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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-731

Filed: 3 July 2018

Brunswick County, No. 13 CRS 56129

STATE OF NORTH CAROLINA

v.

HARVEY LEE GRADY, Defendant.

Appeal by Defendant from Judgment and Commitment entered 25 August 2015 by Judge James F. Ammons, Jr., in Brunswick County Superior Court. Heard in the Court of Appeals 14 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashish K. Sharda, for the State.

Cooley Law Office, by Craig M. Cooley, for Appellant-Defendant.

INMAN, Judge.

Harvey Lee Grady ("Defendant") appeals, following a final judgment and commitment, from the trial court's denial of his motion to suppress. Defendant argues the trial court erred as a matter of law by failing to issue a written order that included proper findings of fact and conclusions of law. Defendant further argues that the lack of an adequate verbatim transcript of his trial—which resulted from a

malfunction with the recording equipment—has precluded him from meaningful appellate review, such that he is entitled to a new trial.

After careful review, we hold the trial court did not err by failing to reduce its ruling denying Defendant's motion to suppress to writing. We also hold that the deficiencies in the verbatim trial transcript do not amount to prejudicial error.

Facts and Procedural History

The State's evidence at trial tended to show the following:

On 21 November 2013, Sergeant Christopher Sasser ("Agent Sasser") of the Brunswick County Sheriff's Department's drug enforcement division contacted a confidential informant (the "Informant") to arrange for a controlled purchase of crack cocaine. The Informant contacted a man known as "Bird," who was later identified as Defendant, to set up a buy. Defendant agreed to meet the Informant in a Food Lion parking lot and said that he would be in a red Ford pickup truck.

Agent Sasser drove with the Informant to the Food Lion and observed Defendant sitting in a red Ford pickup truck. Agent Sasser dropped the Informant off around the corner and requested backup from Sergeant Jeff Beck ("Agent Beck") of the Brunswick County Sheriff's Department. Agent Beck had been conducting surveillance while waiting for Agent Sasser to make contact.

Once Agent Sasser arrived in the parking lot, he and Agent Beck approached the red Ford pickup truck and started a conversation with Defendant. Agent Beck

asked Defendant to step out of the vehicle, and as he did so, Agent Sasser observed Defendant throw a bag to the ground. The contents of the bag were later tested and revealed to be cocaine. Agent Sasser placed Defendant in handcuffs and sat him on the ground. The agents then took Defendant to a separate location, informed him of his Miranda rights, and questioned him.

Defendant agreed to cooperate and provided the agents with information regarding other people involved in narcotics. Agent Sasser gave Defendant his cell phone number, instructed Defendant to contact him the following day, and released Defendant from custody. Defendant, however, failed to contact Agent Sasser.

Agent Sasser then obtained an arrest warrant for Defendant on charges of possession of cocaine with the intent to manufacture, sell, or deliver and possession of drug paraphernalia. Defendant was arrested and was indicted on 3 March 2014.

Prior to trial, Defendant's counsel filed a motion to dismiss and a motion to suppress. Defendant's motion to suppress was grounded in the argument that he was detained, questioned, and searched without reasonable suspicion, probable cause, or a search warrant. Defendant also argued that he did not voluntarily consent to any search and denied that he knowingly waived his Miranda rights prior to making any statements. The trial court denied Defendant's motion to dismiss and held the motion to suppress in abeyance until after Defendant testified at trial. The trial proceeded before a jury on 20 August 2015.

Defendant testified at trial that he had no contact with the Informant prior to arriving in the parking lot. Defendant also denied dropping anything when he stepped out of the vehicle. The jury found Defendant guilty of possession with the intent to manufacture, sell, or deliver cocaine. Defendant entered a guilty plea to being a habitual felon, and he was sentenced on 25 August 2015 as a level VI offender to 84 to 113 months of imprisonment.

Defendant wrote the superior court on 22 September 2015 to give notice of appeal and to request a copy of his judgment and commitment. Defendant again wrote the superior court in October 2015 seeking appointment of appellate counsel. Defendant filed a *pro se* motion for a trial transcript in June 2016, which the trial court denied. Defendant was subsequently appointed appellate counsel, and this Court granted Defendant's petition for writ of certiorari asking to reinstate his direct appeal rights.

