IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-54

Filed: 6 October 2020

Wilson County, No. 16 CRS 050459

STATE OF NORTH CAROLINA

v.

SYLVESTER RUFFIN, Defendant.

Appeal by Defendant from judgment entered 18 July 2018 by Judge Walter H. Godwin Jr. in Wilson County Superior Court. Heard in the Court of Appeals 4 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Daniel T. Wilkes, for the State.

Dylan J.C. Buffum for defendant-appellant.

MURPHY, Judge.

A defendant's claim regarding a violation of his right to a speedy trial is evaluated by addressing the following: "[1] the length of delay, [2] the reason for the delay, [3] the defendant's assertion of his right to a speedy trial, and [4] whether the defendant has suffered prejudice as a result of the delay." *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000). While asserting a requisite length of delay, as

conceded by the State, Defendant, Sylvester Ruffin, fails to establish his right to a speedy trial was violated when we consider the other three factors on balance, and we find no error in the trial court's denial of his *Motion to Dismiss*.

We also hold the trial court's limiting instruction to the jury that a witness's testimony was offered for the purpose of corroboration, and not as substantive evidence, did not constitute an improper opinion. Any prejudice Defendant could have potentially sustained by the issuance of such an instruction was ameliorated by the pattern instruction the trial court issued prior to jury deliberation.

Finally, we hold the trial court did not abuse its discretion in denying Defendant's *Motion for Appropriate Relief* and his request to hold an evidentiary hearing. On appeal, Defendant fails to present evidence demonstrating the trial court's ruling was unsupported by reason.

BACKGROUND

On the evening of 2 February 2016, Defendant celebrated the birthday of his fiancée at a club with a small group of family and friends. Defendant's fiancée, Gwendolyn Eason ("Eason"), had not planned to stay long, as she had to work the next morning, and informed Defendant at some point in the evening that they needed to leave. During the ride home, Defendant and Eason argued, as he wanted to keep drinking at a "bootlegger house" that served alcohol after hours, and she did not.

Upon entering the residence, Defendant punched Eason in the back of the head, knocking her to the floor. At trial, Eason testified as to what happened next:

> So that's when he jumped on me. He was beating me in my face. I heard like a loud pop but I didn't realize that my jaw was broke then but I just hear like a big pop so I kept asking him why he doing that. He said he don't love me and I don't never go nowhere with him.

After breaking Eason's jaw, Defendant dragged her outside and continued to beat her, leaving her with "scratching and scarring all over her skin and body." Upon re-entering the residence, Defendant produced a gun, holding it to Eason's head. Eason testified he then ordered her to remove her clothing, bent her over a chair, and forcibly inserted his penis in her anus. Discontinuing the assault, Defendant stated "he was going to torture" Eason instead, choking her until he had to stop due to his own asthma attack.

Defendant's asthma attack provided Eason with an opportunity to escape, and she ran for approximately one mile to the residence of a friend, Sharylene Barnes ("Barnes"). Eason told Barnes that Defendant had beaten and tried to kill her, telling Barnes not to tell anyone else for fear Defendant would kill Eason and her family. Against Eason's wishes, Barnes's cousin, Tawanda Williams, who was also present, contacted police. One of the reporting officers testified he could not speak to Eason at the time because she was "so frantically in pain . . . spitting out blood and

complaining about her insides burning," but that Barnes identified Eason's assailant as Defendant.

Though Eason initially maintained to law enforcement her assailant was unknown, she disclosed two days later in a separate police interview that Defendant was her attacker. Eason testified at trial she withheld Defendant's identity because he "said if I tell anybody he was going to kill me so I told the officer I didn't know who did it." Eason also testified she took the threat seriously, as two weeks prior Defendant had threatened to kill her if she ever left him. As a result of the events of that night, Eason lost six teeth and sustained permanent nerve damage to her jaw, which had to be rebuilt with metal. She was also treated for a bruised lung, fluid in her abdomen, and required surgery on her intestine. Defendant was arrested on 5 February 2016 and indicted on 14 November 2016 for one count of assault inflicting serious bodily injury.[1]

While Eason did not disclose details of the alleged sexual assault when interviewed by law enforcement shortly after the incident, she did recount them separately to Assistant District Attorney Orndorff over a year later during the State's preparation for the scheduled 17 April 2017 trial. Following an investigation, Defendant was subsequently indicted for one count of first-degree sexual offense on

[1] Defendant was also indicted for the unauthorized use of a motor vehicle, allegedly having used Eason's vehicle without her permission on 3 February 2016, the same day as the assault. The State dismissed that charge on 17 July 2018.

13 February 2018. Defendant filed a *Motion to Dismiss* on 13 June 2018, citing a violation of his right to a speedy trial, which the trial court denied. All charges were brought to trial on 16 July 2018 and the jury acquitted Defendant of first-degree sexual offense. Defendant was convicted of assault inflicting serious bodily injury and given an active sentence of 33 to 49 months, after which he gave Notice of Appeal in open court.

Defendant filed a motion for appropriate relief on 27 July 2018, stating neither he, nor his defense counsel,[2] were given the opportunity to review and sign the sentencing worksheet used in determining his prior record level, which reflected a higher level than the worksheet to which he had previously stipulated. Defendant requested the prior sentencing worksheet, reflecting a lower prior record level, be used in the determination of his sentence, citing a lack of evidence presented by the State for the higher level. The trial court denied that motion on 23 August 2018 without holding an evidentiary hearing.

