IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-96

Filed: 17 December 2019

Mecklenburg County, 17CRS201621-22

STATE OF NORTH CAROLINA

v.

BRYAN XAVIER JOHNSON, Defendant.

Appeal by Defendant from Judgment entered 26 June 2018 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Douglas W. Corkhill, for the State.

Kimberly P. Hoppin for Defendant-Appellant.

INMAN, Judge.

Bryan Xavier Johnson ("Defendant") appeals his convictions following guilty pleas to felony cocaine possession and misdemeanor possession of drug paraphernalia. Defendant argues the trial court erred in denying a motion to suppress evidence supporting these convictions because the police officer who searched Defendant's vehicle (1) lacked reasonable suspicion to conduct the search and (2) unlawfully extended the duration of the traffic stop. After thorough review of the record and applicable law, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record and the evidence introduced at the suppression hearing tend to show the following:

At about 12:45 am on 14 January 2017, Officer Elliot Whitley ("Officer Whitley") and Sergeant Visiano of the Charlotte-Mecklenburg Police Department were traveling on Central Avenue in Charlotte in a single patrol car. Officer Whitley described the location as a high-crime area, where he has been involved in numerous drug and firearm cases.

During their patrol, Officer Whitley observed Defendant's black Dodge Charger. Sergeant Visiano ran a computer database search of the license plate number and discovered that it was registered to a different vehicle. Officer Whitley then initiated a traffic stop of Defendant's vehicle. Defendant stopped "fairly immediately."

As Officer Whitley approached the driver's side of Defendant's vehicle, he noticed Defendant raising his hands in the air and holding them outside the window of the vehicle. Based on his seven years of experience, including almost five years with particular involvement in drug crimes, Officer Whitley took notice that Defendant was raising his hands because "sometimes it can mean [that the person has] a gun."

Officer Whitley asked Defendant for his license and registration and stated that he stopped him because his vehicle tag was registered to an Acura MDX. Officer Whitley also asked Defendant if he had a firearm; Defendant responded that he did not. As Defendant was looking for his license and the vehicle registration, he explained to Officer Whitley that he had just purchased the vehicle that day. Defendant handed Officer Whitley his license out of his wallet and then searched in the center console to retrieve the registration and the bill of sale. As Defendant was searching in the console, Officer Whitley noticed him "blading his body," as if he were "trying to conceal something that [was] to his right." Although Defendant was cooperative throughout this process, he appeared "very nervous . . . like his heart [was] beating out of his chest a little bit." Defendant eventually provided the paperwork, including an apparent bill of sale. Officer Whitley returned to the patrol car to run Defendant's information through law enforcement databases. Defendant remained in his vehicle and Sergeant Visiano stood near the right passenger door during this time.

While reviewing Defendant's information on law enforcement databases, Officer Whitley learned that from 2003 to 2009, Defendant was charged with violent crimes of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, assault with a deadly weapon with the intent to kill, and discharging a weapon into occupied property. Officer Whitley testified that, of

Defendant's criminal history, he recalled that there were two convictions, the most recent occurring in 2009. Considering the totality of the circumstances, including Defendant's placement of his hands, blading of his body, nervous behavior, and criminal history, Officer Whitley believed that Defendant "was armed and dangerous at that point."

Officer Whitley directed Defendant to step out of the vehicle and stand behind the vehicle on the driver's side. With Sergeant Visiano and two other officers who had arrived behind him, Officer Whitley conducted a consensual frisk of Defendant's person, which did not reveal a weapon. Officer Whitley then searched the "lungeable areas" of the vehicle, over the objection of Defendant. Although no weapon was discovered in the vehicle, Officer Whitley found cocaine in the center console and placed Defendant under arrest.

On 14 January 2017, Defendant was charged with felony possession with the intent to sell or deliver cocaine and misdemeanor possession of drug paraphernalia. On 25 September 2017, Defendant was indicted on a charge of felony possession of cocaine.

Defendant filed a motion to suppress the evidence seized as a result of the search, arguing that Officer Whitley lacked authority to search his vehicle. A hearing on the motion was held on 26 June 2018. Officer Whitley was the sole witness and the only other evidence presented was a video of the stop and search captured by

Officer Whitley's audio-visual body camera. The trial court denied Defendant's motion, and Defendant then entered guilty pleas to felony possession of cocaine and misdemeanor possession of drug paraphernalia, reserving the right to appeal the denial of his motion to suppress. The trial court entered judgment, sentencing Defendant to 8 to 19 months' imprisonment, but suspended that sentence and placed Defendant on supervised probation for 24 months.

