No. 22-906 DISTRICT 25B

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Catawba County
	)	19-CRS-53701-02; 20-CRS-1227
JOSHUA JEZREEL DUNCAN	)	
	)	

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DEFENDANT-APPELLANT'S
OPENING BRIEF

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DEFENDANT-APPELLANT'S
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ISSUE PRESENTED

I. DID THE TRIAL COURT ERR IN DENYING MR. DUNCAN'S MOTION TO SUPPRESS WHEN LAW ENFORCEMENT SUBSTANTIALLY AND WILLFULLY VIOLATED STATUTORY KNOCK-AND-ANNOUNCE REQUIREMENTS?

STATEMENT OF THE CASE

The State indicted Joshua Jezreel Duncan for possession with intent to manufacture, sell, or deliver cocaine; two counts of trafficking in heroin; maintaining a dwelling for controlled substances; and possession of a firearm by a convicted felon. (R pp 6-8)[1] Mr. Duncan's pretrial motion to suppress was heard by the Honorable Thomas Davis on 28 March 2022. (T p 1) The trial court denied the motion orally that same day, (T pp 98-99), in a ruling memorialized by a written order entered on 1 April 2022, (R pp 70-80).

Mr. Duncan then pled guilty to all charges on 29 March 2022. (R pp 81-84) The trial court sentenced Mr. Duncan to consecutive sentences of 90-120 months and 19-32 months. (R pp 89-92) Mr. Duncan gave notice of appeal of the judgment and the denial of the motion to suppress on 7 April 2022. (R pp 93-94)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Mr. Duncan has filed a petition for writ of certiorari asking this Court to grant review of the trial court's denial of his motion to suppress.

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[1] The record on appeal is cited as "R." "T" refers to the trial court transcript dating from 28 March 2022. Footage from Investigator Langer's body worn camera is cited as "BWC."

FACTUAL AND PROCEDURAL BACKGROUND

I. EVENTS LEADING UP TO AND ON 26 JULY 2019

Based on the suspicion that Lacy Neil Smyre III was selling narcotics, Newton Police Department Investigator Dylan Scism applied for and received a search warrant on 25 July 2019. (R p 70-71) The warrant application alleged Mr. Smyre sold narcotics out of 202 West D Street, Apartment A in Newton [hereinafter "Apartment A"]. (R pp 70-71) Accordingly, the warrant permitted the search of Apartment A, part of a single-story brick, ranch-style duplex on the corner of D Street and Boast Avenue. (R p 25) It also authorized the search of Mr. Smyre's 2007 black Lexus. (R p 25) Defendant Joshua Duncan was not a target of the warrant. (R pp 22-35)

In preparation for executing the warrant, Investigator Scism requested and received assistance from the Catawba County S.T.A.R. team. (R p 71; T pp 41-42) According to S.T.A.R. team member and Catawba County Sheriff's Deputy Jr. Hewitt, the team "is a specialized unit trained in the execution of search warrants." (T pp 41-42)

Investigator Scism led a pre-search warrant execution meeting in the early morning hours of 26 July 2019. (R p 71; T pp 51, 68) This meeting included S.T.A.R. team members tasked with entry as well as other officers supporting them and the associated search, both groups featuring officers with the Newton Police Department and the Catawba County Sheriff's Office. (R pp

56-57, 73; T pp 51, 55-56, 61) At least one officer from the Lenoir Police Department participated in the warrant execution as well. (T pp 77, 79)

The meeting advised those assisting in warrant execution "of the target, the target residence location, and the operation plan." (R p 71) The meeting did not identify any exigent circumstances associated with this warrant execution, according to Investigator Scism and Deputy Hewitt as well as Catawba County Sheriff Deputy Anthony Stobbe and Newton Police Investigator Carlos Uribe. (R p 71; T pp 46, 53, 59, 75) If the officers expected exigencies to arise, they would have noted them in the operation plan and "reviewed [them] at the briefing." (T pp 53-54) These officers also left this meeting not knowing whether anyone was at home in Apartment A. (R pp 72-73; T p 43)

The team's written operation plan reiterated many items reviewed at the pre-planning meeting, including the target, target residence, and target car. (R p 56) In addition, it stated that "THE ENTRY TEAM WILL FIRST KNOCK AND ANNOUNCE PRIOR TO ANY ENTRY BEING MADE UNLESS EXIGENT CIRCUMSTANCES OCCUR." (R p 56) (emphasis in original); *see also* (T p 58) (Investigator Uribe testifying he knew this was a knock-and-announce warrant execution). The plan also identified 10 members of the S.T.A.R. entry team participating in the warrant execution, including Deputies

Stobbe and Hewitt and Investigator Uribe, as well as seven members of a separate search team, including Investigator Scism. (R p 57)[2]

Law enforcement "arrived at the target residence for execution of the search warrant" at approximately 6:46AM. (R p 71) Investigators Scism and Langer, also of the Newton Police Department, arrived together in a marked patrol car and positioned themselves on the south side of Apartment A to monitor its back door. (R p 74) The S.T.A.R. team initially positioned their van and themselves to the north on the street nearest Apartment A's front door. (BWC 0:34; T p 56; R p 74) Approximately 50 feet separated these south and north teams. (T p 73)

Investigator Langer wore a body camera on the morning of 26 July 2019. [Defendant's Exhibit 1, hereinafter "BWC"][3] (T pp 80-81) Though the BWC does not show all of the S.T.A.R. team's actions, it does depict them at pivotal moments in the warrant execution.