ANALYSIS

A. Right to a Speedy Trial

Defendant contends the trial court erred in denying his *Motion to Dismiss* for violating his Sixth Amendment right to a speedy trial. "The denial of a motion to dismiss on speedy trial grounds presents a question of constitutional law subject to *de*

[2] Verified by Defendant's trial counsel in an affidavit.

novo review." *State v. Johnson*, 251 N.C. App. 260, 265, 795 S.E.2d 126, 131 (2016). The Sixth Amendment of the United States Constitution and Article I, Section 18 of the North Carolina Constitution guarantee a criminal defendant's right to a public and speedy trial. U.S. Const. amend. VI; N.C. Const. art. I, § 18. In evaluating whether a criminal defendant has been denied the right to a speedy trial, our courts have adopted the four-factor test set out in *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972), considering "[1] the length of delay, [2] the reason for the delay, [3] the defendant's assertion of his right to a speedy trial, and [4] whether the defendant has suffered prejudice as a result of the delay." *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721. "No single factor is dispositive; rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Johnson*, 251 N.C. App. at 266, 795 S.E.2d at 131 (internal quotations omitted).

1. Length of Delay

"A defendant's right to a speedy trial attaches upon being formally accused of criminal activity, by arrest or indictment. The period relevant to speedy trial analysis ends upon trial." *State v. Evans*, 251 N.C. App. 610, 614, 795 S.E.2d 444, 449 (2017) (internal quotations omitted). A postaccusation delay approaching one year is "presumptively prejudicial . . . mark[ing] the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992) (internal citations omitted).

However, "the length of the delay is not *per se* determinative of whether the defendant has been deprived of his right to a speedy trial." *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721.

Defendant was arrested on 5 February 2016 and his trial did not commence until 16 July 2018, a delay of two years and five months. The State stipulates this delay is sufficient to trigger an enquiry of the remaining *Barker* factors. We agree this lengthy delay raises the question of reasonableness and proceed to examine the remaining *Barker* factors. *Johnson*, 251 N.C. App. at 266, 795 S.E.2d at 131.

2. Cause of Delay

"[D]efendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution." *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721. "Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence." *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003).[3]

[3] Defendant argues a "delay of fourteen months in bringing [a] defendant to trial [is] *prima facie* unreasonable and require[s] the [D]istrict [A]ttorney to fully justify the delay." *State v. Pippin,* 72 N.C. App. 387, 392, 324 S.E.2d 900, 904 (1985). We have held such a delay does not circumvent the defendant's need to show neglect or willfulness before shifting the burden to the State. *Evans,* 251 N.C. App. at 616, 795 S.E.2d at 450. Defendant contends he is not attempting to circumvent the prescribed burden-shifting method but rather simply applying the language of *Pippin.* However, Defendant misinterprets *Pippin*, which also made this distinction: "[o]nce the defendant presented a *prima facie* case that substantial delay was *the result of the district attorney's negligence*, the burden

Defendant was arrested for assault inflicting serious bodily injury on 5 February 2016, triggering the review period.[4] *Evans*, 251 N.C. App. at 614, 795 S.E.2d at 449. While Defendant's case was set to be reviewed by the Grand Jury by 4 July 2016, he was not indicted for this charge until 14 November 2016, nine months after his arrest. No explanation regarding this delay is provided by the State or identified in the Record.

Defendant failed to appear in court on 6 December 2016 because he was incarcerated in Onslow County on unrelated charges. Defendant posits this should be held against the State. We have held a prosecutor's failure to twice locate a defendant, who both times failed to appear in court due to his incarceration within the state prison system, to be prosecutorial neglect, weighing in the defendant's favor. *State v. Armistead*, 256 N.C. App. 233, 239, 807 S.E.2d 664, 669 (2017). We so held because the State could have avoided such delay by using "reasonable effort." *Id.* While neither the State, nor Defense Counsel, were aware of Defendant's whereabouts on the specified court date, we attribute such delay to the State, which could have ascertained Defendant's whereabouts in Onslow County through a search conducted with "reasonable effort." *Id.*

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of proof shifted to the [S]tate to fully explain and justify the reasons for the delay." *Pippin*, 72 N.C. App. at 398, 324 S.E.2d at 908 (emphasis added). Accordingly, we reject Defendant's interpretation of *Pippin*.

[4] An arrest warrant for unauthorized use of a motor vehicle was issued on the same date, but the Record does not provide a date of arrest.

Next, in a court appearance on 18 January 2017, Defendant requested a trial date, subsequently set for 17 April 2017. However, on 11 April 2017, during the State's preparation for trial, Eason first alleged Defendant sexually assaulted her during the incident; Assistant District Attorney Orndorff told the court Eason stated she was "embarrassed" to bring forward the new allegation. The State then requested a continuance until 14 August 2017, expressing its plans to charge Defendant with forcible sex offense. Defendant contends the State's failure to uncover this evidence in the preceding 14 months is evidence of a "negligent absence of investigation."

At trial, two separate officers testified they interviewed Eason shortly after the incident. One recounted she "basically asked [Eason] what happened" and at that time, Eason did not mention the sexual assault. Based on the officers' reports, the State would have had no reason to believe another crime had been committed, and having collected the evidence it felt necessary to prosecute the assault Eason did report, would have had no reason to investigate the matter further. Following Eason's April 2017 allegation, the State conducted further investigation, which ultimately resulted in an indictment for first-degree sexual offense. We see no evidence the State failed to thoroughly interview Eason following the incident and find the discovery of new evidence in April 2017 should not be held against the State.

