IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-984

Filed: 6 August 2019

Mecklenburg County, Nos. 16CRS021580, 16CRS21582, 16CRS21585

STATE OF NORTH CAROLINA

v.

ARMAND LES WASHINGTON, Defendant.

Appeal by Defendant from judgment entered 15 February 2018 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State.

William D. Spence for the Defendant.

DILLON, Judge.

Defendant Armand Les Washington appeals a judgment entered upon a jury verdict finding him guilty of possession of a firearm by a felon, possession of a stolen firearm, and possession of stolen goods and property. On appeal, Defendant argues that the trial court erred in trying and sentencing him on a facially deficient

indictment, denying his motion to suppress, and allowing the State to elicit testimony regarding his post-arrest silence.

I. Background

On 11 December 2015, the Charlotte police received a phone call regarding a "suspicious person" at Hill Point Court Apartments. An officer responded to the call and obtained more details about the "suspicious person." The complainant told the officer that he had observed an older model red Honda pull into the apartment complex's parking lot; two black males got out of the Honda, and they began walking around the parking lot pulling on the doors of parked cars. The complainant said that he did not see any car doors opened or cars entered. The officer then broadcasted this information to nearby officers in the area.

Another officer saw a Honda matching the description given by the complainant about half a mile from the apartment complex. Based solely on this radio announcement, and not on any observed criminal activity or traffic violation, the officer stopped the vehicle, which was owned and being driven by Defendant. Other officers also convened during the stop.

Defendant and the other three occupants were ordered to stay inside the vehicle. However, the back right passenger door opened and a piece of paper fell out of the vehicle. An officer retrieved this piece of paper, which was a medical document regarding a Mr. Marquis McCain. Mr. McCain was not an occupant of the vehicle. It

was later discovered that Mr. McCain's car had been broken into and several items, including a black Oakley backpack, a Sony PlayStation 3, and his wallet, had been taken.

Officers then ordered the four occupants out of the vehicle. Officers observed a PlayStation 3 and a black Oakley backpack inside the vehicle. The occupants of the vehicle were placed under arrest, and Defendant's vehicle was searched. During the search, the officers discovered a GPS and other electronic devices, a guitar case, a shotgun with ammunition and case, an ammunition bandoleer, and a gun cleaning kit.

Following the search of the vehicle, the officers learned of a recent 911 call from a Mr. Omari Patterson, who reported that his vehicle had been broken into and his shotgun and related items had been stolen.

Defendant was arrested, indicted, and tried for a number of crimes based on the items found in his vehicle during the search.

Defendant moved to suppress the evidence obtained during the stop on the basis that the officers did not have reasonable suspicion to stop his vehicle and, otherwise, that the stop was unreasonably prolonged. The trial court denied Defendant's motion. During the trial, Mr. Patterson made an in-court identification of the shotgun, shell belt, gun cleaning kit, and ammunition found in Defendant's vehicle as belonging to him.

The jury found Defendant guilty of possession of a firearm by a felon, possession of a stolen firearm, and possession of stolen goods and property, but Defendant was found not guilty of other charges. Defendant was sentenced in the presumptive range. He now appeals to our Court.

II. Analysis

On appeal, Defendant makes a number of arguments, which we address in turn.

A. Fatally Defective Indictment

Defendant takes issue with the indictment for the charge of misdemeanor possession of stolen goods. Defendant contends that the indictment was "invalid on its face and fatally defective for failure to properly describe the stolen goods/personal property . . . with reasonable certainty."

Regardless of whether a defendant has previously challenged the validity of an indictment, we review the sufficiency of an indictment *de novo*. *See State v. Sturdivant*, 304 N.C. 293, 308-09, 283 S.E.2d 719, 730 (1981).

It is well settled that an indictment "must allege . . . all the essential elements of the offense endeavored to be charged." *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953) (identifying the constitutional purposes of indictment requirements as: "(1) . . . certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being

twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial[;] and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case"). If an indictment fails to meet these requirements, the trial court is deprived of its subject matter jurisdiction over the cause. *See State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000).

An indictment for the charge of possession of stolen goods must allege: "(1) possession of personal property, (2) [with a value], (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose." *State v. Davis*, 302 N.C. 370, 373, 275 S.E.2d 491, 493 (1981); N.C. Gen. Stat. § 14-71.1 (2016). Such allegations must be sufficiently descriptive. *See Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731.