The van in which the S.T.A.R. team arrived is first visible outside of Apartment A at 0:27 on the BWC. (BWC 0:27) At this point, the van has not yet parked in its final position outside of Apartment A, (BWC 0:27, 0:34), nor have S.T.A.R. team members emerged from the van, (BWC 0:34).

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[2] The 17 officers listed does not include all the officers who assisted with the warrant execution. For instance, Investigator T.J. Langer, discussed below, is not listed. (R p 57)

[3] No member of the S.T.A.R. team wore BWCs. (R p 41)

The S.T.A.R. team van is next visible at 0:34 on the BWC, having now arrived at its final position. (BWC 0:34) Members of the S.T.A.R. team are visible emerging from the van from 0:34 to 0:41 on the BWC. (BWC 0:34-0:41) They are visible walking in a line toward the front door of Apartment A from 0:39 to 0:44 on the BWC. (BWC 0:39-0:44; T pp 52-53, 58) Deputy Hewitt was at the front of this line with a battering ram, Investigator Uribe was at its end, and Deputy Stobbe somewhere in between. (R p 72; T pp 42, 52, 56, 58) At 0:44 in the BWC, Deputy Hewitt had not yet reached the front door. (BWC 0:44; T p 42) The BWC then loses sight of the path to the door and the S.T.A.R. team as the view is obstructed by Investigators Scism's and Langer's patrol car. (BWC 0:44; R p 74)

Though the BWC is showing the patrol car, sounds from the area around the house are still audible on the BWC. The first sound heard from the front door of the house where the S.T.A.R. team was located, (R p 72; T pp 42, 45, 50, 52, 56, 58), is a pounding noise at 0:48 on the BWC, (BWC 0:48). This noise recurs approximately seven times from 0:49-0:52. (BWC 0:49-0:52) Following this, there is a noise at 0:53 consistent with the door giving way after having been rammed. (BWC 0:53); *see also* (T p 45) (Deputy Hewitt testifying he rammed the door open). The pounding then stops and does not recur. (BWC 0:53-3:10) After forcing the door, Investigator Stobbe testified that the S.T.A.R. team entered Apartment A. (T p 50) In short, Deputy Hewitt breached the door

and the S.T.A.R. team entered Apartment A approximately 19 seconds after they are first seen disembarking their van and assembling and five seconds after reaching the front door, all without making any announcements audible on the BWC. (BWC 0:34-0:53)

Just over 10 seconds after noise from the door ends and the door is heard giving way, a Black man looked out of one of Apartment A's back windows. (R p 74; BWC 1:05) Investigators Scism and Langer then begin approaching the back door of Apartment A. (BWC 1:07) In approaching the back door, the path approaching the front door becomes visible again on the BWC; no S.T.A.R. team members are visible on that path. (BWC 1:09) After another 10 seconds, Investigators Scism and Langer observed an individual, allegedly Mr. Duncan, throw materials into the back yard before going back into the home. (BWC 1:15-1:19; R p 74)

Investigators Scism and Langer continued toward the back door. (BWC 1:15-1:30) They then entered the bedroom of Apartment's A tenant, Ms. Burnette Misher. (BWC 1:30-1:39; R pp 36, 59, 74) S.T.A.R. team members had already reached the bedroom and handcuffed and detained Mr. Duncan and Ms. Misher by the point Investigators Scism and Langer entered. (BWC 1:30-1:39; R pp 36, 59, 74; T pp 50, 56, 90) Both Mr. Duncan and Ms. Misher were naked when detained. (BWC 1:30-1:39; R p 36)

In total, three adults, Mr. Smyre, Mr. Duncan, and Ms. Misher, as well as two children, were inside Apartment A when law enforcement forcibly entered. (T p 64) Mr. Smyre, Mr. Duncan, and Ms. Misher were sleeping when law enforcement executed the warrant. (R p 59) Mr. Duncan was Ms. Misher's frequent overnight guest. (R p 36) Pertinent to this case, law enforcement seized a bag of gray, powdery substance located outside Apartment A in front of a bush, a bag of a white powdery substance located behind that bush, as well as a bag of a white, granular substance, a tub of Benefiber, and a handgun (the latter with materials belonging to Mr. Duncan) in Ms. Misher's bedroom. (R pp 59-60)

