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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-169

Filed: 6 June 2017

New Hanover County, No. 15 CRS 51345

STATE OF NORTH CAROLINA

v.

JASON RODGER DUBOSE, Defendant.

Appeal by defendant from judgment entered on or about 12 October 2015 by Judge W. Allen Cobb, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 22 August 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.

Meghan Adelle Jones for defendant-appellant.

STROUD, Judge.

Defendant Jason Rodger Dubose ("defendant") appeals from his conviction of robbery with a dangerous weapon. Defendant argues that the trial court erred by

admitting evidence of a prior bad act based on insufficient evidence of similarity and for an improper purpose, and he alleges that he was prejudiced by the improper admission. Defendant further argues that the evidence of the prior act was highly prejudicial and the trial court abused its discretion when it performed its Rule of Evidence 403 balancing test. Defendant also contends that the trial court violated his right to a unanimous jury verdict by providing ambiguous jury instructions and requests this Court vacate his conviction and order a new trial. After reviewing the record and the parties' arguments, we hold that the trial court heard sufficient evidence of the prior act the State sought to enter into evidence under Rule of Evidence 404(b). Both the prior alleged act and the instant offense occurred at the same Walmart with several similar, if not identical, facts and parties. As to defendant's second contention, we decline to hear defendant's argument because he has invited error by failing to object when the trial court asked if defendant had any issues with the misstatement in the jury instructions. Accordingly, we find no error.

I. Background

The evidence tends to show that on 12 February 2015, Matthew Dessing ("Mr. Dessing"), an asset protection associate for the Walmart on Sigmond Road, identified defendant in the store's menswear section. Mr. Dessing's primary role was to patrol the store and monitor customers who exhibited suspicious behavior that indicates a possibility they might shoplift items. Mr. Dessing was trained to recognize common

signs of item theft such as concealing items and certain behavioral cues. When Mr. Dessing identified a suspicious customer, he would follow that person past the final point of sale. Once outside of the store, he would then request the suspected shoplifter to come back into the store to confirm the purchase of the items. If the suspect refused to stop and reenter the store, Mr. Dessing would avoid confrontation and contact law enforcement.

In February, on the day of the incident at issue in this case, Mr. Dessing saw a woman and defendant walking through the store with a cart full of items. Defendant caught Mr. Dessing's attention because, in December 2014, he saw defendant leave the store without paying for items. During the December encounter, Mr. Dessing observed a different woman and defendant pass the last point of sale with bags full of unpaid items. He approached the two in the parking lot, identified himself, and asked them to return to the store. The pair did not comply and left by vehicle.

Regarding the February encounter, Mr. Dessing testified at trial that, in addition to recognizing defendant from December, "I remember him moving around very erratically and fast, not necessarily paying attention to sizes of the merchandise, just grabbing clothes and putting them in the cart." Suspecting defendant might again leave the store without purchasing the items, Mr. Dessing followed and observed defendant as he navigated the store. Mr. Dessing also contacted another

associate, Nathan Jackson ("Mr. Jackson"), to assist him in monitoring defendant. Mr. Jackson contacted the store manager for assistance should defendant leave the store without paying. The manager was, at the time, meeting with Major Bobby Blackmon ("Major Blackmon") of the New Hanover Sherriff's Office. Major Blackmon was at the store on a personal matter and was neither armed nor in uniform. Eventually, defendant moved his cart beyond the registers and into the in-store Checkers restaurant. A few minutes later, defendant left the store with the cart full of items. Mr. Dessing did not see defendant pay for the items in his cart.

Following the usual procedure, Mr. Dessing followed defendant just outside of the store, identified himself as Walmart security, and stated, " 'I need you to come back into the store with me.' " Major Blackmon then emerged from the manager's office, and Mr. Dessing further stated that " '[t]here's no point in running, the cops are here.' " Mr. Dessing then looked down and saw what he believed to be a knife slip into view from defendant's jacket sleeve. He informed Mr. Jackson that defendant had a knife and the two employees backed away. He also informed Major Blackmon that defendant was armed. Major Blackmon saw the blade and immediately recognized that it was an open box-cutter.