Defendant also contends continuances reflected in the Record—17 April 2017; 14 August 2017; 23 October 2017; 22 November 2017; and 12 March 2018—are

evidence of prosecutorial neglect in failing to move the case to trial. The calendaring of a defendant's case 31 times over a three-year period, during which it was never called to trial by the State, was *prima facie* evidence of the State's negligence or willfulness. *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 656 (1996). Where the State requested a continuance and then failed to bring the case to trial for ten months, stating the defendant "was in prison where he belonged" and the State saw no reason to try him, we found evidence of willful prosecutorial neglect, avoidable through "reasonable effort." *State v. McKoy*, 294 N.C. 134, 137, 141-142, 240 S.E.2d 383, 386, 389 (1978). Here, the State cites *State v. Webster*, wherein the prosecution continued the case six times in a period of six months, failing to call the case for either pretrial motions or trial. *State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994). Our Supreme Court, while expressing disapproval of such practice, held the repeated continuances, on their face, did not demonstrate prosecutorial negligence or willfulness. *Id.*

The 17 April 2017 to 14 August 2017 continuance followed Eason's allegation of sexual assault, at which time the State continued the case to investigate the claim. The State provided no explanation as to the other continuances. This case falls somewhere between *Chaplin* and *Webster*. Here, the continuances were granted over a period of more than one year, not six months, distinguishing this case from *Webster*. *Id.* Given the applicable timeframe is twice the length of the period analyzed in

Webster, we apply greater scrutiny to the impact on Defendant's right to a speedy trial. However, this case does not go so far as *Chaplin*. In this instance, the State was preparing to bring the case to trial in April 2017 when Eason's new allegation surfaced the week prior to trial, resulting in the 17 April 2017 continuance. We note the three continuances following the one granted on 17 April 2017—14 August 2017; 23 October 2017; and 22 November 2017—took place during the State's investigation of Eason's claim and prior to Defendant's indictment for sexual offense on 13 February 2018. While we find no evidence of the willful prosecutorial neglect demonstrated in *McKoy*, nor evidence of the neglect identified in *Chaplin*, we do not go so far as to say the continuances here are synonymous with those in *Webster*, given the length of delay was twice as long.

Defendant also notes Eason was not interviewed by law enforcement until 10 May 2017 regarding the allegation, and a report following the subsequent investigation was not provided to Assistant District Attorney Orndorff until 13 October 2017, four months prior to Defendant's indictment. We do not disagree with Defendant that the length of investigation following Eason's allegation until the time of his indictment for the sexual offense raises questions of prosecutorial efficiency. In evaluating the entire Record, we also question why it took the State nine months to call a Grand Jury review of the initial charges after Defendant's arrest in February 2016. Additionally, outside of the allegation of sexual assault which surfaced in April

2017, no explanation is provided for the delays in Defendant's case, in contrast to prior cases where circumstances such as congested court dockets and missing witnesses were deemed to be valid reasons for delay. *See State v. Smith*, 289 N.C. 143, 148-149, 221 S.E.2d 247, 250 (1976); *Spivey*, 357 N.C. at 119-120, 579 S.E.2d at 255. However, we also do not see any evidence of the type of conduct we previously held to be prosecutorial neglect, absent continuances, such as in *State v. Washington* where we found *prima facie* evidence of neglect based on

> the State's three-year delay in submitting the evidence to the SBI lab, its failure to request that such evidence be compared to the AFIS Database and convicted offender indexes of the NCSBI State Database, and its failure to notify the SBI that it had been court ordered to conduct tests necessary for its prosecution.

State v. Washington, 192 N.C. App. 277, 289, 665 S.E.2d 799, 807 (2008).

Our Supreme Court has stated "[i]nherent in every criminal prosecution is the probability of some delay . . . and for that reason the right to a speedy trial is necessarily relative." *State v. Tann*, 302 N.C. 89, 94, 273 S.E.2d 720, 724 (1981). "The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case . . . . Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay." *State v. Hammonds*, 141 N.C. App. 152, 160, 541 S.E.2d 166, 173 (2000) (quoting *State v. Johnson*, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969)). The purpose is to avoid "purposeful or oppressive delays and those which the

prosecution could have avoided by reasonable effort." *Id.* Here, while we disapprove of the amount of time the State took in obtaining both indictments, and question the amount of time taken by the State in investigating Eason's allegation of sexual assault, we cannot say the length of delay was "purposeful" or definitively state that such delays "could have [been] avoided by reasonable effort." *Id.*

Defendant also asserts any delay caused by the assignment of a different court-appointed attorney to the sexual assault charge, later transferred to his original court-appointed attorney, is attributable to the State. The United States Supreme Court has held that "assigned counsel generally are not state actors for purposes of a speedy-trial claim." *Vermont v. Brillon*, 556 U.S. 81, 92, 173 L. Ed. 2d 231, 241 (2009). However, "delay resulting from a systemic breakdown in the public defender system" is potentially chargeable to the State. *Id.* at 94, 173 L. Ed. 2d at 242 (internal quotations omitted). Here, a separate court-appointed attorney was initially assigned to Defendant's sexual assault charge, which the District Attorney planned to add, on 17 April 2017. A warrant was issued on 2 June 2017 for Defendant's arrest on the sexual assault charge, and he was indicted on 13 February 2018. Defendant's original court-appointed attorney did not assume representation of the sexual offense charge until 12 March 2018 and received the order appointing him to the sexual offense charge on 6 April 2018.