II. REPORTS ON 26 JULY 2019 WARRANT EXECUTION

On 2 August 2019, Officer Annis of the Lenoir Police Department, submitted a report on the 26 July 2019 warrant execution. (T pp 77, 79) Officer Annis assisted in executing the warrant. (T p 79) Officer Annis's roughly contemporary report does not mention the officers knocking or announcing themselves when they executed the warrant on 26 July 2019. (T p 79)

In December 2021, Deputies Hewitt and Stobbe as well as Investigator Uribe filed supplemental reports on the July 2019 warrant execution at issue. (T pp 46-47, 52, 80) They had not previously filed supplemental reports. (T p 80) Deputies Hewitt and Stobbe testified they filed reports at the request of the district attorney. (T pp 47, 52) For the first time in these reports,

Deputies Hewitt and Stobbe as well as Investigator Uribe indicated that officers knocked and announced themselves when they conducted the warrant execution at issue. (T p 80)

III. MOTION TO SUPPRESS HEARING

At the hearing on Mr. Duncan's motion to suppress all evidence obtained as a result of the warrant execution, Deputy Stobbe and Investigator Uribe testified that they heard Deputy Hewitt knock and announce before forcibly entering Apartment A. (T pp 52, 58) Deputy Stobbe testified the knock and announce "*was loud enough so someone on the other side of the house would be able to hear*." (T p 52) (emphasis added) He estimated that five seconds passed between the last of the three announcements and the ramming of the door. (T p 53) Investigator Uribe testified that Deputy Hewitt announced "Sheriff's office, search warrant, open the door[,]" (T p 56), on multiple occasions, (T p 58). He estimated 12 seconds passed between the last announcement and the ramming of the door. (T p 58)

Deputy Hewitt testified he "knocked on the door loudly three times and . . . yelled 'Sheriff's office, search warrant, open the door.'" (T p 42) He testified he made three such announcements "loud enough for the [Apartment A] occupants to hear it if they're inside" as well as people on the other side of the home. (T pp 44-45) He estimated 12 to 15 seconds passed between the third announcement and his ramming the door. (T p 45) He acknowledged he did not

know whether anyone was inside Apartment A when he entered, that he did not receive an order to ram the door, and that no exigent circumstances developed during his approach to and entry of Apartment A. (T pp 43, 46)

Investigator Scism testified that he did not hear any of these three purported "Sheriff's office, search warrant, open the door" announcements on the other side of the home approximately 50 feet away.[4] (T pp 61-62, 73) He further testified that he could not hear the announcements on the BWC. (T p 84) Indeed, while the ramming of the door as well as its giving way is plainly audible on the BWC, (BWC 0:49-0:53), no yelling of any sort is audible to this point, (BWC 0:00-0:53).

IV. ORDER DENYING MOTION TO SUPPRESS

The trial court denied Mr. Duncan's motion to suppress pursuant to an order rendered 28 March 2022 and entered on 1 April 2022. (R pp 70-80) In pertinent part, the trial court found that Deputy Hewitt "knocked on the [front] door loudly three times, then announced in a loud voice, 'Sheriff's Office,

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[4] Fifty feet, or less than 17 yards, is roughly the typical distance between a quarterback in the shotgun formation and a defensive safety before a snap in a football game. Wikipedia, The Free Encyclopedia, Safety (Gridiron Football Position), at https://en.wikipedia.org/wiki/Safety_(gridiron_football_position) (noting safety sets up 10 to 15 yards from line of scrimmage) (last visited 3 March 2023). Or, for soccer, fans 17 yards is less than the distance between the top or center of the penalty box and the center of the goal, which is 18 yards away. Wikipedia, The Free Encyclopedia, Penalty Area, at https://en.wikipedia.org/wiki/Penalty_area#:~:text=The%20penalty%20area%20or%2018,yd)%20in%20front%20of%20it (last visited 3 March 2023).

Search Warrant, Open the Door.'" (R p 72) The trial court then found "Deputy Hewitt repeated the knock and announcement two (2) more times." (R p 72) "When no one answered" after "[f]ifteen (15) seconds elapsed between the last knock and announcement," according to the trial court, "Deputy Hewitt reasonably believed entry was being denied or [un]reasonably delayed, and thus the door was then breached with a 'Halogen' battering ram." (R p 72)

The trial court further found that immediately prior to the S.T.A.R. team entering Apartment A, a "black male (later identified as Defendant) opened the door of the South side of the residence which led to a porch (back door), and threw out two (2) baggies of suspected narcotics into the yard, and opened up a third bag of suspected narcotics and dump (sic) it on the ground." (R p 74) The trial court characterized this as "the Defendant attempting to destroy evidence." (R p 75)

ARGUMENT

Law enforcement struck the door of Apartment A with a battering ram at approximately 6:46AM on 25 July 2019. They did so without announcing themselves or their purpose. This violated North Carolina law governing knock-and-announce warrant executions. In conducting an impermissible no-knock warrant, the S.T.A.R. team procured the challenged evidence by egregiously and willfully violating deeply entrenched privacy interests

associated with homes like Apartment A. This Court must reverse the trial court's denial of Mr. Duncan's motion to suppress.