Major Blackmon identified himself as law enforcement and instructed defendant to drop the weapon. Defendant did not drop it and kept walking as Major Blackmon continued to instruct defendant to stop. As defendant neared the part of

the lot where cars were parked, Major Blackmon subdued defendant and attempted to disarm him. When defendant finally dropped the blade, Mr. Jackson kicked it away out of defendant's reach. Major Blackmon restrained defendant until police could arrive to make an arrest. The woman accompanying defendant was not involved in the scuffle and backed away when instructed by Major Blackmon. While subduing defendant, Major Blackmon suffered a cut on his hand that resulted in bleeding; the cut did not require stitches and blood tests indicated no infection.

In total, defendant's cart contained $216.07 of unpaid merchandise. The items included apparel, toiletries, and food. Defendant testified at trial and asserted that he did not intend to steal the goods but rather was fleeing from several men in the in-store Checkers restaurant. Defendant stated that his girlfriend, Shawnette, was getting food in the restaurant when he realized that he did not have his wallet. He asserts that he went into the restaurant to get money from Shawnette to pay for the items in his cart. He testified that while he was in the restaurant, two men were becoming agitated because the woman who was sitting with them was making flirtatious looks towards him. The two men and the woman then left the store abruptly. Defendant contends that, after they left, he wanted to leave the store immediately to avoid a potential confrontation. Defendant said that he did not comply with Mr. Dessing or Major Blackmon because he did not believe them when they identified themselves. He instead believed that they were charging him. There

was no other evidence to suggest that two men from Checkers followed defendant or that any exchange occurred. There were no closed-circuit cameras located in the restaurant and no witness at trial had a good view of what transpired in that area.

The trial court instructed the jury as to the offense of robbery with a dangerous weapon and common-law robbery. The jury found defendant guilty of robbery with a dangerous weapon. The court entered judgment and imposed an active term of incarceration for a period of a minimum of 84 months and a maximum of 113 months. Defendant gave notice of appeal in open court.

II. Prior Bad Act Evidence under Rule 404(b)

Defendant first contends that the trial court admitted evidence of the alleged December prior shoplifting incident based upon insufficient evidence. He argues that the State presented very little evidence during *voir dire* and the evidence presented failed to show sufficient similarity between the December and February alleged shoplifting incidents at the store or that the prior act had a use in conformance with the limits of Rule 404(b). Alternatively, defendant argues evidence of the prior act was highly prejudicial and should not have been admitted pursuant to the provisions of Rule 403.

After hearing the State's proffer, the trial court admitted the use of the December incident for the limited purpose of showing defendant's intent, motive, absence of mistake, and knowledge. The trial court noted defendant's exception for

the record, preserving the issue for appeal. Defendant asks this Court to find error in the trial court's ruling and to order a new trial. After reviewing the record, we hold that the trial court correctly found sufficient similarity to permit the admission of the December incident. We also hold that the State properly used the prior act to rebut defendant's lack of intent defense. While it is true that prior acts have the capacity to cause prejudice, intent was a critical component of the trial, making the prior act highly probative as to that key issue.

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "Under a *de novo* review, the court 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) (quotation marks omitted).

Relating to evidence of other acts, Rule 404(b) of the Rules of Evidence provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

> opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

"This list [of permitted uses] is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (citation and quotation marks omitted). Furthermore, "[b]ecause this Rule disallows the introduction of evidence only when the evidence would be used for a specific forbidden purpose, [our Supreme Court has] long described Rule 404(b) as a general rule of inclusion." *State v. Hembree*, 368 N.C. 2, 10, 770 S.E.2d 77, 83 (2015).

As Rule 404(b) evidence presents a danger of misleading a jury, our Court exercises close scrutiny through a two-prong test; admission of evidence of a prior act is "constrained by the requirements of similarity and temporal proximity" between the prior act and the instant offense. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). In determining the admissibility of evidence of prior conduct, "[t]he determination of similarity and remoteness is made on a case-by-case basis, with the degree of similarity required being that which would lead the jury to the reasonable inference that the defendant committed both the prior and present acts." *State v. Rayfield*, 231 N.C. App. 632, 657, 752 S.E.2d 745, 762 (2014) (quotation marks omitted). First, to satisfy the similarity prong of Rule 404(b) evidence admission, "[t]he similarities need not be unique and bizarre." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (quotation marks omitted). A prior incident is

sufficiently similar "if there are some unusual facts present in both crimes[.]" *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890 (1991) (citation and quotation marks omitted). If the details the testimony will reveal are entirely "generic to the act" it describes, the evidence should be held inadmissible. *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123.