While acknowledging a potential delay because of the change in counsel, the State posits such delay should be a neutral factor. We disagree. The failure to recognize the existing appointment of a court-appointed defender and to assign any new charge arising out of the same incident to him until nine months after Defendant's arrest for the new charge is indicative of a "breakdown in the public defender system," the reasons for which are unidentified by the State. *Id*. Defendant does not charge that any delay *was* incurred because of the change in attorneys, merely that any so identified from February to March 2018 should be attributed to the State. While we agree that any such delay *would* be attributable to the State, none are identified and so we withhold judgment on this particular portion of Defendant's claim.

While holding Defendant does demonstrate prosecutorial negligence in the State's failure to locate his whereabouts in December 2016, we also find Defendant does not demonstrate the State was negligent in failing to uncover evidence of Eason's alleged sexual assault until over a year after the incident. Additionally, we do not find Defendant carried his burden as it relates to the other continuances cited and the assignment of a second attorney. We hold the impact of the second *Barker* factor to be neutral.

3. Assertion of Right

We next consider the extent to which Defendant asserted his right to a speedy trial. *Johnson*, 251 N.C. App. at 268, 795 S.E.2d at 132. "A criminal defendant who vigorously asserts his right to a speedy trial will be considered in a more favorable light than a defendant who does not." *State v. Strickland*, 153 N.C. App. 581, 587, 570 S.E.2d 898, 903 (2002). While "Defendant's failure to assert his right to a speedy trial, or his failure to assert his right sooner in the process, does not foreclose his speedy trial claim, [it] does weigh against his contention that he has been denied his constitutional right to a speedy trial." *Grooms*, 353 N.C. at 63, 540 S.E.2d at 722.

Defendant contends his 18 January 2017 request for a trial date constitutes an assertion of his right to a speedy trial and should therefore weigh in favor of holding that his *Motion to Dismiss* was improperly denied. As Defendant concedes, a timely trial date of 17 April 2017 was set on the same day Defendant made his request. However, as previously discussed, the State removed the date from the trial calendar when Eason's allegation of sexual assault surfaced on 11 April 2017. Far from delaying, it appears the State heeded Defendant's request, which was only frustrated upon the presentation of additional related allegations. While evincing an assertion of his right, Defendant's single request falls far short of previous cases in which we have held such assertions to have persuasively established a violation of a defendant's right to a speedy trial. *See McKoy*, 294 N.C. at 142, 240 S.E.2d at 389 (1978) (finding

a defendant's assertion of his Sixth Amendment right had been impermissibly ignored after he "requested a trial date eight or nine times . . .").

Defendant next asserted his right in his *Motion to Dismiss*, filed 13 June 2018. The following day, the case was set for trial on 16 July 2018, and proceeded to trial a little over a month after Defendant's assertion. Again, the timing suggests that, far from ignoring his right to a speedy trial, the State and the trial court heeded the assertion of Defendant's right and ensured his trial would take place in a timely manner. Thus, the degree to which the assertions of Defendant's right bears in favor of dismissal is minimal.[5]

4. Prejudice

Finally, we consider whether Defendant was prejudiced by the delay. *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721. Generally, "[a] defendant must show actual, substantial prejudice." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257. The constitutional right to a speedy trial exists "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* at 122, 579 S.E.2d at 256 (internal marks omitted). "Of these, the most serious is the last, because the inability of a defendant adequately to

[5] However, it would be too far-reaching to accept the State's contention that, by waiting one year and five months after requesting a trial date to more formally assert his right to a speedy trial, Defendant "acquiesced in a delay," thereby turning the third *Barker* factor against him. *State v. Tindall*, 294 N.C. 689, 695-96, 242 S.E.2d 806, 810 (1978). Defendant's silence alone is not the same as a defendant willfully fleeing across state lines and living under an assumed name to evade authorities, thereby causing a delay. *Id.*

prepare his case skews the fairness of the entire system." *Webster*, 337 N.C. at 681, 447 S.E.2d at 352.

Defendant argues "consideration of prejudice is not limited to the specifically demonstrable . . . [and] affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655, 120 L. Ed. 2d at 530. He further contends "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.* We addressed this contention in *State v. Hammonds*:

> Although defendant contends that he need not demonstrate prejudice resulting from the delay to obtain relief . . . the holding of *Doggett* is that the need to demonstrate prejudice diminishes as the egregiousness of the delay increases. To warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice. Nevertheless, courts will not presume that a delay in prosecution has prejudiced the accused. The defendant has the burden of proving the fourth factor.

Hammonds, 141 N.C. App. at 163, 541 S.E.2d at 175 (internal quotations omitted). In *Doggett*, the defendant faced a delay of more than eight years between arrest and indictment, six of which the United States Supreme Court held the government responsible for. *Doggett*, 505 U.S. at 657-58, 120 L. Ed. 2d. at 532. Here, Defendant faced a far shorter delay of two years and five months. As Defendant still needs to demonstrate prejudice, as we recognized in *Hammonds*, in the absence of any further assertions, such as the three enumerated, we find he fails to do so.