I. THE TRIAL COURT ERRED IN DENYING MR. DUNCAN'S MOTION TO SUPPRESS WHEN LAW ENFORCEMENT SUBSTANTIALLY AND WILLFULLY VIOLATED STATUTORY KNOCK-AND-ANNOUNCE REQUIREMENTS.

A. Standard of Review

"At a hearing to resolve a defendant's motion to suppress, the State carries the burden to prove by a preponderance of the evidence that the challenged evidence is admissible." *State v. Parker*, 183 N.C. App. 1, 3, 644 S.E.2d 235, 238 (2007). "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). "Conclusions of law are reviewed de novo and are subject to full review." *Id.* at 168, 712 S.E.2d at 878.

B. Many of the trial court's findings of fact are not supported by competent evidence.

BWC footage captures the circumstances surrounding law enforcement's warrant execution in this case. Most importantly, this footage belies officer testimony and trial court findings that the S.T.A.R. team gave Apartment A's occupants notice of its identity and purpose before forcibly entering. The clear record evidence here must trump self-serving law enforcement testimony to

the contrary. In addition, this footage and the broader evidentiary record establishes Mr. Duncan did not seek to "destroy" evidence. These and other related findings are not supported by the record.

1. This Court has in the past and should in this instance assess the trial court testimony and findings in light of the BWC footage.

Though deference is owed to trial court findings and its assessment of the evidence, that does not extend to versions of events "discredited by the record." *Scott v. Harris*, 550 U.S. 372, 380 (2007). More specifically, where an interested party tells one story and the video another, appellate courts should "view[] the facts in the light depicted by the videotape" available. *Id.* at 381.

Our courts have done just that. With the proliferation of dash and body-worn cameras, this Court has not hesitated to assess factual findings and testimony with the assistance of objective observation. *See, e.g., State v Eagle*, 879 S.E.2d 377, 385, 387 (N.C. App. 2022) (determining, contrary to the trial court's assessment, that defendant would not have felt at liberty to leave police encounter based in part on video evidence), *State v. Johnson*, 279 N.C. App. 475, 476, 488-89, 865 S.E.2d 673, 676, 683-84 (2021) (reviewing video evidence from patrol car in assessing officer conducted search as opposed to frisk and reversing trial court denial of motion to suppress as a consequence); *State v. Bedient*, 247 N.C. App. 314, 320-21, 786 S.E.2d 319, 324-25 (2016) (rejecting

trial court finding inconsistent with what was depicted on dashboard video footage).

2. Findings asserting a knock and announce occurred are belied by the BWC footage.

The BWC footage belies Findings of Fact 14-15, 20, 26, and 34 as well as Conclusions of Law 3 and 5-7.[5] Each of these findings and "conclusions" embrace, in some form or another, the notion that law enforcement knocked, announced, and waited before forcibly entering Apartment A. Finding of Fact 14, for example, states that Deputy Hewitt "announced in a loud voice, 'Sheriff's Office, Search Warrant, Open the Door'" three times. (R p 72, Finding of Fact ¶ 14) Others reference the contention that forcible entry occurred 15 seconds after the last of multiple knock and announces. (R p 72, Finding of Fact ¶ 15; R p 78, Conclusion of Law ¶ 5; R p 79, Conclusion of Law ¶ 6) Another asserts that the throwing of evidence into the back yard demonstrates a knock and announce had occurred. (R p 78, Conclusion of Law ¶ 3) Yet another contends that the knock and announce caused the throwing of evidence into

[5] Labels are not dispositive when appellate courts review a trial court order. *Griffin v. Absolute Fire Control, Inc.*, 269 N.C. App. 193, 204, 837 S.E.2d 420, 428 n.5 (2020). Even when labelled a conclusion of law, a "determination reached through logical reasoning from evidentiary facts" is a finding of fact. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and internal quotation marks omitted). For instance, the trial court "conclusion of law" that "there is no causal relationship between the potential statutory violations and the evidence found" is logical, as opposed to legal, reasoning and, hence, a finding of fact despite its label. (R p 79, Conclusion of Law ¶ 7)

the yard. (R p 79, Conclusion of Law ¶ 7) Finally, Finding of Fact 34 asserts "Investigator Scism did not hear the knock and announce happening on the North side of the residence due to the fact he was focused on the activity occurring with Defendant on the South side of the residence." (R pp 74-75, Finding of Fact ¶ 34)

The BWC footage disproves each of these findings and discredits all of the testimony upon which they rely. This footage makes plain law enforcement never announced themselves or their purpose, much less doing so loudly on three occasions. (BWC 0:35-1:39)