After making a *de novo* review of the Rule 404(b) proffer, we analyze an erroneous admission of a prior act under Rule 404(b) for prejudice. *See* N.C. Gen. Stat. § 15A-1443(a) (2015) ("A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.").

As for evaluating the trial court's Rule 403 analysis, "[i]t is within the trial court's sound discretion to decide whether to exclude evidence under Rule 403, and its ruling will not be reversed absent a showing of abuse of that discretion." *State v. Crockett*, 238 N.C. App. 96, 107, 767 S.E.2d 78, 85 (2014), *affirmed,* 368 N.C. 717, 727, 782 S.E.2d 878, 885 (2016). Furthermore, "plain error review is inapplicable to issues that fall within the realm of the trial court's discretion, which include a trial court's determination as to the admissibility of evidence based on the Rule 403 balancing test." *State v. Duffie*, __ N.C. App. __, __, 772 S.E.2d 100, 104 (2015) (citation and quotation marks omitted). An appellate court reverses the trial court for

an abuse of discretion "only when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Locklear*, 363 N.C. 438, 448-49, 681 S.E.2d 293, 302 (2009) (citation and quotation marks omitted).

The full analytical process is set out in *State v. Foust*, 220 N.C. App. 63, 69, 724 S.E.2d 154, 159 (2012), which guides us to use a three-part test to determine whether evidence relating to defendant's other crimes, wrongs, or acts was properly admitted in light of the similarity and temporal proximity requirements, asking: (1) whether the evidence is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried, (2) whether that purpose is relevant to an issue material to the pending case, and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

Defendant asserts that the trial court admitted evidence of the alleged December shoplifting incident absent sufficient evidence of similarity. Just before the commencement of the trial, defendant made a motion in limine to exclude any use of the December incident. That motion asked the trial court to preclude the State from presenting evidence as to the December incident because defendant contended that the probative value of witness testimony regarding the prior act was

substantially outweighed by the risk of unfair prejudice, violating Rule 403. A portion of that motion reads as follows:

> 1. That the Defendant has been charged with the offense of Robbery with a Dangerous Weapon allegedly occurring on February 12, 2015 at a Wal-Mart in New Hanover County.
>
> 2. That in a written statement dated September 24, 2015 by Matthew Dessing, an employee of the store provided an account of the case to Assistant District Attorney, E. Barrett Temple.
>
> 3. That Dessing's statement includes a paragraph which states "Defendant and the girl had been in the store a month or so earlier and had bagged stuff and it in Wal-Mart bags. Had tried to stop them and they refused to stop and left in van. Saw defendant get multiple items and putting it in car. Didn't have bags, was watching him because of what had happened before. Cut through the registers and then goes like he is going to leave but goes into the Checkers for a couple of minutes. Female and him come out of Checker's and pass last point of sale. Nate and him go to approach suspect. Approach him outside of door and he didn't stop. Looked down and saw box cutter open and out. Dessing disengaged and Blackmon got involved. Identified himself and told him to put the weapon down and he didn't. Officer took him down on the ground and got weapon out of hands."

The trial court had access to the content of this motion, detailing the written statement of Mr. Dessing, during the State's Rule 404(b) proffer. The State argued for the admission of the December incident during *voir dire* where Mr. Dessing testified as follows:

> Q. [The State:] So, Mr. Dessing, on this day did you

see the defendant in the store?

A. [Mr. Dessing:] Yes, ma'am, I did.

Q. What drew your attention to him?

A. I had had an encounter with him that previous December, so about two months prior to that, where I observed him and a female selecting some merchandise and concealing it into Walmart bags, they proceeded through the last point of sale without any form of payment. I went to approach them and identified myself, asked them to come back into the store but they refused to come back into the store that day. I remembered him. I saw him again that day, so I decided to observe him to see if anything was going to happen today or that day.

