IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-516

Filed 19 December 2023

Cabarrus County, Nos. 18 CRS 52885, 52926

STATE OF NORTH CAROLINA

v.

DONAT CALEB PORTER, Defendant.

Appeal by defendant from judgment entered 13 October 2021 by Judge Lori Hamilton in Cabarrus County Superior Court. Heard in the Court of Appeals 26 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.

Kimberly P. Hoppin for the defendant-appellant.

STADING, Judge.

Defendant Donat Caleb Porter appeals from judgment after a jury found him guilty of felonious marijuana possession, maintaining a dwelling for the keeping or storing of a controlled substance, manufacturing marijuana, and possession of marijuana paraphernalia. For the reasons below, we find no error.

I. Background

On 29 June 2018, at 4:45 a.m., Lieutenant Bailey, Deputy Grooms, and Deputy Rominger of the Cabarrus County Sheriff's Office were dispatched to the scene of a shooting in a cul-de-sac. Upon arrival, they located the victim of the gunshot wound—the defendant in this case—at his neighbor's house. Defendant informed Lieutenant Bailey that "somebody came in his house and shot him." The neighbor stated that defendant's sister sometimes resides in the house where the shooting took place, but "he wasn't sure if she was there or not." Upon learning this information, Lieutenant Bailey attempted to communicate with defendant to find out if anyone was still in the home, but defendant "quit responding" to him. All the while, defendant continued responding to his neighbor.

The law enforcement officers worked to secure the scene until emergency medical services ("EMS") arrived to transfer defendant to the hospital. Concerned that other victims or the shooter might be inside, Deputies Grooms and Rominger performed a protective sweep of defendant's home to "clear the residence." Once at the front door, Deputy Rominger noticed a strong odor of marijuana coming from inside. He also observed a shoeprint on the front door, noting it appeared to have been kicked open. When Deputy Grooms entered the garage, he discovered an apparent marijuana-growing operation. After determining that no one was in the garage, he continued clearing the remainder of "the residence[,] looking for victims or

suspects." The sweep took three minutes, and no one was found.

Later that morning, law enforcement officers applied for and executed a search warrant at defendant's home. During the search execution, various items were collected—among them: ammunition, a spent bullet casing and bullet, 4.1 pounds of marijuana wax or butter, 1.1 pounds of marijuana in a cooler, and items used to grow, distribute, and use marijuana. Thereafter, defendant was arrested for possession with intent to sell and deliver marijuana, maintaining a dwelling for keeping and selling marijuana, manufacturing marijuana, possession of drug paraphernalia, and conspiracy to sell marijuana. In a post-*Miranda* interview, defendant admitted to smoking marijuana. Defendant also said there were "profits" in the house from the "sales of marijuana," but the proceeds were missing after a breaking and entering of the house.

In trial court, defendant elected to represent himself and filed two pretrial motions: a motion to suppress and a motion to dismiss. In the first motion, defendant sought to suppress all evidence from the search, arguing that the search warrant was not supported by probable cause and there were no exigent circumstances permitting officers to enter his home. The trial court conducted a hearing and ultimately denied defendant's suppression motion. As for his motion to dismiss, defendant argued that the charges against him violated the "Religious Freedom Restoration Act" and the

"United Nations Treat[y] International Convention on the Elimination of All Forms of Racial Discrimination." Defendant contended that "anti-marijuana legislation, the Control Substance[s] Act, and the U.S. Drug policy as imposed in North Carolina and the United States [are] unconstitutional." At a pretrial hearing, defendant testified that he possessed the marijuana for religious purposes, and that anti-drug policy and legislation was "discriminative," "which is a violation of international law." The trial court found defendant's arguments meritless and denied defendant's motion. Defendant's case then proceeded to trial.

At trial, after the close of State's evidence and outside the presence of the jury, defendant asked the trial court whether introducing evidence in his case would cause him to lose the privilege of the last closing argument. In response, the trial court explained the following to defendant:

> Whether you testify, call a witness or introduce an exhibit because [the State] agreed that they are just going to let it come in, that constitutes you putting on evidence. If you put on evidence, then you lose the privilege of going last in closing arguments. That will then fall to the State. . . . [I]f you do not put on evidence, then you get to go last. . . . So, now, having said that and having also reminded you that you have the absolute right to testify on your own behalf and to put on any evidence that you feel is relevant and admissible in this case, what is your decision about testifying or putting on evidence?

Defendant answered that he was "willing to put" his case brief and its supporting

documents "on evidence," as it helped establish his constitutional claims. The trial court informed defendant that his case brief and transcripts could not be evidence in his case in chief but suggested as follows: "You can make a motion at the appropriate time, and you can ask that in conjunction with your motion that the Court take into consideration your case brief and the transcripts in support of your motion. You can do that. And they could become part of the record."

