IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-258

Filed 2 April 2024

Cumberland County, No. 17 CRS 50999

STATE OF NORTH CAROLINA

v.

JAMEEL MALIK DAVIDSON

Appeal by Defendant from Judgment rendered 29 April 2022 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 25 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zachary K. Dunn, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jameel M. Davidson (Defendant) appeals from a Judgment rendered pursuant to a jury verdict finding him guilty of First-Degree Murder. The Record before us tends to reflect the following:

Gerald Gillespie, an 86-year-old man living alone in an apartment in Fayetteville, North Carolina, was found deceased around 2:00 p.m. on 18 January 2017. His apartment door was unlocked and there were no signs of forced entry. Gillespie's body was discovered just inside the door on the floor of the living room with a pool of blood under his head and another pool of blood approximately three feet away. There were bloody drag marks between the two pools of blood, indicating the body had likely been moved. The rest of the apartment appeared undisturbed except for two jars of coins typically kept on the dresser which were missing.

Emergency Medical Services personnel, who were called to the scene, suspected that a crime had occurred based on the drag marks. Police obtained a search warrant for Gillespie's apartment and discovered a bloody knife in a bucket in the bathroom. After this, they inspected the body more closely and found marks on Gillespie consistent with stab wounds. Police believed the knife found in the bathroom "definitely appeared" to have caused Gillespie's injuries. At around 9:00 p.m. the same day, a detective spoke to the family in the parking lot, where people had gathered since EMS and police arrived.

Defendant, then 21 years old with diagnosed but untreated schizophrenia, lived with his father in the apartment directly below Gillespie. Defendant was seen walking in and around the apartment building and parking lot throughout the day. A police officer posted at Gillespie's door observed Defendant, believed his behavior was "strange," and notified his colleagues. An officer with the Fayetteville Police

Department, Detective Jamaal Littlejohn, first spoke to Defendant on 18 January 2017 during an initial canvass and again later that day after noticing Defendant walking around. Detective Littlejohn stated Defendant was cooperative and polite during these conversations.

During a more comprehensive canvass on 20 January 2017, police spoke with Henry Simpson, who was also a resident of the apartment complex. Simpson told an officer he had been drinking all day and was "pretty jazzy."[1] Simpson told an officer that while investigators were on the scene on 18 January, Defendant approached him, and when Simpson asked him what was going on, Defendant replied that the victim had been stabbed. Further, Simpson stated Defendant was trying to buy a gun to leave town, but Simpson did not sell him one. Detective Littlejohn spoke with Simpson again on 21 January 2017 and showed him a photograph of Defendant to identify.

Based on Simpson's statements, as well as those of another witness, Robert Phillips, Detective Littlejohn obtained a search warrant for Defendant's apartment. In Detective Littlejohn's search warrant affidavit, he attested that Defendant told Simpson[2] the victim had been robbed and stabbed, and that this information was

[1] In this context, "jazzy" means intoxicated or tipsy.

[2] Paragraph 7 of Detective Littlejohn's affidavit states that during the 20 January 2021 canvass, "contact with [sic] made with witness SIMPSON and witness PHILLIPS . . . [Defendant] told the witness that an old man was robbed and stabbed." It is unclear from Littlejohn's affidavit whether "the witness" refers to Simpson or Phillips, or whether it should refer to both witnesses. However, both briefs infer that "the witness" refers to Simpson.

unknown to law enforcement at the time of the conversation and had not been released to the public—allegations which Defendant contests.

Deputies searched Defendant's apartment on 21 January 2017. Pursuant to this search, officers seized a pair of tennis shoes belonging to Defendant that were just inside the front door. Police also seized three knives found under a mattress and other knives in a bag in the kitchen pantry. The knives were all different brands, none of which matched the knife found in Gillespie's bathroom. The search did not turn up any bloody clothes or towels, and there was no blood visible in the apartment. Forensic testing revealed Gillespie's DNA was present on the top of Defendant's shoe. Police obtained an arrest warrant for Defendant, and he was arrested in Miami, Florida on 25 January 2017. Defendant was initially deemed incompetent to stand trial. After commitment to a health care facility, Defendant's competency was restored on 4 February 2021.

On 18 August 2020, Defendant filed a Motion to Suppress evidence seized pursuant to the 21 January 2017 search warrant, including Defendant's shoe that had Gillespie's DNA on it. On 6 May 2021, the trial court heard arguments on Defendant's Motion to Suppress. Defendant did not submit evidence, but submitted only an affidavit made by defense counsel upon information and belief. After hearing arguments from counsel, the trial court denied Defendant's Motion. The trial court entered a written Order Denying Defendant's Motion to Suppress on 18 May 2022, after both trials, that made several Findings of Fact, notably including the following:

> 3. Before the method of homicide was fully known by police, and before the release of those stab wounds outside the family of the victim, and before it was known that there were items missing from the apartment, the Defendant told Simpson and Phillips that the "old man was stabbed and robbed."