Defendant also uses our language in *State v. Armistead*—"when weighed against a legitimate reason for the State's delayed prosecution, a defendant must show actual or substantial prejudice resulting from the delay to establish a violation of his constitutional right to a speedy trial"—to seemingly argue not only a different standard in his need to show actual or substantial prejudice, but the State's principal reason for delay, the investigation of the sexual offense, was not legitimate, thereby relieving him of his burden to show such prejudice. *Armistead*, 256 N.C. App. at 241, 807 S.E.2d at 671 (internal marks omitted). However, this quote in *Armistead* cites directly to the language of *State v. Spivey*—"[a] defendant must show actual, substantial prejudice"—demonstrating the language used in *Armistead* is derived from the same rule, not a modification of it. *Id.* Defendant must still show actual or substantial prejudice, and he fails to offer an argument that his defense was impaired, or he suffered anxiety, concern, and other oppression in connection with pretrial incarceration. Consequently, Defendant has not demonstrated prejudice under the fourth *Barker* factor.

5. *Barker* Factors on Balance

The length of the delay between Defendant's arrest and trial is sufficient to raise initial speedy trial concerns under *Barker*. While we find Defendant demonstrated minimal assertions of his right to a speedy trial, we hold the reasons for delay to be neutral in the aggregate, where Defendant has failed to demonstrate

the requisite prejudice "resulting from the delay to obtain relief." *Hammonds*, 141 N.C. App. at 163, 541 S.E.2d at 175. Balancing these factors, we hold the trial court did not err in denying Defendant's *Motion to Dismiss* on speedy trial grounds.

B. Improper Opinion

Defendant next argues the trial court expressed an improper opinion in its instruction that the testimony of the reporting officer was for the purpose of corroborating prior witness testimony.

Prohibitions on improper opinions are codified in N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232. *See State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) ("The statutory prohibitions against expressions of opinion by the trial court contained in N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232 are mandatory."). N.C.G.S. § 15A-1222 provides "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (2019). N.C.G.S. § 15A-1232 provides "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C.G.S. § 15A-1232 (2019). "Whenever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature

of these statutory prohibitions." *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005).

"[A]n alleged improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made. Furthermore, [D]efendant must show that he was prejudiced by a judge's remark." *State v. Jones*, 358 N.C. 330, 355, 595 S.E.2d 124, 140 (2004). Prejudice occurs where "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." N.C.G.S. § 15A-1443(a) (2019).

Defendant excepts to the last statement made by the trial court in this exchange, during the direct examination of the reporting officer:

> [DETECTIVE:] . . . I talked with [Barnes] inside the residence. [Barnes] stated that when [Eason] burst through the front door, they opened the front door, she told them that she had been in a domestic fight with her boyfriend. I asked [Barnes] who her boyfriend was and she said she knew her boyfriend to be [Defendant].
>
> [STATE:] And did you –
>
> [DEFENSE:] Motion to strike. Hearsay.
>
> THE COURT: Overruled.
> . . . .
> THE COURT: Well, just a minute. Ladies and gentlemen, the purpose of that last statement was to corroborate what the other witnesses said. It was

> not offered for the purpose of substantive evidence. It was offered for the purpose of corroboration.

Defendant contends this statement improperly expresses the trial court's opinion that the officer's testimony corroborated earlier witnesses, as "it is error . . . to emphasize to the jury that the testimony of [a] prosecuting witness was corroborated by other testimony." *State v. McLean*, 17 N.C. App. 629, 633, 195 S.E.2d 336, 339 (1973). We disagree.

Here, the trial court's comments, which were a limiting instruction, were that the purpose of the testimony was to "corroborate what the other witnesses said." This is distinguishable from *McLean*, where the trial court restated at length the position of the State, remarking that "the testimony of [the] victim was . . . corroborated and strengthened by the testimony of another [witness] . . . so the State says and contends." *Id.* at 631, 195 S.E.2d at 338. Not only was a paraphrasing of the State's argument embedded within a detailed description of that argument as a whole, but it was also accompanied by an evocation of sympathy for the victim. *Id.* Unlike the trial court in *McLean*, the trial court here did not paraphrase or otherwise summarize the State's argument and did not attempt to evoke sympathy for either party. Finally—and perhaps more significantly—the trial court's comment was a direct response to Defendant's concern that the witness's comment would be understood as substantive rather than corroborative. Here, the trial court's instruction was offered not to establish what the statement *did* accomplish from an evidentiary standpoint,

but rather to establish what it *could not* accomplish. Thus, "in light of the circumstances in which [the statement] was made," it did not constitute an improper opinion. *Jones*, 358 N.C. at 355, 595 S.E.2d at 140.

Defendant also contends the trial court should have issued N.C.P.I.—CRIM. 105.20 following the reporting officer's testimony, in lieu of the limiting instruction given. The pattern instruction provides in part, "[e]vidence has been received . . . which may conflict or be consistent with the testimony of the witness at this trial . . . . [Y]ou may consider this, and all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve the witness's testimony." N.C.P.I.—CRIM. 105.20 (2019). "The admission of evidence which is competent for a restricted purpose without limiting instructions will not be held to be error in the absence of a request by the defendant for such limiting instructions." *State v. Love*, 152 N.C. App. 608, 617, 568 S.E.2d 320, 326 (2002). Defendant did not request the trial court issue N.C.P.I.—CRIM. 105.20 as a limiting instruction following the testimony of the reporting officer. Moreover, the trial court did give this pattern instruction in its charge to the jury prior to deliberations. Defendant does not show the trial court erred in failing to give the instruction immediately following the testimony of the officer.