The trial court repeated that it "would consider allowing [defendant] to ask the Court to consider [the case brief and supporting documents] in conjunction with any motions that you make, so that it becomes part of the record." Defendant asked whether he could make a motion to introduce the case brief and supporting documents "in conjunction with the record." The trial court informed the parties that, to help defendant, it would interpret defendant's case brief as a standard motion to dismiss that defendants typically make at the close of the State's case. The trial court stated it would consider the case brief and documents that defendant wanted to introduce. Still with the jury still out, defendant argued in support of his motion to dismiss. Defendant's argument included his contention that the "war on drugs" violated the Fourteenth Amendment because, while the law was supposed to be applied to all people, "the reality is that a majority of Black and Latino people are . . . overly the victims of the war on drugs, and therefore, that it's not quite equitable."

Defendant also described the supporting documents attached to his case brief:

> [T]he supporting documents are more or less just research done by different universities. . . . I want to make sure that either you or the jury has the proper educational foundation to even understand what I'm saying. . . . [In reference to another part of the supporting documents:] It has nothing to do with this case particularly, but it is a Senate hearing document from 1989 talking about the Iran Contra deal and how the United States was bringing in cocaine through the use of Oliver North, Rick Ross, Danilo Blandon, and other—John Poindexter, Felix Rodriguez of the CIA. And this is, like I said, it has nothing to do with, you know, any of them or you guys, but it is a Senate document[.]

The trial court informed defendant that it had read the case brief, but the State had met its burden to survive a motion to dismiss. The trial court denied defendant's motion. Thereafter, defendant continued to offer supporting documents, which the trial court accepted and attached to his case brief. After defendant rested, he continued to argue to the trial court about the formation of U.S. anti-drug policy. Defendant also advanced general policy arguments against the enforcement of drug laws. Defendant concluded his argument by saying:

> And that is 99 percent of people in Washington right now. They don't care about helping the American people, they don't care about getting rid of these laws. And then they don't plan on to. We've heard both parties talk about we're going to do this, we're doing to do that. So we can't continuously to ask the legislature to wait all day while millions of people are affected. So it's up to maybe not this court, but it's up to the courts to actually strike down these

> laws as unconstitutional. And most of that, that's the majority of my argument.

The trial court denied defendant's motion a second time and reiterated that its job was to "to apply the law as it exists. There is an appropriate forum for changing the law, but it is not in a trial court. And so, my job is to apply the law. And based on my understanding and application of the law, at this time the motion to dismiss is denied." Thereafter, the jury returned a verdict of guilty on all counts and defendant entered his notice of appeal.

II. Jurisdiction

This Court has jurisdiction to hear defendant's appeal under N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(e) (2021).

III. Analysis

Defendant presents two issues on appeal: (1) whether the trial court erred when it denied his motion to suppress and admitted evidence obtained from the warrantless entry, and (2) whether the trial court erred when it denied defendant's motion to dismiss or did not permit him to present evidence in support of that motion.

A. Motion to Suppress

Defendant argues that the trial court erred in finding exigent circumstances justified the initial warrantless entry. Moreover, he invokes the fruit-of-the-poisonous-tree doctrine, alleging that the taint of the initial warrantless entry

extended to the subsequent search conducted pursuant to a warrant. Thus, he contends that the evidence obtained in each instance is inadmissible, as it was derived from unreasonable searches in violation of his constitutional rights. U.S. CONST. amend. IV; N.C. CONST. art. I, § 20.

Although defendant filed a pretrial motion to suppress, he readily acknowledges that "he did not specifically object each time a witness testified about entering the home based on the alleged exigent circumstances." And "[i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

Here, although defendant recognizes that he failed to properly preserve the issue, he nevertheless contends that the trial court committed plain error by admitting the evidence obtained from the searches. 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)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

1. Findings of Fact Nos. 2, 3, and 5

Defendant challenges portions of findings of fact nos. 2, 3, and 5. Our review of a trial court's denial of a motion to suppress is "limited to determining 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) (citations omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Aguilar*, 287 N.C. App. 248, 252, 882 S.E.2d 411, 415 (2022) (citation omitted). "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).

Defendant challenges the portion of finding no. 2 providing that "defendant, at that time, indicated that he did not know who had shot him and was otherwise uncooperative." He maintains that evidence supporting this finding was produced by a witness who "arrived after the warrantless entry had occurred." Nonetheless, upon

disregarding the testimony of such witness, there remains competent evidence to support this finding. Before the warrantless entry, while officers attempted to obtain information about others possibly in the house, defendant "quit responding to [him]" but "would still respond to [his neighbor]." Thus, "[a]s the trial court's finding of fact is supported by competent evidence, it cannot be disturbed on appeal." *State v. Oglesby*, 361 N.C. 550, 556, 648 S.E.2d 819, 822 (2007) (citation omitted).

