or conclusions before us, and we cannot employ our usual standard of review to evaluate defendant's challenge to the admission of the revolver. *Mohamed*, 205 N.C. App. at 476, 696 S.E.2d at 730. Confronted with the same problem in *Mohamed*, the Court articulated a new standard which accounts for the trial court's lack of opportunity to address and rule upon the defendant's argument: "[W]e must simply examine the information before the trial court in order to determine if it committed plain error by allowing the admission of the challenged [evidence]." *Id.* We apply this same framework in addressing defendant's argument that the revolver was the result of an unconstitutional detention, and therefore, the trial court committed plain error by failing *sua sponte* to exclude it from evidence at trial.

The Fourth Amendment protects "against unreasonable searches and seizures." U.S. Const. amend IV. "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979)). To be reasonable under the Constitution, the stop must be supported by "reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968)); *see also Styles*, 362 N.C.

at 415, 665 S.E.2d at 440 (clarifying that reasonable suspicion is the standard for traffic stops).

"While something more than a mere hunch is required, the reasonable suspicion standard demands less than probable cause and considerably less than preponderance of the evidence." *State v. Williams*, 366 N.C. 110, 117, 726 S.E.2d 161, 167 (2012) (citing *Wardlow*, 528 U.S. at 123, 145 L. Ed. 2d at 576). More precisely, it requires "specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441–42, 446 S.E.2d 67, 70 (1994) (citing *Terry*, 392 U.S. at 21–22, 20 L. Ed. 2d at 906; *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979)). In determining whether reasonable suspicion exists, "the totality of the circumstances—the whole picture—must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981).

Where objective circumstances justify a traffic stop, the subjective intent of the officer is irrelevant. *Whren v. United States*, 517 U.S. 806, 135 L. Ed. 2d 89 (1996). Accordingly, an officer who observes a motorist commit a traffic violation may stop the vehicle even if the true motivation for the stop is to investigate whether some other criminal activity—for which the officer lacks reasonable suspicion—is taking or has taken place. *Id.* at 813, 135 L. Ed. 2d at 98 (rejecting the petitioner's argument

that "the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"); *see Scott v. United States*, 436 U.S. 128, 138, 56 L. Ed. 2d 168, 178 (1978) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." (discussing *United States v. Robinson*, 414 U.S. 218, 38 L. Ed. 2d 427 (1973))); *see also State v. McClendon*, 350 N.C. 630, 634–36, 517 S.E.2d 128, 131–32 (1999) (adopting the rule established in *Whren* under the North Carolina Constitution).

"After a lawful stop, an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer's suspicions." *McClendon*, 350 N.C. at 636–37, 517 S.E.2d at 132–33 (citing *Berkemer v. McCarty*, 468 U.S. 420, 82 L. Ed. 2d 317 (1984); *State v. Jones,* 96 N.C. App. 389, 386 S.E.2d 217 (1989), *appeal dismissed and disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990)). The Supreme Court of the United States recently explained that "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. ____, ____, 191 L. Ed. 2d 492, 498 (2015) (citations omitted). The stop may last no longer than is necessary to address the infraction. *Id.* "Authority for the seizure thus ends when tasks tied to the traffic

infraction are—or reasonably should have been—completed." *Id.* (citation omitted). The critical issue is not whether the extraneous questioning occurred before or after the officer issued a ticket, but whether the questioning "prolonged" the stop. *Id.* at ____, 191 L. Ed. 2d at 501.

To extend a lawful stop beyond its original purpose, "there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual." *State v. Jackson*, 199 N.C. App. 236, 241–42, 681 S.E.2d 492, 496 (2009) (citing *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 755, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008)); *see also Rodriguez*, 575 U.S. at ____, 191 L. Ed. 2d at 499 ("An officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."); *Williams*, 366 N.C. at 116, 726 S.E.2d at 166 ("[T]o detain a driver beyond the scope of the traffic stop, the officer must have the driver's consent or reasonable articulable suspicion that illegal activity is afoot." (citations omitted)).