In the present case, the indictment at issue provides, in pertinent part, that:

> [Defendant] did unlawfully and willfully possess gun supplies, the personal property of Omari Patterson, having some value, which property was stolen property, knowing and having reasonable grounds to believe the property to have been stolen, taken, and carried away.

Defendant contends that "gun supplies" is not detailed enough "to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny[.]" *State v. Ingram*, 271 N.C. 538, 542, 157 S.E.2d 119, 122 (1967) (concluding that an indictment's description of the property taken as

"merchandise, chattels, money, valuable securities and other personal property" was too general to adequately describe "eleven rings with a total value of $878.00[,]" and therefore insufficient); *but see State v. Monk*, 36 N.C. App. 337, 340, 244 S.E.2d 186, 188 (1978) (finding an indictment's description of the property taken as "assorted items of clothing, having a value of $504.99 the property of Payne's, Inc." was particular and sufficient).

We disagree with Defendant and conclude that "gun supplies, the personal property of Omari Patterson," sufficiently identifies the property which Defendant is charged with possessing. *See State v. Foster*, 10 N.C. App. 141, 143, 177 S.E.2d 756, 757 (1970) ("We are of the opinion that the description 'automobile parts . . . of one Furches Motor Company' sufficiently identifies the property alleged to have been stolen and satisfies the provisions of the North Carolina Constitution and their purposes. The description identifies the type of parts and the owner from whom they were taken."). Thus, the indictment is not fatally defective.

B. Fourth Amendment Violation

Defendant argues that the trial court erred in denying his motion to suppress. Specifically, Defendant argues that the trial court should have suppressed the evidence obtained during the stop of his vehicle for two reasons: (1) the officer did not have reasonable suspicion to stop his vehicle and, alternatively, (2) the stop was unreasonably prolonged.

A trial court's ruling and order on a motion to suppress is reviewed for "whether the . . . 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 . . . conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution protect individuals against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Such protection extends to individuals and their vehicles. *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

In order to stop a vehicle, an officer must have reasonable suspicion. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008). "Reasonable suspicion is a less demanding standard than probable cause and requires . . . [o]nly some minimal level of objective justification[.]" *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (internal citations omitted). Our Supreme Court "has determined that the reasonable suspicion standard requires that the stop . . . be based on 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." *Id.* (internal citations omitted).

We conclude that based on the totality of the circumstances, the officer had reasonable suspicion to stop Defendant's vehicle. Specifically, there had been a report of attempted vehicle break-ins involving two black males traveling in an older red Honda during the early morning hours. Defendant's vehicle is an older red Honda and was spotted by the officer in proximity to the place and time from where the original complaint originated. Defendant was stopped at approximately three o'clock in the morning. *See State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 ("The 'unusual hour' is an appropriate factor for a law enforcement officer to consider in formulating a reasonable suspicion."). And four black males were in Defendant's vehicle, similar to the two black males seen exiting the vehicle and attempting the break-ins nearby. Perhaps any of these factors, standing alone, would not be sufficient to meet even the low reasonable suspicion threshold. But taken together, we conclude that reasonable suspicion was met.

Defendant argues, though, that even if the stop was justified, the *prolonging* of the stop was not. When a vehicle is validly stopped, the length of the stop, or the "tolerable duration of [the stop,] is determined by the seizure's mission, which is to address the traffic violation that warranted the stop, and attend to related safety concerns." *State v. Cox*, ___ N.C. App. ___, ___, 817 S.E.2d 53, 57-58 (2018) (internal citations omitted) (quoting *Rodriguez v. U.S.*, 575 U.S. ___, ___, 135 S. Ct. 1609, 1611 (2015)); s*ee State v. Downey*, 251 N.C. App. 829, 832, 796 S.E.2d 517, 519 (2017)

("When a law enforcement officer initiates a valid traffic stop, . . . the officer may not extend the duration of that stop beyond the time necessary to issue the traffic citation unless the officer has reasonable, articulable suspicion of some other crime."). For instance, "an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop." *State v. Warren*, 242 N.C. App. 496, 499, 775 S.E.2d 362, 365 (2015) (citing *Rodriguez*, *supra*).