Defendant appeals.[1]

II. ANALYSIS

A. Standard of Review

"When reviewing a motion to suppress, the trial court's findings of fact are conclusive and binding on appeal if supported by competent evidence." *State v. Fields*, 195 N.C. App. 740, 742-43, 673 S.E.2d 765, 767 (2009). Unchallenged findings of fact are presumed to be supported by competent evidence. *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004). The trial court's conclusions of law are reviewed *de novo*. *Fields*, 195 N.C. App. at 743, 673 S.E.2d at 767.

Here, the trial court made the following relevant findings of fact:

> 1. That on January 14, 2017, Officer E. Whitley was licensed, sworn, and on duty, and was acting as a patrol officer conducting traffic control near Central Ave. and N. Sharon

[1] Defendant petitions this Court to issue a writ of certiorari in the event that we determine any defect in his appeal exists. Because Defendant specifically reserved his right to appeal before entering his guilty plea and gave oral notice of appeal thereafter, his appeal is properly before us, rendering his petition moot. *State v. Crandall*, __ N.C. App. __, __, 786 S.E.2d 789, 792 (2016).

Amity Rd. in Charlotte, Mecklenburg County, North Carolina.

2. That based on his training and experience working in that area for 7 years, the above mentioned area is considered by Officer Whitley to be a high crime area.

3. That while Officer Whitley observed a black Dodge Charger on N. Sharon Amity Rd. his partner ran the license plate through Department of Motor Vehicle (DMV) on that particular vehicle.

4. That upon searching the vehicle in the DMV database, officers learned that the license plate displayed on the black Dodge Charger had been issued to an Acura MDX vehicle.

5. That when the tag appeared to be fictitious, Officer Whitley initiated a traffic stop to investigate further.

6. That when Officer Whitley initiated the traffic stop, the driver stopped fairly immediately and pulled into a Burger King parking lot.

7. That the Defendant was the driver and sole passenger of the black Dodge Charger.

8. That after the Defendant stopped, he raised both of his hands in the air upon the officer's approach.

9. That Officer Whitley observed the Defendant's hands in the air, and based on Officer Whitley's training and experience, he believed that the gesture of raising one's hands in the car can indicate that a person has a gun inside the vehicle.

10. That based on his training and experience, Officer Whitley was on alert about the possible presence of a gun.

11. That when Officer Whitley explained that the stop was conducted for the fictitious tag, the Defendant immediately provided an explanation and told Officer Whitley that he had purchased the vehicle earlier that day.

12. That the Defendant presented Officer Whitley with documentation, one of which appeared to be a Bill of Sale.

13. That Officer Whitley asked the Defendant whether he had a gun and the Defendant indicated that he did not.

14. That Officer Whitley went to his patrol vehicle to check the Defendant's information in NCID, including his criminal history, and to run the VIN of the vehicle.

15. That Officer Whitley described that each step mentioned in finding 14 is part of Officer Whitley's routine practice during a traffic stop.

16. That when Officer Whitley observed the Defendant's record, there was an indication of a criminal history including: Robbery with a Dangerous Weapon, Conspiracy to Commit Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with the Intent to Kill, and Discharging a Weapon into Occupied Property.

17. That Officer Whitley reasonably had concerns for his safety.

18. That when Officer Whitley returned to the vehicle, he asked the Defendant to step out.

19. That once the Defendant had exited the vehicle, Officer Whitley conducted a frisk of the Defendant for weapons and did not find any weapons.

20. That Officer Whitley asked for the Defendant's consent to frisk the vehicle for weapons, which the Defendant denied.

21. That the Defendant questioned the officer about why he would need to frisk the car.

22. That Officer Whitley conducted a weapons frisk of the lungeable areas of the Defendant's car without consent of the Defendant.

23. That during that weapons frisk, Officer Whitley found a substance in a plastic baggie in the center console which appeared to be an illegal substance.

24. That after Officer Whitley completed the weapons frisk, the Defendant was placed under arrest.

B. Sufficiency of the Findings

Defendant first argues that portions of the trial court's findings are not supported by competent evidence. In reviewing the competency of the evidence, we afford "great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and . . . render a legal decision" based on those facts. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982).