The trial court concluded the search warrant contained probable cause to search Defendant's apartment.

Defendant's first trial began on 10 May 2021 in Cumberland County Superior Court. On 14 May 2021, the trial court declared a mistrial due to a hung jury. Defendant was brought again for trial beginning 25 April 2022.

At the second trial, the State's pathologist testified that Gillespie had suffered approximately 25 stab wounds and died as a result of blood loss. She further testified she could not tell the angle nor the direction from which the wounds occurred. DNA testing on the knife from Gillespie's bathroom showed only Gillespie's DNA on the blade on the knife. The State's forensic testing revealed a mixture of DNA on the handle of the knife—the major contributor was Gillespie, and the minor contributor was an unknown third person; Defendant was excluded. The DNA from the top of Defendant's shoe showed Gillespie as the major contributor, and the minor contributor was inconclusive. Fingernail scrapings taken from Gillespie did not match Defendant.

The trial concluded after only two days. On 27 April 2022, the jury was sent out to choose a foreperson at 4:54 p.m. and dismissed after doing so at 5:06 p.m. The next day, the jury was sent to deliberate at 9:13 a.m. After approximately four and a

half hours, excluding their lunch break, the jury sent a note to the trial court stating they were unable to reach a unanimous decision and requested guidance. After discussion with the attorneys, the trial court read an *Allen* charge to the entire jury without asking them any questions. The jurors were then sent to deliberate. They deliberated, with the exception of a short break, until nearly 5:00 p.m. Just before 5:00 p.m., the jury sent another note to the trial court which read: "All jurors agreed to the elements of the crime and that it is first degree murder. However, one juror is not convinced that the defendant committed [the] crime." At that point, the trial court brought the jury in and dismissed them for the day, telling them the note would be discussed with them the next day. Both attorneys asked to see the note, but the trial court denied their requests and stated the note would be sealed.

The next day, 29 April 2022, the trial court appeared ready to send the jury back to deliberate when a juror asked about the note the jury had sent the previous day. The trial court responded it would address it with the attorneys while the jury continued to deliberate. After the jury left, the trial court and the attorneys discussed the note in broad terms. The trial court did not tell the attorneys precisely what the note said, but the conversation centered around questioning whether one or more of the jurors was fully participating in deliberations. The trial court decided to wait and consider whether to ask the foreperson if the votes had changed over the course of deliberations and whether to instruct the jury further. After this, the jury sent another note requesting a new verdict form because "the original was checked

prematurely." The trial court shared the note with the attorneys, but did not tell them what the verdict sheet said. New verdict sheets were given to the jury, but no other action was taken.

Around 10:30 a.m. the same day, the jury sent another note which read: "We cannot come to a unanimous vote amongst ourselves. One juror is unable to reach a similar conclusion as the whole." The trial court read only the first sentence of the note to the attorneys. The trial court took no further action and sent the jury out on recess an hour later. When the jury returned from recess around 11:45 am, the foreperson submitted a note on behalf of Juror 6 stating that she wanted to be replaced on the jury and did not feel she could continue. The trial court read the note to the attorneys without identifying the juror by number.

The trial court and attorneys then discussed how to proceed. The jury returned at 12:10 pm, and the trial court pulled the foreperson in separately to ask him several yes or no questions around 1:30 p.m. The foreperson informed the trial court that every juror had made their mind up and that the juror asking to be excused was doing so for a mental rather than physical reason. The foreperson reported the juror "had reached a decision where there's nothing available to us and to her to change her opinion . . . What's the point in us keep going on if she already decided where she is going to be on it and there's nothing that can change it based on the evidence that we had[.]" During discussions after the foreperson left, Defense Counsel said: "That to me is the definition of a hung jury." However, he did not move for a mistrial.

Discussions continued until the parties and trial court agreed the trial court would speak to the juror asking to be excused in chambers without attorneys present. The trial court proposed to the parties that he bring in the juror "and just say how do you feel; are you physically able to continue with jury deliberations; are you mentally able? . . . Nothing else?" Both sides agreed. The parties and trial court agreed the court reporter, clerk, and bailiff would be present during the discussion with the juror. Defense Counsel requested the conversation be on the record and the trial court agreed. The trial court recessed and brought the juror into chambers.