Defendant fails to show prejudice as he cannot demonstrate "a reasonable possibility that, had the error in question not been committed, a different result

would have been reached at the trial . . . ." N.C.G.S. § 15A-1443(a) (2019). Assuming, arguendo, we found the trial court's statement to be an improper opinion, the pattern instruction given prior to the jury charge would have cured the statement. *See State v. Hines*, 131 N.C. App. 457, 462, 508 S.E.2d 310, 314 (1998). "Our system of justice is based upon the assumption that trial jurors are women and men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *Id.* The trial court's statement did not constitute an improper opinion and Defendant fails to show prejudice.

C. Motion for Appropriate Relief

Defendant asserts the trial court abused its discretion in denying his *Motion for Appropriate Relief* without holding an evidentiary hearing to resolve issues of material fact. We disagree. Defendant filed the motion, pursuant to N.C.G.S. § 15A-1414(b)(4), on 27 July 2018, nine days after sentencing. In it, Defendant stated:

> 1. He was found guilty by the jury on 17 July 2018 of Assault Inflicting Serious Bodily Injury in 16 CRS 50459, and acquitted in the other case in the caption above. Afterwards, he was sentenced based on information not introduced at the trial or sentencing hearing in violation of [N.C.G.S. §] 15A-1414(b)(4).
>
> 2. In fact, there was no sentencing hearing. Following the return of the verdict by the Jury, instead of presenting evidence, the prosecutor asked, and was allowed by the Judge, to approach the bench. The prosecutor then presented to the Judge what appeared to be a sentencing worksheet showing 18 points including a misdemeanor conviction in December 2017, and a prior record level of VI

> (6). That sentencing worksheet had not been shown to and was not signed by the Defendant nor Counsel for Defendant before being presented to the Judge or at any time since then.
>
> 3. By contrast, on 13 June 2018, after asking the prosecutor for information about Defendant's criminal record and his prior record level, the prosecutor presented a sentencing worksheet that Counsel reviewed with Defendant; that worksheet showed four convictions totaling 17 points and a prior record level of V (5). Counsel for Defendant signed that document on that date. See Exhibit A attached.
>
> 4. No evidence was presented to the Court, as required by [N.C.G.S. §] 15A-1340.14(f), by the prosecutor in support of the information on the sentencing worksheet shown to the Court. Therefore, Defendant should have been sentenced at a record level I (1), not withstanding the unsupported sentencing worksheet handed to the Judge at the bench.

Defendant's counsel also submitted an affidavit with the motion stating:

> I, Darryl Smith, Attorney for Defendant, hereby submit the above Motion on behalf of my client, Sylvester Ruffin. I have read the Discovery materials provided by the State and discussed this matter with my client before preparing this Motion. The statements contained in it are accurate based on information and belief and there is a sound legal basis for this Motion and it is being filed in good faith. Since most of the proceedings in question in this Motion took place at the Judge's bench, and not in open court, it is not likely that a copy of the transcript would be necessary for consideration of this matter.

The trial court denied the motion, finding the proceedings to be in order, "[t]he foundation of which was put on the record in open court."

N.C.G.S. § 15A-1420(c) governs hearings on motions for appropriate relief and provides the following in relevant part:

> Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact.

N.C.G.S. § 15A-1420(c)(1) (2019). "If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact." N.C.G.S. § 15A-1420(c)(4) (2019). However, "[a]n evidentiary hearing is *not* required when the motion is made in the trial court pursuant to [N.C.]G.S. [§] 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact." N.C.G.S. § 15A-1420(c)(2) (2019) (emphasis added).

> [I]f a defendant files a motion for appropriate relief under N.C.G.S. § 15A–1414, the decision of whether an evidentiary hearing is held is within the sound discretion of the trial court. Defendant's motion for appropriate relief was made in the trial court pursuant to N.C.G.S. § 15A–1414 so, therefore, we review the trial court's order denying an evidentiary hearing for abuse of discretion.

State v. Elliott, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006). "Abuse of discretion results where 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." *Id.*

As stated in Defendant's *Motion for Appropriate Relief*, immediately following the verdict, the State asked to present a sentencing worksheet to the trial court and an off-record bench conference ensued. The Court then sentenced Defendant as a Level VI offender, with 18 prior points. Shortly thereafter, Defendant's counsel asked to make a statement on the Record regarding the sentencing worksheet, recorded as follows:

> [DEFENSE COUNSEL:] May I make a statement for the record about the information we just received from the State?
>
> THE COURT: I'm sorry?
>
> [DEFENSE COUNSEL:] May I make a statement also for the record about the information that we just conferred with at the bench about the Record Level?
>
> THE COURT: Well, that is on the record about what the Record Level is. The charges, the dates and that Record Level was determined by the Court to be correct. Your exception to that ruling is hereby noted for the record.
>
> [DEFENSE COUNSEL:] Simply on the basis of one that had a conviction subsequent to the date of the event, the assault.
>
> THE COURT: That exception is noted for the record. Thank you, sir.