The footage also demonstrates the impossibility of 15 seconds elapsing between the purported third announcement and forcible entry. Members of the S.T.A.R. team are visible emerging from the van from 0:34 to 0:39 on the BWC. (BWC 0:34-0:39) At 0:44 on the BWC, the S.T.A.R. team had not yet reached the front door of Apartment A. (BWC 0:44) Pounding from the front door is audible from 0:48-0:52 on the BWC. (BWC 0:48-0:52; R p 72 ¶ 14; T pp 42, 45, 50, 52, 56, 58) Then, at 0:53, there is a noise consistent with the door giving way after having been rammed. (BWC 0:53; T p 45) The pounding stops after 0:52 on the BWC, (BWC 0:53-3:10); Investigator Stobbe testified that the S.T.A.R. team then entered, (T p 50).

The BWC shows a much more condensed timeline than the trial court found. Specifically, the BWC and associated testimony establish that Deputy

Hewitt breached the door 19 seconds after members of the S.T.A.R. team were still disembarking their van and assembling, (BWC 0:34-0:53; T pp 45, 50), nine seconds after S.T.A.R. team members were still approaching the door, (BWC 0:44-0:53), and within five seconds of the first pounding noise. (BWC 0:48-0:53) The BWC makes plain that the officers could not have knocked and announced three times and then waited 15 seconds before ramming the door.

Consistent with the BWC, Investigator Scism did not hear the knock and announce because it did not occur, not because his focus was elsewhere. Given his positioning alongside Investigator Langer (and his BWC) on the other side of the home within approximately 50 feet of the S.T.A.R. team, (T p 73), Investigator Scism surely would have heard (and the BWC captured) three knock and announces. Indeed, Deputies Stobbe and Hewitt both testified that the announcements were "loud enough so someone *on the other side of the house* would be able to hear." (T p 52) (Stobbe) (emphasis added); *see also* (T pp 44-45) (Hewitt). The trial court's suggestion that Investigator Scism simply missed the three knock and announces likewise does not withstand scrutiny. As discussed further below, the suggestion that Mr. Duncan's action distracted Investigator Scism, (R pp 74-75, Finding of Fact ¶ 34), gets the chronology of events wrong. The officers' approach to and breaching of the front door preceded any activity at the back of the home. (BWC 0:49-1:05; T pp 46, 50)

3. Findings contending that the occupants' denial or delay of entry justified forcible entry are also disproven by the BWC footage.

Finding of Fact 15 and Conclusion of Law 5 both assert that Deputy Hewitt reasonably believed that occupants were denying or unreasonably delaying S.T.A.R. team entry into Apartment A when there was no response to his repeated knock and announces. (R p 72, Finding of Fact ¶ 15, R p 78, Conclusion of Law ¶ 5) Again, this supposed justification is fatally undermined by the fact that there were no knock and announces to respond to. Apartment A's occupants could not deny or unreasonably delay entry to law enforcement in the absence of law enforcement identifying themselves.

4. Trial court findings regarding a causal connection (or lack thereof) between notice and disposal of evidence are incompatible with the BWC footage.

In Finding of Fact 31, the trial court finds

> *Immediately prior to the S.T.A.R. team's entry into the residence* using the North door (front door), Investigator Scism and Investigator Langer, who were positioned on the South side of the residence with a marked police car, observed a black male peer through the window toward them, and then the same black male (later identified as the Defendant), opened the door on the South side of the residence which led to a porch (back door), and threw out two (2) baggies of suspected narcotics into the yard, and opened up a third bag of suspected narcotics and dump (sic) it on the ground.

(R p 74, Finding of Fact ¶ 31) (emphasis added) And, in Conclusion of Law 6, the trial court finds that "[t]he actions of the Defendant on July 26, 2019 in his attempt to exit the residence and destroy evidence further support the short notice [before entry]." (R p 79, Conclusion of Law ¶ 6)

These findings get the order of events wrong. The S.T.A.R. team breached the door at 0:53 on the BWC. (BWC 0:53) They then entered the home. (T p 50) Investigators Scism and Langer did not see activity at the window for another 12 seconds, followed by materials being thrown into the back yard after another 10 seconds passed. (BWC 1:05-1:15)

Moreover, to the extent these findings are read as indicating action inside the home influenced the S.T.A.R. team's decision to force entry, this assertion is baseless. The chronology plainly indicates the team's forcible entry led to the action at the back of the home, not vice versa. In addition, consistent with Deputy Hewitt's testimony that no unforeseen circumstances influenced his decision to force the door, (T p 46), the S.T.A.R. team was unaware (and, given their positioning at the front of the home, could not have been aware) of the activity at the back of the home before entering.

On the other hand, the trial court also finds "there is no causal relationship between the potential statutory violations and the evidence found[.]" (R p 79, Conclusion of Law ¶ 7) But, obviously, the unannounced entry resulted in the disposal of evidence in the back yard.