Defendant does not challenge Sergeant Mitchell's initial authority to stop Mr. Elam's vehicle for the tag light violation. He argues instead that Sergeant Mitchell unlawfully extended the stop by asking Mr. Elam if there was contraband in the car and seeking his consent to search because, first, he lacked reasonable suspicion to

ask questions unrelated to the tag light violation, and second, the encounter had not become consensual. According to defendant, therefore, Sergeant Mitchell's questioning measurably extended the duration of the stop which rendered the detention unconstitutional.

After reviewing the record, we agree with defendant that there is no evidence that the encounter had become consensual. "Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration." *Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497 (citing *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991); *State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001)). Like the encounter in *Jackson*, here the record shows that Sergeant Mitchell took Mr. Elam's driver's license but never returned it. "As a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license," *id.*, Sergeant Mitchell's continued questioning was not part of a consensual encounter.

Sergeant Mitchell's testimony does show, however, that he had reasonable suspicion, apart from the tag light violation, to extend the stop. In determining whether reasonable suspicion exists, our courts have considered, *inter alia*, a suspect's nervousness, *McLendon*, 350 N.C. at 638–39, 517 S.E.2d at 134, and presence in a high crime area, *State v. Butler*, 331 N.C. 227, 233–34, 415 S.E.2d 719,

722–23 (1992). While neither, standing alone, is sufficient to justify an investigatory stop, *see Brown v. Texas*, 443 U.S. 47, 52, 61 L. Ed. 2d 357, 362–63 (1979); *McLendon*, 350 N.C. at 638–39, 517 S.E.2d at 134, each may support reasonable suspicion in combination with other factors, *see, e.g.*, *State v. Jackson*, 368 N.C. 75, 80–81, 772 S.E.2d 847, 850–51 (2015) (finding reasonable suspicion based on the defendant's evasive action in a high crime area).

At the time of defendant's arrest, Sergeant Mitchell was assigned to the K-9 division, whose main objective includes enforcing traffic laws and drug violations. He testified that around 9:00 p.m., he first noticed the Honda parked outside of a house with which he was "very familiar" from prior drug investigations. *See Jackson*, 368 N.C. at 80, 772 S.E.2d at 850 (noting that "the trial court based its conclusion on more than defendant's presence in a high crime and high drug area" where the findings showed, *inter alia*, that "defendant stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions that had been the site of many narcotics investigations"); *Butler*, 331 N.C. at 233, 415 S.E.2d at 722 (noting that an officer observed the defendant "not simply in a general high crime area, but on a specific corner known for drug activity and as the scene of recent, multiple drug-related arrests"). After Sergeant Mitchell stopped the vehicle, he observed that Mr. Elam appeared nervous. He testified that usually when he informs a driver of the reason for a traffic stop, "that nervousness, if there is any nervousness, will go away."

According to Sergeant Mitchell, however, there was no change in Mr. Elam's behavior even after he informed Mr. Elam that he was stopped for a tag light violation. When Sergeant Mitchell asked Mr. Elam for his driver's license, Mr. Elam's hands were "visibly shaking" and he had trouble retrieving his license from his wallet.

We believe Mr. Elam's behavior, coupled with the vehicle's initial presence in front of a house known by Sergeant Mitchell for drug activity, justified further detention and questioning. *See Butler*, 331 N.C. at 233–34, 415 S.E.2d at 722–23 (finding reasonable suspicion where officers observed the defendant "on a specific corner known for drug activity" and he immediately left the corner and walked away from the officers after making eye contact with them); *State v. Mello*, 200 N.C. App. 437, 447, 684 S.E.2d 483, 490 (2009) (finding reasonable suspicion based on the defendant's "presence in an area known to be a center of drug-related activity coupled with evasive action on the part of individuals involved in some sort of interaction with Defendant"); *see also Jackson*, 368 N.C. at 80, 772 S.E.2d at 850–51 (finding reasonable suspicion where the "defendant stood at 9:00 p.m. in a specific location known for drug transactions," walked away upon seeing patrol car approach, returned once car had passed, and walked away a second time when patrol car returned). Accordingly, the record supports the trial court's decision not to intervene. *See Mohamed*, 205 N.C. App. at 480, 696 S.E.2d at 732.