Q. Right. So on February 12th when you first saw him, it wasn't that he was showing you any of these clues that you talked about as far as actually concealing merchandise at that time, you just recognized him from the prior encounter?

A. Yes, ma'am.

Q. The day in December when you saw him, do you recall what the person he was with looks like?

A. I remember it to be a black female.

Q. Okay. Do you recognize her in the courtroom or would you recognize her if you saw her again?

A. Possibly. I was honestly paying more attention to him that day than anybody else.

Q. Okay. When you saw him on February 12th, did he have his hair in braids like he has it today?

A. I believe so. They were -- I do -- I recall him

looking -- he wasn't as well put together on the day I saw him in February as he was back in December. Hair was a little messy, he hadn't shaved, so I wasn't a hundred percent sure it was him that day, that's why I wanted to keep on continuing to watch.

Q. Okay.

A. I also didn't see the female with him in the store that day.

Q. On the 12th?

A. On the 12th, yes, ma'am, shopping while he was shopping, so. . .

Q. Okay. Now, as you are here today, can you say with certainty that the person that you saw in December concealing merchandise in the bags and not paying for it is the same person you saw on the 12th?

A. Yes, ma'am.

Q. You are sure about that?

A. Yes, ma'am.

Q. And on the December date, ultimately, you were not able to stop him?

A. I was not. I identified myself along with my manager at the time. He refused to come back into the store. I followed him out to a vehicle which he got into. I notified local authorities and provided them with a license plate number. I believe they -- the tag came back as stolen, so it did not lead to anything further than that.

Q. So when you tell them to stop and they don't stop, you don't go any further, like you don't try to physically --

> A. Correct.
>
> Q. Is the person seated here, the defendant, is that the same person you saw in December?
>
> A. Yes, ma'am.
>
> Q. And the same person you saw in February?
>
> A. Yes, ma'am.

The trial court ruled that this testimony was sufficient to show that defendant committed the act in December 2014 and that there existed sufficient similarity for the State to use the incident for a limited purpose under Rule 404(b). The trial court held:

> THE COURT: I think under the 404(b) analysis there is sufficient evidence that defendant committed the other act in December of 2014, that it cannot be used to prove the character of the person, but it is sufficiently similar to the act in question in February, and it's obviously not too remote because it happened two months earlier.
>
> I'm going to determine it to be offered for a proper purpose which is proof of motive, opportunity, intent, absence of mistake, and I determine that the probative value is greater than the danger of undue prejudice, confusion. Having conducted the balancing test under 403, the Court will allow such evidence to be introduced.

We agree with the trial court that the two acts are not so remote in time as to fail the temporal requirement because two months is certainly a short enough span of time to meet this first requirement. *See, e.g., State v. Haskins*, 104 N.C. App. 675, 681,

411 S.E.2d 376, 381 (1991) ("[T]he prior crime must not be so remote in time as to have lost its probative value.") (citation, quotation marks, and brackets omitted).

As for the similarity prong, defendant contends that this case involves even less similarity than in *Al-Bayinnah*, where our Supreme Court concluded that "substantial evidence of similarity among the prior bad acts and the crimes charged is nonetheless lacking." 356 N.C. at 155, 567 S.E.2d at 123. In *Al-Bayinnah*, the defendant was charged with attempted robbery of a grocery store. *Id.* at 151-52, 567 S.E.2d at 121. The trial court allowed Rule 404(b) testimony of previous robberies of that same store, but that testimony revealed only that the culprit in the previous robberies "wore dark, nondescript clothing that obscured his face; carried a weapon; demanded money; and fled upon receiving it." *Id.* at 155, 567 S.E.2d at 123. Our Supreme Court found that this kind of testimony merely described facts "generic to the act of robbery[,]" noting that the earlier robberies were factually dissimilar from the one being tried, and held that the Rule 404(b) testimony was admitted in error. *Id.* at 155-57, 567 S.E.2d at 123-24.