Additionally, defendant challenges the portion of finding no. 3 that states "[i]nside, the officer saw a trail of blood that also led to [his neighbor's] property." He contends that (1) "[w]hatever officers found inside [of] the house would not be relevant to exigent circumstances," and (2) "testimony about blood outside [of] the house was variable and non-specific." The record contains testimony by Lieutenant Bailey indicating that defendant was located on his neighbor's property, "there was a trail of blood" coming from defendant's house, and the neighbor told the officer that defendant was shot at his own house. Likewise, Deputy Grooms testified that "[w]e were able to locate blood trails back to the residence." Furthermore, Deputy Rominger testified that "we had a blood trail trailing from that house." Accordingly, this portion of the finding is supported by competent evidence. *See Aguilar*, 287 N.C. App. at 252, 882 S.E.2d at 415. And while there is competent evidence to support the trail of blood between the two houses, the portion of the finding that states "[i]nside"

as any consideration of evidence from the interior of the house was derived from entry and does not show to have come from a plain view on the exterior prior to entry. *See Horton v. California*, 496 U.S. 128, 133–34, 110 S. Ct. 2301, 2306 (1990); *see also State v. Lupek*, 214 N.C. App. 146, 150, 712 S.E.2d 915, 918 (2011). Thus, "[t]his portion of the finding is not supported by substantial evidence" and "we strike this portion of the finding." *State v. Messer*, 255 N.C. App. 812, 825, 806 S.E.2d 315, 324 (2017).

Defendant also challenges the portion of finding no. 5 that provides "[t]he search warrant is supported by probable cause to search and is a valid search warrant, [and] exigent circumstances existed for the officers to enter the home in response to the 911 call and what they collectively observed at the scene." Defendant contends this portion is "more appropriated categorized as [a] conclusion[] of law." "Findings of fact are statements of what happened in space and time, while conclusions of law state the legal basis upon which a defendant's liability may be predicated under the applicable statutes." *State v. Parisi*, 372 N.C. 639, 655, 831 S.E.2d 236, 247 (2019) (internal citations and quotation marks omitted). "Any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law," while "[a]ny determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)

(internal citations and quotation marks omitted). In light of the foregoing authority, defendant is correct that finding no. 5 is more appropriately categorized as a conclusion of law. As explained below, this challenged conclusion of law withstands full review under a *de novo* standard. *Aguilar*, 287 N.C. App. at 252, 882 S.E.2d at 415.

2. Exigent Circumstances

The trial court concluded that exigent circumstances existed for law enforcement officers to enter the home and conduct a protective sweep. However, defendant maintains that "[t]he facts here did not demonstrate exigent circumstances sufficient to justify the warrantless entry into [his] home." "The governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *Cooke*, 306 N.C. at 135, 291 S.E.2d at 620 (citations omitted). "The existence of probable cause and exigent circumstances is one such exception." *State v. Marrero*, 248 N.C. App. 787, 794, 789 S.E.2d 560, 566 (2016) (citation omitted). Since defendant does not challenge the existence of probable cause, our review focuses on whether exigent circumstances were present. *See id.*

"An exigent circumstance is found to exist in the presence of an emergency or dangerous situation." *State v. Stover*, 200 N.C. App. 506, 511, 685 S.E.2d 127, 131 (2009) (internal quotation marks and citation omitted). The burden lies upon the State to prove that exigent circumstances necessitated the warrantless entry, the existence of which "depends on the totality of the circumstances." *Marrero*, 248 N.C. App. at 794, 789 S.E.2d at 566 (citations omitted). "In conducting this analysis, the United States Supreme Court has instructed courts to look to objective factors, rather than subjective intent." *Id.* at 795, 789 S.E.2d at 566 (citing *Kentucky v. King*, 563 U.S. 452, 464, 131 S. Ct. 1849, 1859 (2011)). Some of the factors considered in determining the presence of exigent circumstances include, but are not limited to:

> (1) the degree of urgency involved and the time necessary to obtain a warrant; (2) the officer's reasonably objective belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband.

Id. at 794–95, 789 S.E.2d at 566 (citation omitted).

By way of illustration, precedent provides a level of guidance for considering the application of the forgoing legal principles. A previous panel from our Court has held that "[w]hen there is a possibility of danger to police, officers may conduct a protective sweep of a residence in order to ensure that their safety is not in jeopardy."