On appeal, Defendant alleges fraud, stating Defense Counsel never signed the worksheet or it was edited without his knowledge, as attested to in Defendant's *Motion for Appropriate Relief*. The Record provides us with two worksheets,

beginning with the 18 July 2018 worksheet reviewed in the off-record bench conference:

III. [illegible] - 39 - [illegible]TION

The prosecutor and defense counsel, or the defendant, if not r[illegible]d by counsel, stipulate to the information set out in Sections I and V of this form, and agree with the defendant's prior record level or prior conviction level as set out in Section II based on the information herein.

Date	Signature Of Prosecutor	Date	Signature Of Defense Counsel Or Defendant
7/18/18			

IV. DNA CERTIFICATION
(For Offenses Committed On Or After Feb. 1, 2011)

A review of the case record (the form required by G.S. 15A-266.3A(c)) and the records of the State Bureau of Investigation (the DCI-CCH rap sheet) indicates that *(check one)*:

☐ 1. The defendant is NOT required to provide a DNA sample for this conviction because (i) the offense is not covered by G.S. 15A-266.4 or (ii) a sample of the defendant's DNA has previously been obtained and the defendant's DNA record is currently stored in the State DNA database.

☒ 2. The defendant IS required to provide a DNA sample for this conviction because (i) the offense is covered by G.S. 15A-266.4 and (ii) a sample of the defendant's DNA has not previously been obtained and the defendant's DNA record has not previously been stored in the State DNA Database, or if previously obtained and stored, the defendant's DNA sample and record have been expunged.

Date	Name Of Prosecutor (Type Or Print)	Signature Of Prosecutor
7/18/18	Terry S. Underhill	

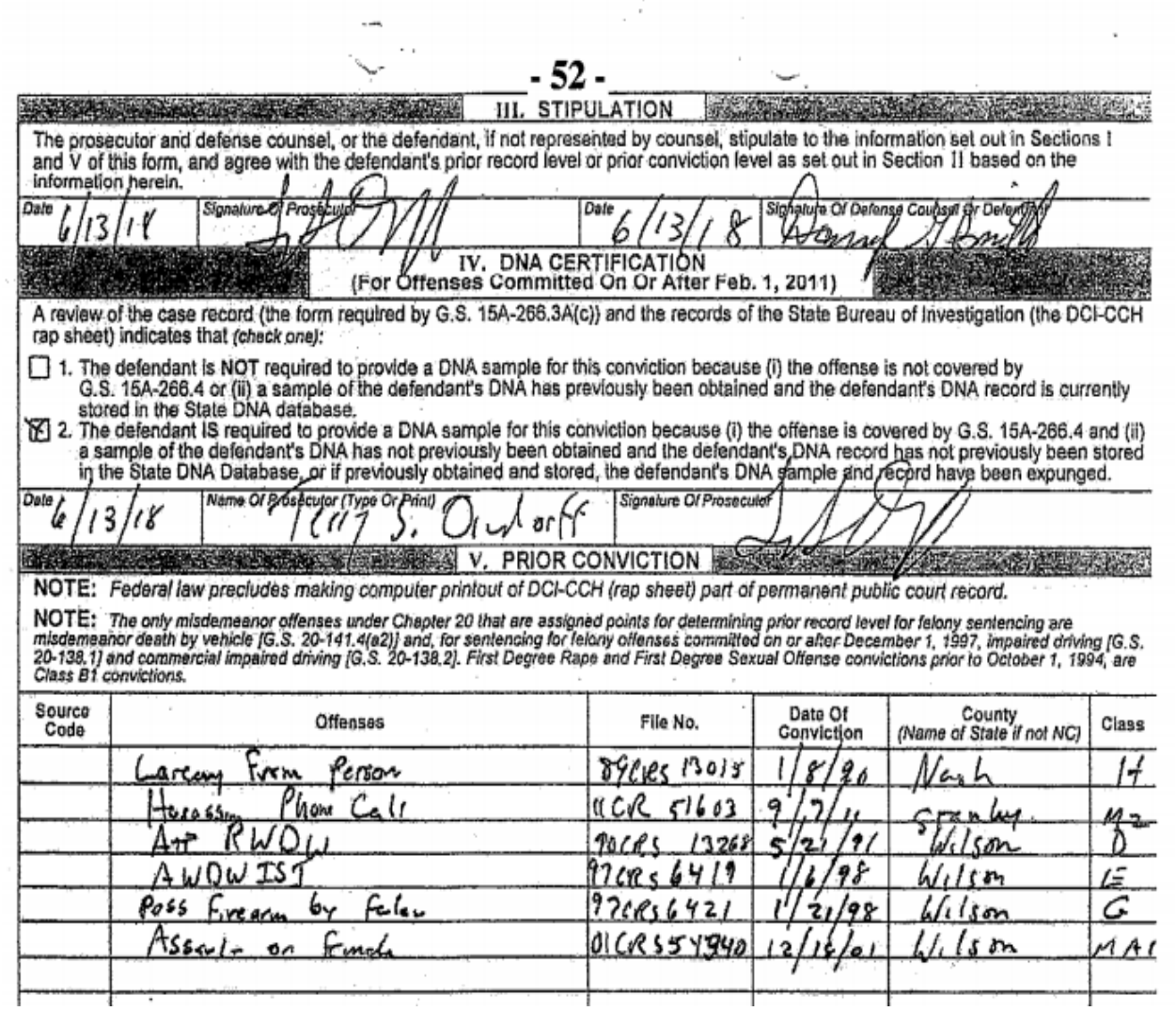
V. PRIOR CONVICTION

NOTE: *Federal law precludes making computer printout of DCI-CCH (rap sheet) part of permanent public court record.*