Analysis

Defendant's primary argument on appeal is that the trial court erred in denying his motion to suppress because there was a material conflict in the evidence and because the trial court failed to reduce its findings of fact and conclusions of law to writing.

1. Section 15A-977

When ruling on a motion to suppress evidence, the trial court "must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2017). Our courts have interpreted this directive to not require written findings and conclusions, while emphasizing that the better practice is to do so. *See State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012).

Our courts have further held that absent a material conflict in the evidence, explicit findings of fact are not required. "[O]nly a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (citations omitted) (holding additionally that "[w]hen there is no conflict in the evidence, the trial court's findings can be inferred from its decision"). The Court in *Bartlett*, abrogating our precedent requiring written findings, held that the trial court is allowed to "make these findings *either orally or in writing*." *Id.* at 312, 776 S.E.2d at 674 (emphasis added).

Here, even assuming *arguendo* that a material conflict in the evidence exists, the trial court rendered oral findings of fact resolving any such conflict. Defendant asserted, in contradiction to the State's evidence, that he never threw down a bag and that he had no prior contact with the Informant. The trial court found in relevant part:

> THE COURT: . . . on the date that it happened, . . . Agent Beck approached the defendant, who was seated in a

> vehicle. Asked him to step out of the vehicle. That he did this after having a reasonable suspicion that the defendant may be engaged in illegal activities based on the fact that the defendant had been identified by a confidential informant that's the person he was there to buy drugs from. That as he stepped out of the vehicle, he was not under arrest. He was not under any obligation to even step out of the vehicle. As he stepped out of the vehicle, Sergeant Sasser saw the defendant throw down a [indiscernible] from his hand. After retrieving it, Sergeant Sasser recognized it as possibly contraband. That at this point the officers both had probable cause to detain the defendant and question him. [indiscernible] after the defendant was advised of his Miranda rights, he freely and voluntarily and understandingly talked to the officers of his own free will. Contraband which was seized by Sergeant Sasser was in plain sight on the ground in a public parking lot. Agent Sasser saw the defendant throw it down. It was seized at that point. The Court has been personally present during the entire hearing, was able to see, hear and understand the witnesses as they have testified and assign credibility [indiscernible].

Defendant contends that the trial court's failure to reduce findings to writing has deprived him of meaningful appellate review. However, as the Supreme Court in *Bartlett* explained, while the better practice is to reduce an order to writing, an oral ruling that includes the necessary findings of fact and conclusions of law is sufficient. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674.

The trial court's oral findings resolved any material conflicts in the evidence and were well-supported by Agents Sasser's and Beck's testimony. Agent Sasser testified that he witnessed Defendant throw a bag to the ground when he stepped out of the Ford pickup truck. Agent Sasser further explained that after witnessing

Defendant throw the bag to the ground, he detained Defendant and sought to interrogate him. Agent Sasser's testimony further supported the trial court's finding that Defendant knowingly and voluntarily waived his Miranda rights prior to questioning. This testimony supports the trial court's findings, which in turn resolved the conflicts between Defendant's testimony and the agents' testimonies. Accordingly, we affirm the trial court's denial of Defendant's motion to suppress.

2. Verbatim Transcript

Defendant next argues that he is deprived of a meaningful appellate review in light of the incompleteness of the verbatim transcript of his trial, which Defendant contends violates his constitutional right to effective assistance of counsel on appeal. We disagree.

Pursuant to N.C. Gen. Stat. § 7A-452(e), indigent defendants who have entered notice of appeal are entitled to receive a copy of their trial transcript at the State's expense. N.C. Gen. Stat. § 7A-452(e) (2017); *see also State v. Hobbs*, 190 N.C. App. 183, 185, 660 S.E.2d 168, 170 (2008). Our Court has explained that "[a]lthough due process does not 'require[] a verbatim transcript of the entire proceedings,' the United States Supreme Court has held that an appellate 'counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution.' " *Hobbs*, 190 N.C. App. at 185, 660 S.E.2d at 170

(alteration in original) (internal citations omitted). Interpreting this mandate, we have held:

> The unavailability of a verbatim transcript does not automatically constitute error. *See Hunt v. Hunt*, 112 N.C. App. 722, 726, 436 S.E.2d 856, 859 (1993). To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice. [*In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003)]. General allegations of prejudice are insufficient to show reversible error. *Id.*; *In re Peirce*, 53 N.C. App. 373, 382, 281 S.E.2d 198, 204 (1981) (finding an insufficient showing of prejudice where appellee did not indicate the content of the lost testimony in the record). As to unavailable verbatim transcripts, a party has the means to compile a narration of the evidence through a reconstruction of the testimony given. *In re Clark*, 159 N.C. App. at 80, 582 S.E.2d at 660 (citing *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988)); N.C. R. App. P. 9(c)(1).

State v. Quick, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006). In other words, the defendant must show *how* he has been prejudiced by the missing portions of the transcript. *See State v. Boggess*, 358 N.C. 676, 685, 600 S.E.2d 453, 459 (2004); *see also State v. Hammonds*, 141 N.C. App. 152, 167, 541 S.E.2d 166, 177 (2000). If there is no adequate alternative to a complete verbatim transcript, "this Court must determine whether the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review, in which case a new trial would be warranted." *Hobbs*, 190 N.C. App. at 187, 660 S.E.2d at 171 (internal quotation marks and citation omitted).

In this case, the transcript notes at the beginning:

> The court reporter who reported these proceedings experienced an equipment malfunction during these proceedings and the quality of the backup recording was extremely poor. This accounts for the many "indiscernibles".

A review of the transcript reveals that it is in fact replete with "indiscernibles," making reading burdensome and difficult. In an attempt to correct this issue, Defendant's appellate counsel contacted the trial counsel, the prosecutor, the court reporter, and the Court Reporting Manager. However, those contacted either did not respond or were unable to provide appellate counsel with a more complete transcript. Because appellate counsel was unable to reconstruct the missing portions, we are left to determine whether the intact portions of the transcript allow us to conduct a "meaningful appellate review." *See Hobbs*, 190 N.C. App. at 187, 660 S.E.2d at 171.

Hobbs highlights that it is essential for the transcript portions involving Defendant's testimony and evidence, the trial court's charge to the jury, and the testimony and evidence of the State to permit a meaningful review. While there are a substantial number of "indiscernibles" contained within Defendant's testimony, this alone is not sufficient to warrant a new trial. *See, e.g., In re D.W.*, 171 N.C. App. 496, 503, 615 S.E.2d 90, 94 (2005) (holding the failure to record the defendant's direct examination was not sufficient, where "the missing parts of the transcript can be reconstructed from the record, and the transcript is adequate to allow the defendant to raise appellate issues . . . "). In most instances in the present case, the record is

sufficient to reconstruct much of what was said, even if the exact words were lost. As discussed above, while the trial court's resolution of Defendant's motion to suppress contains three "indiscernible" words or phrases, the surrounding context allows for the reconstruction of the missing portions. The trial court's ruling, in conjunction with the intelligible portions of the transcript, including Defendant's testimony, permits us to infer the differences between Defendant's story and the agents' story of the events that occurred in the Food Lion parking lot. We are therefore able to engage in a meaningful review.

Defendant does not argue that the transcript of the State's evidence was insufficient, and our review of the transcript of the trial court's jury charge reveals that it is more than sufficient to allow appellate counsel to raise any potential errors, had such errors existed. As in *Hammonds*, "in the case at bar, the transcript, despite its imperfections, is not so inaccurate as to prevent meaningful review by this Court." *Hammonds*, 141 N.C. App. at 168, 541 S.E.2d at 178. Because the transcript and record are adequate to permit a meaningful appellate review, we reject Defendant's argument for a new trial and hold there is no prejudicial error arising from the deficiencies in the trial transcript.

Conclusion

For the foregoing reasons, we hold that the trial court's failure to reduce its findings of fact and conclusions of law regarding Defendant's motion to suppress is

not erroneous, and the deficiencies in the trial transcript, despite their frequency, do not amount to prejudicial error.

NO ERROR.

Judges HUNTER and BERGER concur.

Report per Rule 30(e).