5. The trial court's findings pertaining to the BWC footage, to the extent they are findings, are not supported by competent evidence.

In Finding of Fact 55, the trial court recites defense counsel's arguments at the hearing as to what the BWC footage depicted. (R p 77 ¶ 55) Such recitations of arguments are not findings warranting appellate deference. *See Sherrill v. Sherrill*, 275 N.C. App. 151, 166, 853 S.E.2d 246, 256 (2020) (noting recitations of allegations do not constitute findings). Assuming that these recitations are factual findings, the assertions that defense counsel's arguments regarding the BWC footage were "speculative[,]" "conclusory, and not reliable[,]" (R p 77 ¶ 55), are not explained elsewhere in the order. And these assertions lack any competent evidence; in fact, Investigator Scism acknowledged body camera footage can assist in accurately documenting law enforcement encounters. (T p 70)

6. The trial court's findings that Mr. Duncan sought to "destroy" evidence is not supported by competent evidence.

In Finding of Fact 39 as well as Conclusions of Law 6-7, the trial court finds Mr. Duncan sought to "destroy" evidence. (R p 75, Finding of Fact ¶ 39, R p 79, Conclusions of Law 6-7) While there is evidence that someone from Apartment A threw materials into its back yard, this disposal, of course, does not amount to seeking to "destroy" it.

C. Law enforcement substantially and willfully violated the knock-and-announce statutory requirements when they forcibly entered Apartment A at approximately 6:46AM on 26 July 2019.

To warrant suppression of evidence, the federal or state constitution must require its exclusion or it must have been obtained as a result of a substantial violation of state statutory law governing search and seizures. N.C. Gen. Stat. § 15A-974(a). "[G]ood faith" violations of the state statutory law will not result in suppression. *Id.*

Here, law enforcement substantially violated the state's knock-and-announce requirements to obtain the challenged evidence. They did so willfully, not based on a good faith, but mistaken, belief that they were following the law. Suppression is required.

1. Violation of NCGS §§ 15A-249 and NCGS 15A-251

Law enforcement must "before entering the premises, give appropriate notice of [its] identity and purpose" in executing a search warrant. N.C. Gen. Stat. § 15A-249. When that warrant is executed at a home and "it is unclear whether anyone is present," law enforcement "must give the notice in a manner likely to be heard by anyone who is present." *Id.*

Forceful announcement of identity and purpose before law enforcement "break and enter" a home is the rule. N.C. Gen. Stat. § 15A-251. Only after that announcement and the development of a reasonable belief "that

admittance is being denied or unreasonably delayed or that the premises . . . is unoccupied" may law enforcement "break and enter" a home. *Id.* The only exception is when law enforcement "has probable cause to believe that the giving of notice would endanger the life or safety of any person." N.C. Gen. Stat. § 15A-251(2). These rules and this sole exception thereto codify "the manner in which knock and announce warrants are to be executed in North Carolina." *State v. White*, 184 N.C. App. 519, 523, 646 S.E.2d 609, 612 (2007).

The analysis of whether law enforcement complied with the law is straightforward here. Law enforcement did not believe the warrant execution presented exigent circumstances, (R p 71; T pp 46, 53, 59, 75), such as danger to life or safety, N.C. Gen. Stat. § 15A-251(2). No such circumstances developed during the approach to Apartment A. (T p 46) Accordingly, knocking and announcing was obligatory. N.C. Gen. Stat. § 15A-251. And, because law enforcement did not know if anyone was home inside Apartment A, (R pp 72-83; T p 43), they were required to give "notice in a manner likely to be heard by anyone who is present[,]" N.C. Gen. Stat. § 15A-249.

They did not do so. Investigator Langer's BWC establishes law enforcement never announced their identity or purpose, and surely not "in a manner likely to be heard by anyone who is present[,]" *id.*, before taking a battering ram to the front door of Apartment A, (T p 45). Though circumstances may permit law enforcement to quickly deploy such tactics after giving clear

notice, *see, e.g., State v. Vick*, 130 N.C. App. 207, 217, 502 S.E.2d 871, 877-78 (1998) (ten to fifteen seconds between notice and forced entry sufficient when officers knew defendant was inside); *State v. Marshall*, 94 N.C. App. 20, 29-30, 380 S.E.2d 360, 366 (1989) ("couple of seconds" between notice and forced entry sufficient when officers heard occupants running around inside and whispering about police presence), they cannot skip over notice altogether, *State v. Brown*, 35 N.C. App. 634, 635, 242 S.E.2d 184, 185 (1978). Indeed, notice is required even when law enforcement has valid concerns over the destruction of contraband. *Id.* (answering "question [of] whether . . . law enforcement officers in the execution of the search warrant . . . were justified in making a forcible, unannounced entry into defendant's residence when it reasonably appeared that notice of entry would cause the destruction o[r] secreting of contraband or evidence . . . in the negative").