Defendant argues finding of fact 10—that "based on his training and experience, Officer Whitley was on alert about the possible presence of a gun"—is not supported by either Officer Whitley's testimony or the video evidence. Officer Whitley testified that, in his experience, when people raise their hands in the manner Defendant did, there is the possibility of a firearm being present. This testimony supports the trial court's finding.

Defendant also challenges finding of fact 17 that "Officer Whitley reasonably had concerns for his safety." This "finding," however, is a conclusion of law that requires *de novo* review, without deference to the trial court. *See State v. Campola*, __ N.C. App. __, __, 812 S.E.2d 681, 687 (2018) ("If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' *de novo*." (citation omitted)). "As a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified as a conclusion of law," while findings of fact normally involve "logical reasoning through the evidentiary facts." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (quotations and citation omitted). This "finding" is akin to the reasonable suspicion framework establishing when a police officer can reasonably search a suspect. *See Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 909 (1968) ("[T]he issue is whether a *reasonably* prudent man in the circumstances would be warranted in the belief that his *safety* or that of others was in danger." (emphasis added)).

C. Reasonable Suspicion to Search the Vehicle

In addition to determining that Officer Whitley had a reasonable concern for his safety when he first spoke with Defendant, the trial court concluded, in relevant part, as follows:

> 1. That the motion of having hands up upon an officer's approach does not automatically incriminate an individual by itself, and the Defendant's action of showing his hands was reasonable. However, based on an officer's experience,

> it is reasonable for an officer to infer that the motion of hands up upon an officer's approach could indicate the presence of a weapon.
>
> 2. That based on the totality of [the] circumstances, including but not limited to: the Defendant's hands in the air upon the Officer's approach, and the Defendant's prior criminal history, that the limited frisk of the lungeable areas of the vehicle was justified.

Defendant contends that these conclusions are not supported by the findings of fact. We disagree.

Both the federal and North Carolina constitutions protect an individual's right to be free from unreasonable government searches and seizures absent probable cause. *State v. Cabbagestalk*, __ N.C. App. __, __, 830 S.E.2d 5, 9 (2019) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). Exceptions to the requirement of probable cause include the *Terry* stop-and-frisk exception, which allows a police officer to stop and briefly search a suspect and the area within the suspect's grasp for weapons if: "(1) the stop, *at its initiation*, was premised on a reasonable suspicion that crime may have been afoot; and (2) the officer possessed a reasonable suspicion that the individual involved was armed and dangerous." *State v. Malachi*, __ N.C. App. __, __, 825 S.E.2d 666, 669 (2019) (citing *Terry*, 392 U.S. 1, 30-31, 20 L. Ed. 2d at 911) (emphasis added).

Reasonable suspicion must "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." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (quotation marks and citation omitted). No fact is viewed in isolation, but rather a court "must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 440 (2008) (quotation marks and citations omitted). Reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence," *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000) (quotation marks omitted), needing only "some minimal level of objective justification." *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quotation marks and citations omitted).

Although originally applied to searches of a suspect's person, the second prong of the *Terry* analysis has been extended to encompass brief and limited searches of a vehicle, "even after the subject is removed from the vehicle." *State v. Minor*, 132 N.C. App. 478, 481, 512 S.E.2d 483, 485 (1999). As explained by the United States Supreme Court:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. . . . If, while

> conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.

Michigan v. Long, 463 U.S. 1032, 1049-50, 77 L. Ed. 2d 1201, 1220 (1983) (quotation marks and citations omitted) (emphasis added). In other words, we review the frisking of a vehicle the same way we would analyze an officer's frisk of a person. *Minor*, 132 N.C. App. at 481, 512 S.E.2d at 485. Because Defendant challenges the search of his vehicle, but not the traffic stop, we only address whether Officer Whitley had reasonable suspicion that Defendant was armed and dangerous.[2]

The facts that the trial court considered in denying Defendant's motion to suppress have all been established as "articulable facts" utilized in supporting an officer's reasonable suspicion. Here, the evidence shows that it was late at night, *State v. Watkins*, 337 N.C. 437, 442-43, 446 S.E.2d 67, 70-71 (1994); the stop occurred in a high-crime area, *Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576; Defendant exhibited a hand gesture, *State v. King*, 206 N.C. App. 585, 590, 696 S.E.2d 913, 916

[2] Defendant does not challenge the evidence supporting the trial court's finding of fact that Officer Whitley searched the "lungeable areas" of Defendant's vehicle. *See State v. Edwards*, 164 N.C. App. 130, 137, 595 S.E.2d 213, 218 (2004) (handcuffing the defendant and placing him on the curb did not prevent "the possibility of him gaining immediate control of the handgun" found in the vehicle); *State v. Braxton*, 90 N.C. App. 204, 209, 368 S.E.2d 56, 59 (1988) ("[T]hose areas of a passenger compartment of a motor vehicle where weapons might be hidden may be searched if the facts, coupled with rational inferences drawn therefrom, reasonably warrant an officer's belief that a suspect is dangerous and may gain control of weapons."). Defendant simply challenges Officer Whitley's reasonable suspicion to search any part of Defendant's vehicle based on a suspicion that he was armed and dangerous.