We conclude that, based on the totality of the circumstances, the officers had reasonable suspicion to detain Defendant further. Specifically, during the stop, a piece of paper, a medical document regarding Mr. Marquis McCain, fell out of the vehicle. Mr. McCain was not an occupant of the vehicle. This occurrence permitted the officers to continue the stop and its related investigations. As such, the trial court did not err in denying Defendant's motion to suppress.

C. Fifth Amendment Violation

Defendant argues that the trial court violated the Fifth Amendment by allowing the State to elicit testimony about his post-arrest silence and requests we review this argument for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

A defendant is guaranteed the right to remain silent. U.S. Const. amend. V; *accord State v. Moore*, 366 N.C. 100, 104, 726 S.E.2d 168, 172 (2012). Such silence, post-arrest and post-*Miranda* warnings, "may not be used for any purpose." *Id.* (citing *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) ("[I]t does not comport with due process to permit the prosecution during the trial to call attention to [a defendant's] silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony[.]")).

In the present case, Defendant testified regarding the night and events in question. On cross-examination, the State questioned Defendant as follows:

> STATE: So Officer [] did not hear this story. And then after you were taken into custody you were read your rights, correct? And you were given an opportunity to speak to a detective, and you declined, right?
>
> DEFENDANT: Correct.
>
> STATE: So you had every opportunity in the world to tell this tale that you told today.
>
> DEFENDANT: No.
>
> STATE: And you've had, I don't know, two years plus to think about it, haven't you.

At which point Defendant's counsel objected.

Such questions by the State are generally error. *State v. Lane*, 301 N.C. 382, 384, 271 S.E.2d 273, 275 (1980) (stating that "any comment upon the exercise of [a defendant's right to remain silent] . . . [is] impermissible").

However, if the line of questioning is "for the purpose of impeachment by showing a prior inconsistent statement[,]" it may be permissible. *Id.* at 385, 271 S.E.2d at 275. Specifically, a defendant's silence will be construed as an inconsistent statement if, "at the time of defendant's silence, it would have been natural for him to speak and give the substance of his trial testimony." *State v. Odom*, 303 N.C. 163, 166, 277 S.E.2d 352, 354 n.2 (1981); *see, e.g., State v. McGinnis*, 70 N.C. App. 421, 424, 320 S.E.2d 297, 300 (1984) (holding that it would have been natural for the defendant to tell the arresting officer that the shooting for which he was arrested was an accident, thereby allowing the State to question defendant as to why he remained silent until trial).

Assuming *arguendo* that the State's line of questioning constituted error, we conclude that it did not amount to reversible error for two independent reasons.

First, any such error did not constitute plain error – there was overwhelming evidence that Defendant committed the crimes at hand, such that the State's line of questioning did *not* have a probable impact on the jury's verdict. *Moore*, 366 N.C. at 109, 726 S.E.2d at 175 (concluding that the defendant failed to meet his burden of establishing plain error where "the jury heard the testimony of all witnesses,

including defendant; and the evidence against defendant was substantial and corroborated by the witnesses").

Second, any error in the State's questioning of Defendant regarding his post-arrest silence was invited by Defendant. N.C. Gen. Stat. § 15A-1443(c) (2018). More specifically, Defendant arguably "opened the door" to this line of questioning when, on direct examination, he explicitly stated that he did not say anything to the officer after he was arrested. *See State v. Bovender*, 233 N.C. 683, 689-90, 65 S.E.2d 323, 329 (1951) ("To permit counsel for a defendant to comment upon or offer explanation of the defendant's failure to testify would open the door for the prosecution[.]").

As such, the trial court did not commit reversible error in allowing the State to impeach Defendant about his post-arrest silence.

III. Conclusion

We conclude that Defendant received a fair trial, free from reversible error. The indictment for misdemeanor possession of stolen goods was not fatally defective by describing the property as "gun supplies." Further, the trial court did not violate the Fourth or Fifth Amendments by denying Defendant's motion to suppress or allowing the State to question Defendant about his post-arrest silence.

NO PLAIN ERROR.

Chief Judge MCGEE concurs.

Judge ZACHARY concurs by separate opinion.

Report per Rule 30(e).

ZACHARY, Judge, concurring.