Law enforcement did not announce their identity or purpose, much less do so in a manner likely heard by anyone present, before forcibly entering Apartment A. This violates the state's knock-and-announce law.

2. Evidence Obtained as a Result of Substantial Violation

Evidence must be suppressed when obtained as a result of a substantial statutory violation. N.C. Gen. Stat. § 15A-974(a)(2). The totality of the circumstances are taken into account in assessing whether a violation is

substantial. *Id.* Considerations include "[t]he importance of the particular interest violated;" "[t]he extent of the deviation from lawful conduct;" "[t]he extent to which the violation was willful;" and "[t]he extent to which exclusion will tend to deter future [statutory] violations." *Id.* An exception to this rule: evidence is not suppressed when those violating the statute in question "acted under the objectively reasonable, good faith belief that the[ir] actions were lawful." N.C. Gen. Stat. § 15A-974(a)(2). Here, the evidence in question was obtained due to the violations of North Carolina General Statutes §§ 15A-249 and 15A-251, and those violations were substantial and knowing.

a. As a Result

Assessing whether law enforcement obtained the evidence in question "as a result" of their violations of knock-and-announce requirements, N.C. Gen. Stat. § 15A-974(a)(2), is straightforward. If its discovery is the direct result of an illegal entry, then suppression is necessary. *See White*, 184 N.C. App. at 525, 646 S.E.2d at 612.

The matter hardly could be clearer here. Law enforcement forcibly entered into Apartment A without announcing themselves or their purpose. (BWC 0:35-0:53) Moments later, an occupant of Apartment A threw evidence in the back yard. (BWC 1:15-1:19; R p 59) Around that same time, the S.T.A.R. team entered Ms. Misher's bedroom (BWC 1:30; T p 90), where additional

evidence was located. (R pp 59-60) The line from illegal entry to the evidence is straight and, hence, the need for suppression clear.

The trial court's assertions to the contrary are unsupported and at war with one another. First, the trial court contends there was "no causal relationship between the potential statutory violations and the evidence found[.]" (R p 79, Conclusion of Law ¶ 7) As discussed above, the sequence of events depicted by the BWC and associated testimony disproves this. Second, the trial court asserts that "regardless of any violations the evidence would have been found due to Defendant's own actions in response to the knock and announcement by coming out of the house throwing evidence[.]" (R p 79, Conclusion of Law ¶ 7) This cedes that the evidence in fact was obtained "as a result" of law enforcement conduct, N.C. Gen. Stat. 15A-974(a)(2), leaving only the lawfulness of that conduct for determination.

b. Substantial Violation

1. Importance of Particular Interest Violated

Protecting "the right to privacy in our homes" is an interest "of the utmost importance." *Brown*, 35 N.C. App. at 637, 242 S.E.2d at 186; *see also State v. Willis*, 58 N.C. App. 617, 622, 294 S.E.2d 330, 333 (1982) (speaking of the "extreme importance of the right of the individual to be secure against unlawful searches of his home"). As Justice Robert Jackson admonished long ago, "[t]he right of officers to thrust themselves into a home is . . . a grave

concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

If the government entering a home raises grave concerns, then no-knock warrants such as the one at issue here amplify these concerns exponentially. The practice, as Justice Scalia noted, runs contrary to the "[ancient] common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door[.]" *Hudson v. Michigan*, 547 U.S. 586, 589 (2006).

There are many good reasons for this. First, "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Id.* at 594; *see also State v. McCombs*, 297 N.C. 151, 152-53, 253 S.E.2d 906, 908 (1979) (defendant argues he shot member of narcotics squad who forcibly entered apartment without identifying himself as law enforcement because he thought he was an intruder); *State v. Miller*, 282 N.C. 633, 637, 194 S.E.2d 353, 355-56 (1973) (defendant argues he shot law enforcement officers who entered establishment because they had not identified themselves and he believed that they were robbers). Second, "[t]he knock-and-announce rule gives individuals the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry." *Hudson*, 547 U.S. at 594 (internal quotation marks omitted). Third, "[t]he brief interlude between announcement and entry

with a warrant may be the opportunity an individual has to pull on clothes or get out of bed . . . protect[ing] those elements of privacy and dignity that can be destroyed by a sudden entrance." *Id.* (internal quotation marks omitted).

The importance of Mr. Duncan's and society's interest in the privacy of the home and freedom from unannounced, unexplained government intrusions is difficult to overstate. And, here, each of these concerns specific to no-knock warrants are implicated. Weapons within Apartment A, (R p 59), could have been turned upon the S.T.A.R. team given that the occupants might have panicked in response to awakening to unknown intruders. Apartment A, of course, was damaged by the S.T.A.R. team forcing the door. (BWC 0:49-0:53; T p 45) And, finally, Mr. Duncan and Ms. Misher were naked when detained. (BWC 1:30-1:39; R p 36)

2. Extent of Deviation from Lawful Conduct

Law enforcement substantially deviated from the statutory knock-and-announce standard. As discussed above, members of the S.T.A.R. team did not announce their identity and purpose before taking a battering ram to the front door of Apartment A. (BWC 0:35-0:53; T p 45) This is a total departure from the obligations of the knock-and-announce regime.