While facts generic to the act of robbery are insufficient, our Court has allowed Rule 404(b) testimony that describes "common locations, victims, [and] type of crime," between previous and present instances of unlawful conduct. *State v. Gordon*, 228 N.C. App. 335, 339, 745 S.E.2d 361, 364 (2013). In *Gordon*, which involved a robbery

in a Walmart parking lot, previous instances of the defendant committing similar robberies was held admissible under Rule 404(b) where the trial court found:

> "[e]ach of these incidents occurred in or in the vicinity of a Wal-Mart parking lot; that each of the victims in this matter were female and alone; that each of the incidents involved a common law robbery, the purse snatching, a grab and dash type of crime; that these incidents occurred within six weeks of one another, one in Statesville, one in Mooresville, which are approximately 20 miles apart; and in each incident, the alleged perpetrator of the crime . . . was a black male."

Id. at 338, 745 S.E.2d at 364. When the defendant argued that "the perpetrator's lack of a 'do-rag' during the second crime prevents the crimes from being substantially similar[,]" this Court stated that to require that level of similarity would require the facts to "rise to the level of the unique and bizarre, which our case law does not require." *Id*. at 339, 745 S.E.2d at 364 (quotation marks omitted).

Here, while defendant contends otherwise, the similarities between the December and February incidents are certainly enough to support the State's position. First, defendant's motion in limine provided some of the information regarding the details of the instant robbery. The details of the motion, when coupled with Mr. Dessing's testimony during the proffer provides sufficient evidence for the trial court to analyze the similarity between the December and February incidents. In the present case, the Rule 404(b) testimony indicated that: (1) defendant took items from the exact same Walmart store; (2) the same asset protection associate positively

identified defendant and witnessed defendant leave without paying, (3) defendant passed the last point of sale without paying resulting in the same asset protection associate asking him to stop; (4) in both instances, defendant refused to comply and proceeded towards the parking lot; and (5) defendant was accompanied by a woman in both instances. There is ample similarity between the December and February incidents, and the dissimilarities that defendant offers in his brief rise to the level of the unique and bizarre. The trial court did not err by holding that the December incident was sufficiently similar and not so remote as to be inadmissible.

As for the Rule 403 balancing test, we hold that the trial court did not abuse its discretion by ruling that the December incident had a probative value that was not substantially outweighed by the danger of unfair prejudice. The record does not indicate that the State ever used the prior incident to assert that defendant acted in conformity with the prior act. Instead, the State used the incident to rebut defendant's assertion that he did not intend to steal the items in February. Given that intent was a critical issue at trial, we hold that the trial court did not abuse its discretion in weighing the evidence under Rule 403.

Having found that the trial court committed no error, we need not address defendant's assertions of prejudice.

III. Unanimity of the Verdict

Defendant next argues that his right to a unanimous verdict, as mandated by Article I, Section 24 of the North Carolina State Constitution, was violated due to a misstatement in the jury instructions that made it "impossible to determine whether the jury unanimously found that the defendant committed one particular offense." *State v. Lyons*, 330 N.C. 298, 303, 412 S.E.2d 308, 312 (1991). He asks this Court to find that the State has not shown that the error was harmless and order a new trial. The trial court presented the following instruction where Major Blackmon was incorrectly described as an "employee" of Walmart:

> Now, as you know, the defendant has been charged with robbery with a dangerous weapon which in this case is the taking and carrying away of the personal property of Walmart from the person or in the presence of its employees without consent by endangering or threatening the employees' lives with a dangerous weapon, the taker knowing that he was not entitled to take the property and intending to deprive Walmart of its use permanently. So for you to find the defendant guilty of this offense, the State must prove seven things beyond a reasonable doubt.
>
> First, that the defendant took property of Walmart from the person or in the presence of its employees, Matthew Dessing and Bobby Blackmon. Second, that the defendant carried away the property. Third, that Walmart by and through its employees did not voluntarily consent to the taking and carrying away of the property. Fourth, that the defendant knew he was not entitled to take the property. Fifth, that at the time of the taking, the defendant intended to deprive Walmart of its use permanently. Sixth, that the defendant had a dangerous weapon in his possession at the time he obtained the property. A dangerous weapon is a weapon which is likely to cause death or serious bodily injury. And seventh, that

> the defendant obtained the property by endangering or threatening the lives of the employees with a dangerous weapon.
>
> So if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant had in his possession a dangerous weapon and took and carried away property of Walmart from the person or in the presence of its employees without Walmart's voluntary consent by endangering or threatening the employees' lives with the use or threatened use of a dangerous weapon, the defendant knowing that he was not entitled to take the property and intending to deprive Walmart of its use permanently, it would be your duty to return a verdict of guilty of robbery with a dangerous weapon.