Id. at 795, 789 S.E.2d at 566–67 (internal quotation marks and citation omitted). And "[a] protective sweep is reasonable if based on articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 795, 789 S.E.2d at 567 (internal quotation marks and citation omitted). Furthermore, quoting the United States Supreme Court, our state's Supreme Court has reaffirmed the ability of law enforcement to conduct a warrantless search "when they reasonably believe that a person within is in need of immediate aid" or "come upon the scene of a homicide . . . to see if there are other victims or if a killer is still on the premises." *State v. Scott*, 343 N.C. 313, 327–28, 471 S.E.2d 605, 614 (1996) (citing *Mincey v. Arizona*, 437 U.S. 385, 392–93, 98 S. Ct. 2408, 2413 (1978)).

Here, the record discloses that law enforcement officers responded to a "911 call regarding a gunshot victim." The "gunshot victim, [defendant], was lying on [his] neighbor's porch one or two doors down from . . . [his] residence." The neighbor was unaware if anyone else was in defendant's home at the time, but informed officers that another individual lived there as well. However, the neighbor told officers he was "unaware if anyone was in the . . . home at the time." Defendant, not yet under suspicion for any crime, stated that he did not know who shot him and "was otherwise

uncooperative." "Once EMS had responded, . . . secured . . . and . . . [began] treating [defendant]," the officers entered defendant's house, "looking for either victims or a shooter." Upon completing the protective sweep and determining "[n]o victims or shooters were located therein," "the officers exited the residence and secured it." While the investigation was not a homicide as in *Scott*, law enforcement in this case responded to a gunshot victim requiring emergency medical attention at a location in the same cul-de-sac as the premises searched. Unable to determine the location of the shooter, the weapon used, or other possible victims, the officers made rational inferences and acted a reasonably prudent manner—believing that the area to be swept harbored an individual posing a danger to those on the arrest scene, or another victim was on the premises. *See Marrero*, 248 N.C. App. at 795, 789 S.E.2d at 567; *see also Scott*, 343 N.C. at 327–28, 471 S.E.2d at 614.

After conducting a *de novo* review, we cannot say that defendant has shown a fundamental error occurred making this case exceptional. *See Aguilar*, 287 N.C. App. at 252, 882 S.E.2d at 415; *see also State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). The initial, brief entry into the house was permissible due to the existence of probable cause and exigent circumstances. Hence, denying the motion to suppress was proper and defendant has failed to show plain error in the trial court's admission of evidence derived from the searches.

B. Motion to Dismiss

Defendant's second contention is that the trial court erred in denying his motion to dismiss and "in failing to allow him to present evidence in support of his motion." Defendant argues that the trial court improperly treated his motion to dismiss for selective enforcement under the Equal Protection Clause as a general motion to dismiss for insufficient evidence. Defendant notes that his lack of knowledge of the law led him to misunderstand certain statements of the trial court. However, "[t]he right of self-representation is not a license to . . . not to comply with relevant rules of procedural and substantive law." *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 2541 (1975). And, when a defendant elects to proceed self-represented in a criminal action:

> the trial court is not required to abandon its position as a neutral, fair and disinterested judge and assume the role of counsel or advisor to the defendant. The defendant waives counsel at [their] peril and by so doing acquires no greater rights or privileges than counsel would have in representing [them].

State v. Rogers, 194 N.C. App. 131, 141, 669 S.E.2d 77, 84 (2008) (citation omitted).

During trial, defendant failed to present his claim as a motion to dismiss for selective enforcement; instead, defendant presented a generic "case brief" to the trial court. The trial court explained the procedures for submitting evidence to the jury. It also explained that defendant's brief and transcripts from prior hearings are not

proper evidence and needed to be included in a motion at the appropriate time. Defendant moved "to introduce [his] case brief and supporting documents in conjunction with the record[.]" The trial court then stated it was "going to treat what he's trying to do as a motion to dismiss at the close of the State's evidence[.]" Defendant did not object to the trial court's suggestion. Defendant never said that either he or the trial court misunderstood or misconstrued the "case brief" into a motion to dismiss. Instead, defendant opted to make arguments on his "case brief" in support of dismissal. The trial court denied defendant's motion, stating that it had read defendant's "case brief" but that the State presented sufficient evidence for the case to move forward. In view of the ambiguity of defendant's motion at trial, and in the interest of lenity—it was procedurally appropriate for the trial court to treat it as a motion to dismiss. *See State v. Sutton*, No. COA16-405, 2017 WL 164471, at *2 (N.C. Ct. App. Jan. 17, 2017).