As is also laid out above, this was not a technical violation resulting in abstract harms but instead a departure fundamentally undermining the purposes of North Carolina General Statutes 15A-249 and 15A-251. Failing to

afford those within Apartment A any opportunity to comply with law enforcement demands risked provoking violence as well as making property and privacy damages much more likely, if not inevitable. *See Hudson*, 547 U.S. at 594.

This is not a case calling for a granular weighing of the facts and equities to ascertain whether law enforcement waited long enough after knocking and announcing before entering. Law enforcement instead entirely skipped over their statutory obligations, thwarting the exceptionally powerful purposes animating the knock-and-announce regime in so doing.

3. Extent to which Violation was Willful

Willful is defined as "voluntary and intentional, but not necessarily malicious." Willful, Black's Law Dictionary (11th ed. 2019). As that definition suggests, violations arising out of fluid warrant executions are less likely attributable to willful deviations from law and more likely attributable to unforeseen developments. *See Willis*, 58 N.C. App. at 623, 294 S.E.2d at 333 (considering presence of family members outside of home targeted by warrant in holding violations not willful or substantial).

Law enforcement acted willfully in their violation of the statutory knock-and-announce regime in this instance. Officers met to plan their warrant execution minutes before arriving at Apartment A. (R p 71; T pp 51, 68) They received an operation plan establishing, consistent with their being no exigent

circumstances, this was a knock-and-announce warrant execution. (R p 56) S.T.A.R. team member testimony evinces a clear understanding of what a knock and announce entails. (T pp 42, 44-45, 52, 56, 58) Deputy Hewitt testified that nothing unexpected occurred as he approached Apartment A and acknowledged he was not given an order to forcibly enter. (T p 46)

And yet, despite clear knowledge of the knock-and-announce plan and associated law as well as the lack of unforeseen developments, BWC footage conveys that the S.T.A.R. team did not identify themselves and their purpose before forcing entry. (BWC 0:35-0:53) That Deputy Hewitt, Deputy Stobbe, and Investigator Uribe insisted there were three loud knock and announces that occupants had sufficient time to respond to only underscores that this was a knowing deviation from the law.

4. Extent to which Exclusion Deters Misconduct

In assessing arguments for suppression, the Supreme Court of the United States has held that "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it[.]" *Herring v. United States*, 555 U.S. 135, 144 (2009). Likewise, our courts have focused on deliberate conduct versus reactions to fluid circumstances in this analysis. *Compare Brown*, 35 N.C. App. at 637, 242 S.E.2d at 187 (violation substantial because attributable to effort to circumvent law) *with Willis*, 58 N.C. App. at 623, 294 S.E.2d at 333 (violation

not substantial because attributable to unforeseen variables arising during warrant execution).

Again, the law enforcement conduct in question was unmistakably deliberate. The S.T.A.R. team approached Apartment A consistent with their pre-planning meeting and operation plan. (BWC 0:35-0:49; R p 56) Nothing changed in the very brief time between the team assembling outside their van and ramming the door that required a spur of the moment change of plan. (T pp 45-46; BWC 0:35-0:53) And still the S.T.A.R. team forcibly entered without the obligatory notice and then testified that they did nothing of the sort. This is deterrable conduct warranting suppression.

c. Good Faith Belief Acting Lawfully

The statutory suppression exception for "good faith," where law enforcement acts on an objectively reasonable but mistaken belief that they are comporting themselves lawfully, N.C. Gen. Stat. § 15A-974(a), is inapplicable here. Law enforcement have never contended that they forcibly entered Apartment A without notice based on a belief that they did not need to knock and announce. Deputy Hewitt, for example, testified his forcing the door was not the result of unforeseen or perceived exigent circumstances. (T p 46) Law enforcement instead contended that they did comply with the knock-and-announce statutory regime before forcing entry. (T pp 42, 44-45, 52, 56, 58) Again, that is belied by the body camera footage. (BWC 0:35-0:53) This

dispute is not over whether these facts excuse an error in judgment by the officer, making the "good faith" exception inapplicable.

CONCLUSION

For the foregoing reasons, Mr. Duncan respectfully requests that this Court reverse the trial court denial of his motion to suppress.

Respectfully submitted, this the 6th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Defendant-Appellant certifies that the foregoing brief, which is prepared using proportional font, is less than 8,750 words (excluding cover, index, table of authorities, certificate of service, this certificate of compliance, and appendices) as reported by the word-processing software.

This 6th day of March, 2023.

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CERTIFICATE OF SERVICE

The undersigned counsel for the Defendant-Appellant hereby certifies that a copy of Defendant-Appellant's Opening Brief served upon the following by email:

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