During the trial, the State brought the incorrect classification of Major Blackmon to the court's attention:

> THE COURT: Any objection, corrections to the charge?
>
> What says the State?
>
> [The State]: No, Judge, although when you talked about Walmart and its employees, Matthew Dessing and Bobby Blackmon, I don't think it's a big deal but, of course, Bobby Blackmon is not an employee of the Walmart. I don't think it's something that is going to cause the jury a problem.
>
> THE COURT: There was only one reference as I recall to Bobby Blackmon and he's named in the indictment.
>
> [The State]: Right, I mean --
>
> THE COURT: Are you asking me to cure it in some fashion?
>
> [The State]: No, no, I'm not.

THE COURT: What says the defendant?

[Defense counsel]: I have no objection to it.

Defendant argues that this misstatement in the instructions warrants harmless error review because preserved objections relating to the North Carolina Constitution are analyzed under that level of scrutiny. *See State v. Wilson*, 363 N.C. 478, 487, 681 S.E.2d 325, 331 (2009); *see also* N.C. Gen. Stat. § 15A-1443(b) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate . . . that the error was harmless.").

The record shows that defendant did not make a timely objection to the misstatement. Generally, this failure to object would render the issue unavailable for appellate review, but our Supreme Court has determined that some issues are eligible for plain error review on appeal even absent timely objection at trial. *See, e.g.*, *State v. May*, 368 N.C. 112, 118, 772 S.E.2d 458, 462 (2015) ("[W]e apply the general rule that failure to raise a constitutional issue at trial generally waives that issue for appeal. Nevertheless, because the alleged constitutional error occurred during the trial court's instructions to the jury, we may review for plain error." (Citations and quotation marks omitted)).

Defendant also argues that case law supports the proposition that errors relating to the right to a unanimous verdict do not require an objection in order to preserve the issue for appeal. *See Wilson*, 363 N.C. at 486, 681 S.E.2d at 331 (2009) (holding "that where the trial court instructed a single juror in violation of defendant's right to a unanimous jury verdict . . ., the error is deemed preserved for appeal notwithstanding defendant's failure to object."); *but see May*, 368 N.C. at 118, 772 S.E.2d at 462 (holding that *Wilson* was a narrow holding and that, instead, the general rule regarding failure to object should apply in instances where the entire jury is read an erroneous instruction).

In the alternative, defendant also asserts that a unanimous verdict is required by statute. *See* N.C. Gen. Stat. § 15A-1237(b) (2015) ("The verdict must be unanimous, and must be returned by the jury in open court."). He calls our attention to this because case law also supports the notion that violations of a mandatory statute do not require objection in order to be preserved for appeal. *See May*, 368 N.C. at 119, 772 S.E.2d at 463 ("[W]hen a trial court is alleged to have violated a mandatory statute, the issue is preserved as a matter of law, but when a trial court is alleged to have violated a permissive statute, we review for plain error if the issue has not been preserved.").

But the authorities cited by defendant do not control this issue. Defendant has invited the error that he seeks to raise on appeal and has thus waived any right to review of the merits of his contentions.

> Pursuant to N.C. Gen. Stat. § 15A-1443(c) 2013, a defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct. Accordingly, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review.

State v. Spence, 237 N.C. App. 367, 375, 764 S.E.2d 670, 677 (2014) (citations and quotation marks omitted).

Our Supreme Court has addressed the concept of "inviting error" within the context of jury instructions. *See State v. Sierra*, 335 N.C. 753, 759-60, 440 S.E.2d 791, 795 (1994). In *Sierra*, the defendant argued on appeal that the trial court should have instructed the jury on second-degree murder. *Id.* At trial, however, the defendant specifically declined the trial court's offer to provide such an instruction on two separate occasions. *Id.* at 760, 440 S.E.2d at 795. Our Supreme Court held that "defendant is not entitled to any relief and will not be heard to complain on appeal" despite any possible error by the trial court because he acquiesced to the trial court's jury instructions. *Id.*

Similarly, in *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991), the defendant argued to our Supreme Court that the trial court erred by failing to properly clarify a jury question regarding the time at which the intent to

kill must be formed for the charge of first-degree murder. At trial, however, the defendant agreed with the trial court's decision to reinstruct the jury on each element of the offense. *Id.* Our Supreme Court held that "[t]he instructions given were in conformity with the defendant's assent and are not error. The defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the defendant." *Id.* (citation omitted).