In chambers, the trial court asked Juror 6 about the last note sent through the foreperson. The trial court asked whether it was a medical or physical issue, and the juror responded that it was not, but that it was a mental issue. The juror reported there was a numerical division among the jurors as to one of the charges and she was in the minority. She expressed she felt pressured by the other jurors because she was in the minority, but she did not feel unsafe and believed she could continue if she were required to do so. The trial court then told her:

> Well, it's important that all jurors feel comfortable, but that all jurors work together and you all have already apparently reached a unanimous verdict as to one matter. So I'm not trying to make you all reach a verdict, but I am trying to give both sides a fair trial . . . And I don't want you to comment to this, but I'm sure there's a lot of frustrated people anytime that there is a disagreement as to the facts of something and it's just easier to sometimes just say okay, I'm done. If the Court were to require that you stay, do you think that you could continue to deliberation with the other jurors with an open mind?

The juror answered that she could. After this, the trial court asked whether there was anything else the juror felt the trial court needed to know, and Juror 6 responded: "I think I am confused on the instructions." The trial court then determined to reread the jury instructions for the entire jury.

Prior to rereading the jury instructions, the trial court spoke again with the attorneys for both sides and informed them the juror was not afraid nor in physical or mental danger, and she felt she could continue to deliberate if she were required to do so. The trial court also told the attorneys the juror said she was confused about the instructions and indicated that it would be helpful to have the jury instructions reread. The trial court did not provide any additional information to the attorneys. Defense counsel did not ask any questions, nor did he move for a mistrial or ask for a copy of the transcript from the trial court's conversation with the juror despite requesting that the conversation be on the record.

The trial court then reread the jury instructions for the entire jury that afternoon and dismissed the jury at 2:17 p.m. to deliberate. Eighteen minutes later, the jury returned with unanimous verdicts finding Defendant guilty of First-Degree Murder and not guilty of Robbery. The trial court sentenced Defendant to life imprisonment without parole. Defendant gave oral Notice of Appeal in open court.

Appellate Jurisdiction

The trial court rendered Judgment and sentenced Defendant on 29 April 2022. The Record also reflects a written Judgment signed by the trial court on 29 April

2022, but this Judgment is neither file-stamped nor certified by the Clerk. Rule 4 of the North Carolina Rules of Appellate Procedure provides appeal from a judgment *rendered* in a criminal case must be given either orally at trial or by filing written notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of judgment. N.C.R. App. P. 4 (2023). Here, the Record reflects the written Judgment was signed by Judge James F. Ammons, Jr. on 29 April 2022, and Defendant gave oral Notice of Appeal on 29 April 2022. There is no dispute between the parties that Judgment was in fact entered and Defendant's oral Notice of Appeal was timely. Therefore, this Court has appellate jurisdiction over this appeal.[3]

Issues

The issues before us are whether: (I) the trial court plainly erred by denying Defendant's Motion to Suppress; (II) the trial court erred by denying Defendant's Motion to Dismiss; and (III) the trial court's actions with respect to the jury notes and in camera discussion with Juror 6—in light of defense counsel's acquiescence—violated Defendant's rights to be present at each stage of trial, his right to the presence of counsel, and his right to a unanimous jury verdict.

[3] Nevertheless, we urge all parties in future to comply with Rule 9(b)(3) of the North Carolina Rules of Appellate Procedure, which provides: "Every pleading, motion, affidavit, or other document included in the printed record should show the date on which it was filed and, if verified, the date of verification and the person who verified it. Every judgment, order, or other determination should show the date on which it was entered." N.C.R. App. P. 9(b)(3) (2023).

Analysis

I. Motion to Suppress

Defendant contends the trial court plainly erred in denying his Motion to Suppress the DNA evidence found on Defendant's shoe. Because defense counsel did not object to the introduction of the shoe evidence at trial, our review is limited to plain error. *See State v. Worley*, 268 N.C. App. 300, 303, 836 S.E.2d 278, 282 (2019) ("In criminal cases, unpreserved issues may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." (citation and quotation marks omitted)).

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in

original).

Defendant contends the trial court's denial of his Motion to Suppress was plain error because the warrant affidavit upon which the search warrant was based "(1) gave the false and misleading impression that [Defendant] had information only the perpetrator would have known; and (2) omitted information that would have shown Henry Simpson to be an unreliable witness." The evidence in the Record does not support the conclusion any such errors amounted to plain error.

First, the Record before us contains no evidence tending to support Defendant's assertion that other persons knew Gillespie had been stabbed before that information was made public. The trial court's Finding of Fact 3 states

> Before the method of homicide was fully known by police, and before the release of those stab wounds outside the family of the victim, and before it was known that there were items missing from the apartment, the Defendant told Simpson and Phillips that the "old man was stabbed and robbed."

This Finding is supported by Detective Littlejohn's affidavit in the search warrant application, which was corroborated by transcripts of his interviews with witnesses, testimony from the first trial, and Detective Littlejohn's contemporaneous notes from his conversations with witnesses. Further, although Defendant asserts discovery produced evidence contradicting the warrant application and witness statements, he does not point to anything in the Record to support this contention.