I write separately to address the merits of Defendant's Fifth Amendment argument. The majority assumes, *arguendo*, that the trial court erred in allowing the State to question Defendant concerning his post-arrest silence. I wish to emphasize that a contrary holding would have the effect of rendering a defendant's post-*Miranda* silence admissible any time the defendant offers exculpatory testimony at trial. I believe that such a holding would reduce the *Miranda* protections to merely an illusory fiction. I concur in the result, however, in that Defendant does not establish plain error.

It is well established that it is "fundamentally unfair to impeach defendants concerning their post-arrest silence after they had been impliedly assured through the *Miranda* warnings that their silence would not result in any penalty." *State v. Lane*, 301 N.C. 382, 384, 271 S.E.2d 273, 275 (1980). Nevertheless, the majority cites *Lane* for the proposition that "if the line of questioning was for the purpose of impeachment by showing a *prior inconsistent statement*, it may be permissible."[1] *Majority* at 11 (emphasis added) (quotation marks omitted). Under this exception, a defendant's invocation of the right to remain silent may "amount[ ] to a contradiction

[1] It is important to note that the *Lane* defendant *had* given a prior statement to officers, thus allowing the Supreme Court to examine whether the alibi to which the defendant testified at trial was inconsistent with that prior statement. *Lane*, 301 N.C. at 386, 271 S.E.2d at 276.

of his testimony at trial . . . only when, at the time of [the] defendant's silence, it would have been natural for him to speak and give the substance of his trial testimony." *State v. Odom*, 303 N.C. 163, 166 n.2, 277 S.E.2d 352, 354 n.2, *cert. denied*, 454 U.S. 1052, 70 L. Ed. 2d 587 (1981). In other words, the test is whether it would have been natural for the defendant to disregard the *Miranda* warnings and instead proceed to "assert[ ] the same defense asserted at trial." *State v. McGinnis*, 70 N.C. App. 421, 424, 320 S.E.2d 297, 300 (1984).

I cannot agree that in this case—or, for that matter, *any* case in which the defendant heeds the *Miranda* warnings by remaining silent—it would have been natural for Defendant to disregard his Fifth Amendment rights in favor of providing an immediate statement to the very individuals who possessed the authority to use it against him, as he had just been warned. Indeed, during cross-examination, the prosecutor specifically pressed Defendant on his decision to exercise his right to remain silent, asking why Defendant "didn't have any of these explanations . . . the night that [the officers] stopped [him] and took [him] into custody." Defendant responded, "[a]ll I know is whenever you're supposed to get locked up, you're supposed to wait until you speak to your lawyer."

In my view, Defendant did precisely that which he was advised would be the most prudent course of action for him to take. As the United States Supreme Court explained in *Miranda*, "[t]he person who has committed no offense . . . will be better

able to clear himself after warnings with counsel present than without." *Miranda v. Arizona*, 384 U.S. 436, 482, 16 L. Ed. 2d 694, 728 (1966). Under these circumstances, I cannot conclude that Defendant's decision to remain silent was anything *but* "natural."

The effect of a holding to the contrary is to force Defendant into a classic "Catch-22" dilemma for which he was not prepared and could not have anticipated. Nor should he have been required to, pursuant to the dictates of *Miranda*. *See id.* at 468 n.37, 16 L. Ed. 2d at 720 n.37 ("The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."); *State v. Moore*, 366 N.C. 100, 104, 726 S.E.2d 168, 172 (2012) ("[T]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.").

Nevertheless, I agree that Defendant cannot establish plain error. Defendant's explanation at trial that he had simply picked up the three individuals in order to give them a ride—without knowledge of their prior criminal activity—was substantially rebutted by the evidence that he was stopped at approximately 3:00 in the morning, shortly after the 911 call was placed, and less than one mile from where the call originated, *while driving a vehicle matching the description of the one employed in the crimes*. In light of the overwhelming evidence of Defendant's guilt, I agree that the prosecutor's reference to his post-*Miranda* silence did not amount to plain error warranting a new trial. *See Moore*, 366 N.C. at 109, 726 S.E.2d at 175

(concluding that the defendant failed to meet his burden of establishing plain error where "the jury heard the testimony of all witnesses, including defendant; and the evidence against defendant was substantial and corroborated by the witnesses").