NOTE: *The only misdemeanor offenses under Chapter 20 that are assigned points for determining prior record level for felony sentencing are misdemeanor death by vehicle [G.S. 20-141.4(a2)] and, for sentencing for felony offenses committed on or after December 1, 1997, impaired driving [G.S. 20-138.1] and commercial impaired driving [G.S. 20-138.2]. First Degree Rape and First Degree Sexual Offense convictions prior to October 1, 1994, are Class B1 convictions.*

Source Code	Offenses	File No.	Date Of Conviction	County (Name of State if not NC)	Class
	Larceny From the Person	89CRS13015	1/9/90	Nash	H
	Att Robbery W DW	90CRS13268	5/21/91	Wilson	D
	AWPWISI	97CRS6419	1/6/98	Wilson	E
	Poss Firearm by Felon	97CRS6421	1/21/98	Wilson	G
	AOF	01CR54340	12/20/01	Wilson	MAI
	AOF	16CRS54289	11/22/17	Onslow	MAI

The Record clearly shows signatures from either Defendant or Defense Counsel. It also reflects the charge in contention, dated 27 November 2017, which accounted for the increase in Defendant's prior Record Level. The 13 June 2018 worksheet previously stipulated to by Defendant also reflects signatures by all parties, although it does not include the 27 November 2017 charge:



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III. STIPULATION

The prosecutor and defense counsel, or the defendant, if not represented by counsel, stipulate to the information set out in Sections I and V of this form, and agree with the defendant's prior record level or prior conviction level as set out in Section II based on the information herein.

Date 6/13/18 | Signature Of Prosecutor | Date 6/13/18 | Signature Of Defense Counsel Or Defendant

IV. DNA CERTIFICATION
(For Offenses Committed On Or After Feb. 1, 2011)

A review of the case record (the form required by G.S. 15A-266.3A(c)) and the records of the State Bureau of Investigation (the DCI-CCH rap sheet) indicates that *(check one)*:

☐ 1. The defendant is NOT required to provide a DNA sample for this conviction because (i) the offense is not covered by G.S. 15A-266.4 or (ii) a sample of the defendant's DNA has previously been obtained and the defendant's DNA record is currently stored in the State DNA database.

☒ 2. The defendant IS required to provide a DNA sample for this conviction because (i) the offense is covered by G.S. 15A-266.4 and (ii) a sample of the defendant's DNA has not previously been obtained and the defendant's DNA record has not previously been stored in the State DNA Database, or if previously obtained and stored, the defendant's DNA sample and record have been expunged.

Date 6/13/18 | Name Of Prosecutor (Type Or Print) Tecia S. Owsley | Signature Of Prosecutor

V. PRIOR CONVICTION

NOTE: *Federal law precludes making computer printout of DCI-CCH (rap sheet) part of permanent public court record.*

NOTE: *The only misdemeanor offenses under Chapter 20 that are assigned points for determining prior record level for felony sentencing are misdemeanor death by vehicle [G.S. 20-141.4(a2)] and, for sentencing for felony offenses committed on or after December 1, 1997, impaired driving [G.S. 20-138.1] and commercial impaired driving [G.S. 20-138.2]. First Degree Rape and First Degree Sexual Offense convictions prior to October 1, 1994, are Class B1 convictions.*

Source Code	Offenses	File No.	Date Of Conviction	County (Name of State if not NC)	Class
	Larceny From Person	89CRS 13015	1/8/90	Nash	H
	Harassing Phone Calls	11CR 51603	9/7/11	Granville	MZ
	Att RWDW	90CRS 13268	5/21/91	Wilson	D
	AWDWIST	97CRS 6419	1/6/98	Wilson	E
	Poss Firearm by Felon	97CRS 6421	1/21/98	Wilson	G
	Assault on Female	01CRS 54940	12/18/01	Wilson	MA1

The trial court did not abuse its discretion in choosing not to hold an evidentiary hearing to decide material issues of fact. Both the State and Defense Counsel conferred with the trial court in the off-record bench conference, which Defendant acknowledged would not have been illuminated by the trial court transcript, as "most of the proceedings in question in this [m]otion took place at the Judge's bench, and not in open court." At no point during sentencing did Defendant,

or his defense counsel, allege fraud in reference to the signatures on the 18 July 2018 worksheet. Indeed, Defendant's exception following entry of judgment appears to be related to the use of the 27 November 2017 conviction in determining his prior record level, not to the existence of fraudulent activity. Moreover, the signatures on both worksheets are clearly visible, as demonstrated by the Record. Given these facts, we do not conclude the trial court abused the discretion accorded to it by N.C.G.S. § 15A-1420(c)(2) in failing to grant Defendant's request for an evidentiary hearing and denying his *Motion for Appropriate Relief*.

CONCLUSION

The trial court did not err in denying Defendant's *Motion to Dismiss* and did not improperly express an opinion. The trial court did not abuse its discretion when it denied Defendant's *Motion for Appropriate Relief*.

NO ERROR.

Judges INMAN and BERGER concur.

Report per Rule 30(e).