We note that the trial court did defendant a favor by treating his "case brief" as a motion to dismiss since it would have been dismissed under Rule 10(a)(1), but the trial court, via Rule 10(a)(3), saved it for appellate review. *See State v. Golder*, 374 N.C. 238, 245–46, 839 S.E.2d 782, 788 (2020) ("[A]lthough Rule 10(a)(3) requires a defendant to make a motion to dismiss in order to preserve an insufficiency of the evidence issue, unlike Rule 10(a)(1)–(2), Rule 10(a)(3) does not require that the

defendant assert a specific ground for a motion to dismiss for insufficiency of the evidence." (citations omitted)). Thus, we are able to review his motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

We now journey into the legal thicket and apply both the substantial-evidence standard reserved for motions to dismiss and the selective-enforcement standard for alleged constitutional violations. First, turning to the substantial-evidence standard, "[i]n ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citing *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citations omitted). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988) (citation

omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565 (1995) (citation omitted).

Here, on treating defendant's "case brief" as a motion to dismiss, the trial court noted that it would consider "case brief" and documents defendant submitted in support. The trial court then explained that it had read defendant's "case brief," and that it was denying defendant's motion to dismiss because "taking the evidence in the light most favorable to the State . . . there is sufficient evidence for the case to go to the next phase." Thus, we see no reason to disturb the trial court's finding that substantial evidence supported the case to go to the jury.

Second, apart from the substantial-evidence standard, defendant's "case brief" still fails to surpass the high constitutional hurdle regarding Equal Protection selective-enforcement claims. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution mandate equal protection under the law for all persons. U.S. CONST. amend. XIV; N.C. CONST. art. I, § 19. Both prohibit "selective enforcement of the law based on considerations such as race[.]" *State v. Ivey*, 360 N.C. 562, 564, 633

S.E.2d 459, 461 (2006), *abrogated on other grounds by State v. Styles*, 362 N.C. 412, 665 S.E.2d 438 (2008) (internal quotation marks and citation omitted).

It is a "basic principle that a defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination." *McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767 (1987) (internal quotation marks and citation omitted). "This is so because 'actual discrimination is not presumed; it must be proved or admitted.'" *State v. Johnson*, 275 N.C. App. 980, 852 S.E.2d 733 (2020), *review allowed, writ allowed*, 379 N.C. 150, 863 S.E.2d 599 (2021), *and aff'd*, 385 N.C. 73, 890 S.E.2d 891 (2023) (quoting *Tarrance v. Florida*, 188 U.S. 519, 520, 23 S. Ct. 402, 403 (1903)). To succeed on a motion to dismiss for selective enforcement, defendants must first establish discrimination by a "clear preponderance of proof." *State v. Pope*, 213 N.C. App. 413, 415–16, 713 S.E.2d 537, 540 (2011) (internal quotations omitted). This "heavy burden" to dismiss a criminal matter for selective enforcement is necessary to assure the court that the selective enforcement "is designed to discriminate." *State v. Howard*, 78 N.C. App. 262, 266, 337 S.E.2d 598, 601 (1985) (citing *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 225 N.Y.S.2d 128 (1962)). Only after proving a *prima facie* case of discriminatory purpose and effect does the burden shift to the State to show permissible race-neutral

rationales for the decision at issue. *See Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 2048 (1976).

Here, defendant failed to make a *prima facie* showing of selective enforcement. His case brief and appellate brief fail to show how any action by police or prosecutors in his case was motivated because of the adverse effect it would have on an identifiable group. *See McCleskey*, 481 U.S. at 292, 107 S. Ct. at 1767 ("[The defendant] must prove that the decisionmakers in his case acted with discriminatory purpose."). Defendant also does not identify any similarly situated individuals of a different race in Cabarrus County or North Carolina who were treated more favorably than he was. *See United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct, 1480, 1482 (1996) ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." (citations omitted)).

Last, we briefly address defendant's remedial request that "this is an appropriate case for this Court's invocation of Rule 2" of the North Carolina Rules of Appellate Procedure such that "[d]ue process and fundamental fairness requires that this Court remand this matter for an evidentiary hearing to allow [defendant] the opportunity to make the prima facie showing on his discrimination claim he was not afforded at trial." N.C. R. App. P. 2. Defendant's request is wholly frivolous and such

action is completely unnecessary considering the foregoing *de novo* analysis of his claims. Defendant's assignments of error with respect to the motion to dismiss are overruled.

IV. Conclusion

We find both of defendant's contentions without merit and discern no error by the trial court.

NO ERROR.

Judge CARPENTER concurs.

Judge HAMPSON concurs in result.

Report per Rule 30(e).