(2010); Defendant appeared highly nervous, *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997); Defendant "bladed" his body to shield something from being seen, *Malachi*, __ N.C. App. at __, 825 S.E.2d at 671; and Defendant had a violent criminal history involving weapons. *State v. Malunda*, 230 N.C. App. 355, 360, 749 S.E.2d 280, 284 (2013).

Though the trial court's findings do not note what time the stop occurred, that Defendant appeared nervous, or that Defendant bladed his body when reaching into the console, because that evidence was uncontradicted, we may imply those findings from the ruling of the court and include them in our reasonable suspicion calculus. *Campola*, __ N.C. App. at __, 812 S.E.2d at 690; *see also State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) ("When there is no conflict in the evidence, the trial court's findings can be inferred from its decision.").

Defendant likens this case to *State v. Minor*, 132 N.C. App. 478, 481, 512 S.E.2d 483, 485 (1999), in which we analyzed the defendant's hand movements and the officers' decision to leave the defendant in the vehicle for an extended period of time prior to the search. In *Minor*, at about 4:00 in the afternoon, a police officer pulled over the vehicle in which the defendant was a passenger because its temporary tag was illegible. *Id.* at 480, 512 S.E.2d at 484. When the officer activated his blue emergency lights, he saw the defendant "move his hand toward the center console of the car." *Id.* Once the car stopped, the officer frisked the driver and started talking

to him. While that was going on, another officer on the scene saw the defendant "put his hand on the door handle as if to emerge from the car, but [then] dropped his hand and remained in the car when he saw" the officer looking at him. *Id.* It was not until the other officer finished speaking with the driver that the defendant was removed from the vehicle and frisked for weapons. Although a frisk of the defendant's person revealed nothing, the officers found a handgun in the interior of the vehicle and found crack cocaine upon a further search of the defendant's pocket incident to his arrest. *Id.* We held in *Minor* that the officers' decision to leave the defendant in the vehicle until the officer conversing with the driver was finished, despite the defendant's hand movements, cut against the finding that "the officers supposedly feared" that the defendant was armed and dangerous. *Id.* at 483, 512 S.E.2d at 486.

Minor is readily distinguishable from this case. Officer Whitley witnessed a vehicle with a mismatched tag driving around midnight in an area where the officer had investigated "[n]umerous drug cases as well as firearm cases." Defendant then raised his hands out of the window, a gesture Officer Whitley has found in his experience increases the probability that a firearm is present. Defendant was also "very nervous" and contorted his body in such a way that made it seem like he was trying to hide something from Officer Whitley's vantage point. Though Officer Whitley was suspicious at this point, it was not until he learned of Defendant's violent

weapons-related criminal history that he then decided to frisk Defendant and the lungeable areas of the vehicle.

Citing a decision by the Fourth Circuit Court of Appeals, Defendant asserts that raising one's hands out of the window is a "show of respect and an attempt to avoid confrontation" similar to that of "a young man[] keeping his eyes down during a police encounter." *United States v. Massenburg*, 654 F.3d 480, 489 (4th Cir. 2011). *Massenburg* is neither binding nor persuasive.[3] The officers in *Massenburg* thought, and the trial court agreed, that the suspect was acting nervously when he refused to make eye contact with them during their request to search him. *Id.* The Fourth Circuit disagreed, writing that a lack of eye contact brings little weight to a determination as to nervousness because "the Government often argues just the reverse: that it was suspicious when an individual looks or stares back at [officers]." *Id.* (quotation marks and citation omitted) (alteration in original).