Even if it were error to admit the revolver, we cannot conclude that it was one that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 321 ("When plain error analysis fails to adequately account for this element, plain error may become indistinguishable from the less stringent harmless error standard."). In fact, this may be a situation where *reversing* for the unpreserved error would harm our judicial proceedings. *See* Troy D. Shelton, *Plain Error but No Plain Future: North Carolina's Plain Error Review After* State v. Lawrence, 91 N.C. L. Rev. 2218, 2236 (2013) (citing *Nguyen v. United States*, 539 U.S. 69, 88, 156 L. Ed. 2d 64, 83 (2003) (Rehnquist, C.J., dissenting)).

First, a reversal in this case would not reflect a conclusion that defendant's constitutional rights were violated. It would only show that the issue was "insufficiently ventilated below," though "we do not know what additional corroborative and/or other evidence could have been introduced by the State had [d]efendant pursued his current argument at the trial level." *State v. Garcia*, No. COA09-684, 2010 WL 522629, at * 4 (N.C. Ct. App. Feb. 16, 2010), *disc. review denied*, 365 N.C. 79, 705 S.E.2d 736 (2011); *see also Mohamed*, 205 N.C. App. at 480, 696 S.E.2d at 732 (noting that "had Defendant made a timely motion to suppress his statements to investigating officers, the trial court would have had the opportunity . . . to address [a] fundamental dispute between the investigating officers

and Defendant relating to Defendant's ability to comprehend English"). In effect, we are being asked to reverse and order a new trial with the suppression of the revolver based not on insufficient evidence or an erroneous conclusion, but an incomplete record. Out of fairness to a defendant, our courts do not allow the State "a gratuitous second chance" to argue on appeal what it failed to at a suppression hearing. *Cooke*, 306 N.C. at 136–37, 291 S.E.2d at 621. And it would certainly seem unfair to allow a defendant an opportunity not afforded to the State.

Second, are we to reasonably expect a trial judge to exclude physical evidence where the matter is never brought to the court's attention? The preservation rules of our adversarial system are not merely "technical rules[s] of procedure." *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983). We require objections to evidentiary admissions to avoid placing "an undue if not impossible burden" on our trial judges. *Id.* By way of example, "[t]here are those occasions when a party feels that evidence which might be incompetent would be advantageous to him, therefore, he does not object. Since the party does not object a trial judge should not have to decide 'on his own' the soundness of a party's trial strategy." *Id.* In addition, our Supreme Court has explained that "[t]he purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial." *Lawrence*, 365 N.C. at 517, 723 S.E.2d

at 333 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). While plain error review "alleviates the potential harshness of preservation rules," *id.* at 514, 723 S.E.2d at 332, it cannot be relied upon for harmless error review as defendant has essentially argued for in his brief, *see Grice*, 367 N.C. at 764, 767 S.E.2d at 321; *see also Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 ("[T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error." (citations omitted)).

Third, where a legal determination, such as whether reasonable suspicion exists, is not raised and discussed at the trial court, our appellate courts are put in a difficult position. A conclusion of law is based on "a careful assessment of the facts, and actually constitutes the application of a standard to the facts." *State v. McDowell,* 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 732 (1986). Trial courts have "institutional advantages over appellate courts in the application of facts to fact-dependent legal standards," *State v. McKinney*, 361 N.C. 53, 65, 637 S.E.2d 868, 876 (2006) (citations and quotation marks omitted), which is why "the conclusion should, in the first instance, be made by the trial court," *McDowell*, 310 N.C. at 74, 310 S.E.2d at 310. The appellate court "sees only a cold, written record," *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971), and cannot substitute itself for the trial

court "to pass upon the credibility of the evidence and to decide what weight to assign to it and which reasonable inferences to draw therefrom," *State v. Villeda,* 165 N.C. App. 431, 438, 599 S.E.2d 62, 66 (2004). It is the trial court that "is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 620; *see also State v. Salinas*, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012) (remanding to the trial court for findings of fact and to "reconsider the evidence pursuant to the reasonable suspicion standard" rather than probable cause standard); *id.* at 123, 124, 729 S.E.2d at 66, 67 (rejecting the contention that remand was unnecessary and that the Court of Appeals should "review[ ] the record to determine if the actions of the police satisfied the [reasonable suspicion] standard").

III. Conclusion

The trial court did not commit plain error by failing *sua sponte* to exclude the revolver from evidence at trial.

NO PLAIN ERROR.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).