In *Spence*, the jury

> asked whether "the penis is considered an object" for the purposes of "penetration" for the charge of first-degree sex offense. In deciding how to answer the jury, the trial court stated, in relevant part:
>
> > TRIAL COURT: What I'm inclined to say is that the legal definition of an object is any object, inanimate or animate, so part of the body may be an animate object or some other item would be an inanimate object. The definitions of sexual acts have been provided to the jury. They include some specific sexual acts such as anal intercourse, which is penetration by the penis into the anus, and then rape, which is penetration of the vagina by the penis, so those are where there's a more specific definition, that's the definition that should be used.
>
> The trial court then asked the defendant's attorney about his thoughts on the issue, and defendant's attorney responded, "I agree . . . . [O]r the Court can reinstruct them on that count, just see what happens." The trial court then responded:
>
> > TRIAL COURT: I'm just going to read the

> definition[,] and under that definition of penis [sic] is a part of body and so as a matter of law, since the Supreme Court has said that any object embraces parts of the human body as well as inanimate or foreign objects, and the answer to the question is yes, the penis is considered an object.
>
> In response to the trial court's proposed answer to the jury question, the defendant's attorney stated, "[t]hat's fine." After the trial court answered the jury's question in the exact manner proposed above, he asked the parties, "I didn't go on to distinguish between vaginal intercourse and sexual intercourse offense, but do either of you feel that further clarification is needed for the jury?" Defendant's attorney responded, "[n]o."

Spence, 237 N.C. App. at 376, 764 S.E.2d at 677-78.

This Court found that "defendant's attorney actively participated in crafting the trial court's response to the jury question, overtly agreed with the trial court's interpretation that a penis could be considered an 'object,' and denied the trial court's proposed clarification between vaginal intercourse and a sexual act for purposes of a sexual offense." *Id.* at 376-77, 764 S.E.2d at 678. Thus, this Court held that "defendant invited any error stemming from the trial court's instructions and dismiss[ed] the issue on appeal." *Id.* at 377, 764 S.E.2d at 678. *See also State v. Hope*, 223 N.C. App. 468, 476, 737 S.E.2d 108, 113 (2012) ("Here, defendant invited the failure to give a self-defense instruction by objecting to the correct instruction, requesting the incorrect instruction, and by choosing to forgo a self-defense instruction"); *State v. Wilkinson*, 344 N.C. 198, 235-36, 474 S.E.2d 375, 396 (1996)

("Although defendant labels this assignment of error as 'plain error,' it is actually invited error because, as the transcript reveals, defendant consented to the manner in which the trial court gave the instructions to the jury.").

Here, the State advised both the trial court and defendant that the jury instructions misclassified Major Blackmon as an employee of Walmart. Defendant was specifically asked if he wanted the trial court to cure the error. Defendant plainly stated that, "I have no objection to it." This exchange falls neatly within the framework of the above cases. Defendant was made aware of a specific error in the jury instructions and the mistake could be corrected very easily by asking the court to remove the reference to Major Blackmon as a Walmart employee. When given the opportunity to ask the trial court to cure the mistake, defendant declined to raise an objection. As in the above cases, defendant participated in the crafting of the portion of the jury instructions at issue in this case and has therefore invited error through his failure to object. As defendant has invited the error that he now seeks to have reviewed on appeal, we decline to review the issue.

IV. Conclusion

After considering both of defendant's assertions, we find that the trial court committed no reversible error. The trial court properly admitted evidence of the December incident because sufficient evidence established similarity beyond generic details of a robbery. The prior incident was probative as to the intent of defendant,

and the State did not use the prior act in a prohibited manner. Furthermore, we will not review defendant's contention of error regarding the jury instruction, since defendant was aware of the incorrect classification of Major Blackmon and declined the opportunity to correct the instructions.

NO ERROR.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).