Here, Defendant is not potentially vulnerable to such a catch-22 as the defendant in *Massenburg* and this Court has established that raising one's hands in a similar fashion is a factor to be considered in determining whether reasonable suspicion justified a search. *See King*, 206 N.C. App. at 590, 696 S.E.2d at 916 (holding reasonable suspicion existed to search the defendant when considering, *inter*

[3] While decisions from other jurisdictions are not binding, "we may consider such decisions as persuasive authority" if found to be instructive. *State v. Fernandez*, __ N.C. App. __, __, 808 S.E.2d 362, 367 n.1 (2017) (citing *Carolina Power & Light Co. v. Emp't Sec. Comm'n of N.C.*, 363 N.C. 562, 569, 681 S.E.2d 776, 780 (2009)).

alia, "the unusual gesture of [the d]efendant placing his hands out of his window."). While it could be construed that a suspect who has his hands up means to convey his concession to police authority, decisions following *Terry* have long held that reasonable suspicion is circumstance-dependent and that each factor, no matter how individually innocent or inconsequential, must be viewed in conjunction with all other factors. *State v. Mangum*, __ N.C. App. __, __, 795 S.E.2d 106, 119 (2016). And as to the notion of Defendant possibly having a gun by the raising of his hands, courts are encouraged to "credit the practical experience of officers," like Officer Whitley, "who observe on a daily basis what transpires on the street." *State v. Johnson*, 246 N.C. App. 677, 692, 783 S.E.2d 753, 764 (2016) (quotations, citations, and alterations omitted). It is not within our purview to "indulge in unrealistic second-guessing" of what reasonable officers should have done in light of their past histories in similar scenarios. *United States v. Sharpe*, 470 U.S. 675, 686, 84 L. Ed. 2d 605, 616 (1985).

In viewing the express and implied facts through the totality of the circumstances, we affirm the trial court's conclusion that, at the time of the search, reasonable suspicion existed that Defendant was armed and dangerous. We acknowledge that Defendant responded to each of Officer Whitley's requests and commands and cooperated with him. However, "even in the face of an otherwise cooperative defendant who present[s] no obvious signs of carrying a weapon," *State v. McRae*, 154 N.C. App. 624, 630, 573 S.E.2d 214, 219 (2002), Officer Whitley was

entitled to rely on his experience and training and "formulate 'common sense conclusions' about 'the modes or patterns of operation of certain kinds of lawbreakers' in reasoning that" Defendant may have been armed. *Johnson*, 246 N.C. App. at 692, 783 S.E.2d at 764 (quoting *State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992)).

C. Extension of the Stop

Defendant also argues that Officer Whitley unlawfully extended the duration of the traffic stop. Because we have already determined that Officer Whitley had reasonable suspicion to conduct the search for weapons following the discovery of Defendant's criminal history, Defendant's argument is overruled.[4] *See State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (2008) ("Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." (quotations and citation omitted)).

III. CONCLUSION

For the foregoing reasons, we hold that Defendant has failed to demonstrate that the trial court erred in denying his motion to suppress.

[4] Defendant concedes that Officer Whitley's criminal history check was a lawful precautionary safety measure. *See State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (" '[T]he almost simultaneous computer check of a person's criminal record, along with his or her license and registration, is reasonable and hardly intrusive.' " (quoting *United States v. McRae*, 81 F.3d 1528, 1536 n.6 (10th Cir. 1996)).

NO ERROR.

Judge BERGER concurs.

Judge MURPHY dissents in a separate opinion.

No. COA19-96 – *State v. Johnson*

MURPHY, Judge, dissenting.

The officer did not have reasonable suspicion Defendant was armed and dangerous to support his search of Defendant's vehicle and I must respectfully dissent from the Majority's opinion to the contrary.

The Majority correctly sets out our binding rule regarding *Terry* searches of a vehicle's interior being appropriate where the officer has reasonable suspicion the suspect is armed and dangerous:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Michigan v. Long, 463 U.S. 1032, 1049, 77 L. Ed. 2d 1201 (1983). However, I disagree with the Majority's analysis of the "articulable facts" of Defendant's case and cannot conclude that, under the circumstances, the police officer here possessed a reasonable belief that Defendant was dangerous.

The Majority concludes, in relevant part, "[t]he facts that the trial court considered in denying Defendant's motion to suppress have all been established as

'articulable facts' utilized in supporting an officer's reasonable suspicion." In support of this statement, the Majority cites the following facts: (1) "it was late at night" when Defendant was pulled over; (2) "the stop occurred in a high-crime area"; (3) "Defendant exhibited a hand gesture"; (4) "Defendant appeared highly nervous"; (5) "Defendant 'bladed' his body to shield something from being seen"; and (6) "Defendant had a violent criminal history involving weapons." These facts were largely not found by the trial court and are not reflected in the record.

The Majority correctly notes that, "[w]hen there is no conflict in the evidence, the trial court's findings can be inferred from its decision." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015). In *Bartlett*, our Supreme Court reaffirmed the principle that, when the evidence is undisputed, certain findings can be inferred from the trial court's decision without the entry of formal findings of fact. *Id.* For example, implicit in a trial court's conclusion that a Defendant's statement to SBI agents must be suppressed because he did not initiate the dialogue with the officers is the finding that the Defendant did not initiate such a dialogue. *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996). This rule does not, however, give our appellate courts carte blanche to imply findings of fact in every instance, and I believe the Majority's reliance on the rule in this case is a misapplication of our jurisprudence. *See Moses v. Bartholomew*, 238 N.C. 714, 718, 78 S.E.2d 923, 926 (1953) (internal citation omitted) ("[The trier of facts] is the sole judge of the credibility and weight of

the evidence. As a consequence, it may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same.").

As the Majority notes, the trial court did not enter findings of fact that Defendant appeared nervous—let alone "highly" nervous—or that he bladed his body—let alone that he did so "to shield something from being seen"—during the stop at issue. Based on the record, I cannot agree with the Majority that these findings may be inferred from the trial court's ruling. Unlike the trial courts in *Bartlett* and *Munsey*, the trial court here entered detailed findings of fact to support its conclusion that the officer had reasonable suspicion to believe Defendant was armed and dangerous. In entering those findings, the trial court did not enter findings regarding Defendant's purported nervousness or "blading" of his body, and I do not infer such findings from the trial court's ruling in this case. Inferring additional findings, ones that go beyond what the trial court actually found, to rescue an otherwise insufficient ruling of the trial court is a perversion of the rule our Supreme Court described in *Bartlett*.

Additionally, I disagree with the Majority's reliance on *State v. King*, 206 N.C. App. 585, 590, 696 S.E.2d 913, 916 (2010), which is a case with facts that are distinguishable from those here. In *King*, the defendant held "both of his hands out of the window as [the officer] approached the vehicle, and without any question or

inquiry, [the d]efendant immediately told [the officer] that he had a gun sitting on the dashboard." *King*, 206 N.C. App at 587, 696 S.E.2d at 914. In weighing the factual circumstances supporting the officer's reasonable suspicion that the defendant was dangerous, we stated:

> The combination of this loaded handgun, the late hour, the odd manner by which Defendant and his passenger continued to look at Cecil as they passed the officer, and the unusual gesture of Defendant placing his hands out of his window, gave rise to far more than a hunch that Defendant might have been armed.

Id. at 590, 696 S.E.2d at 916. The Majority cites *King* as support for its contention that "Defendant made a hand gesture" that supported the officer's reasonable suspicion that he was armed and dangerous. I do not disagree that Defendant's "hand gesture" may enter our calculus, but I note the facts of *King* are distinguishable from those here, where Defendant raised his hands when the officer approached and then acted politely and cooperatively for the remainder of the stop.

Here, where the Majority lists six "articulable facts" supporting the officer's reasonable suspicion Defendant was armed and dangerous, I see far fewer facts to support such a conclusion. Defendant was pulled over late at night[5] in what the officer described as a "high crime area," that he raised his hands in a manner the officer believed was "sometimes" or "potentially" indicative of possession of a firearm,

[5] This is another fact that the trial court did not specifically find. However, the time of a traffic stop is a verifiable and purely objective fact that I am much more comfortable relying upon without a formal finding from the trial court.

and that he had a criminal record that included violent offenses involving weapons. Those facts do not provide a sufficient basis from which the officer may have reasonably suspected Defendant to be armed and dangerous.

I believe the Majority would agree that a holding that any traffic stop that occurs late at night in a "high crime area" is grounds for a *Terry* frisk of the stopped vehicle—even just the areas within the driver's immediate reach—grants officers overbroad authority to search. When I add to that scenario the combined weight of Defendant's action of raising his hands upon being pulled over and his criminal record, the facts of this case are still not enough for me to conclude the officer could articulate, based on demonstrable facts, reasonable suspicion Defendant was armed and dangerous at the time the officer decided to conduct his search. Specifically, in regard to his criminal record, Defendant had paid his debt to society for his previous transgressions and convictions are not meant to be a lifetime scarlet letter or permanent justification for police to treat that individual with a different class of liberty under our State or Federal Constitutions. I respectfully dissent.