Defendant correctly notes Detective Littlejohn failed to disclose Simpson was intoxicated at the time of their conversation on 20 January 2017, which is material

information the magistrate could have considered in evaluating the search warrant. However, this omission does not rise to the level of plain error because Defendant has not addressed the fact that law enforcement obtained the same information from Phillips. Thus, even had the trial court found Simpson's testimony unreliable due to his intoxication, there was still sufficient evidence to support issuing the search warrant for Defendant's apartment. Furthermore, Phillips' statements corroborate Simpson's, which diminishes concerns about their reliability. Given the lack of evidence in the Record showing others knew the details of the crime Defendant relayed to Simpson and Phillips' interview corroborating Simpson's account, we conclude the trial court did not plainly err by denying Defendant's Motion to Suppress.

II. Motion to Dismiss

a. *Standard of Review*

"Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fields*, 265 N.C. App. 69, 71, 827 S.E.2d 120, 122 (2019) (citation and quotation marks omitted), *review allowed, writ allowed*, 372 N.C. 705, 830 S.E.2d 816 (2019), *and aff'd as modified*, 374 N.C. 629, 843 S.E.2d 186 (2020). "Substantial evidence is [the] amount . . . necessary to persuade a rational juror to accept a conclusion." *State v. Golder*,

374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (alterations in original) (citation and quotation marks omitted).

"Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Id.* at 250, 839 S.E.2d at 790 (citation and quotation marks omitted). "In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered 'in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.' " *Id.* at 249-50, 839 S.E.2d at 790 (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). Evidence "need not be irrefutable or uncontroverted" to be substantial. *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002). Discrepancies and contradictions within the evidence are jury issues, and are therefore not considered in reviewing the denial of a motion to dismiss. *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005).

b. Application

Our General Statutes set out the offense of First-Degree Murder in pertinent part as follows:

> A murder which shall be perpetrated by means of . . . any . . . kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of . . . robbery . . . or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree[.]

N.C. Gen. Stat. § 14-17(a) (2021).

Here, Defendant contends the trial court erred in denying his Motion to Dismiss because the State failed to present substantial evidence Defendant had perpetrated the murder. Defendant first contends the DNA evidence found on Defendant's shoe was insubstantial because the State failed to show the DNA evidence could only have been left at the time the crime was committed.

The State presented a coherent explanation for the DNA evidence on Defendant's shoe, which Defendant did not attempt to rebut at trial. The DNA evidence tied Defendant to the scene, and a reasonable person could find it sufficient to support Defendant's guilt. *See State v. Cross*, 345 N.C. 713, 718, 483 S.E.2d 432, 435 (1997) (holding a single fingerprint was sufficient evidence to withstand a defendant's motion to dismiss). Although Defendant offers alternative explanations in his appeal, such arguments are properly considered matters of credibility and weight—issues which are the purview of the jury. *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274; *see also State v. Grigsby*, 351 N.C. 454, 456-57, 526 S.E.2d 460, 462 (2000) (a case should go to a jury even where there is evidence to support reasonable inference of innocence).

Our review is limited to considering whether the evidence presented at trial, viewed in the light most favorable to the State and giving the State the benefit of every reasonable inference, was sufficient for a rational juror to find the crime alleged occurred and Defendant was the perpetrator. *McNeil*, 359 N.C. at 804, 617 S.E.2d at

274. Based on our precedent, DNA evidence, even a single fingerprint, can support a jury verdict. *See Cross*, 345 N.C. at 718, 483 S.E.2d at 435. Here, the State presented evidence Gillespie's blood was on Defendant's shoe, from which a jury could reasonably infer Defendant committed the murder. Accordingly, the trial court did not err by denying Defendant's Motion to Dismiss.

III. Jury Issues

Defendant contends the trial court's actions with respect to the jury notes and the interaction with Juror 6 violated Defendant's Sixth Amendment right to counsel, his right to be present at every stage of trial, and his right to a unanimous jury verdict under the North Carolina Constitution. Defendant asserts the trial court's actions might reasonably have coerced a jury verdict where the jury was not unanimous. As such, Defendant argues the appropriate remedy is a new trial.

For its part, the State contends Defendant should be deemed to have waived each of these arguments through the actions of his trial counsel. The State points out Defendant's trial counsel acquiesced to, if not encouraged, the very actions of the trial court Defendant now challenges. The State further argues the in camera discussion with Juror 6 did not constitute the trial court instructing a single juror in the absence of either the parties or the whole jury and, in any event, was not coercive.

Here, the jury sent several notes over the course of their deliberations Thursday and Friday. One note informed the trial court the jury was "unable to come to a unanimous decision" and requested the trial court's guidance. The State asked

whether it was "time for an *Allen* charge[.]" Defense counsel responded, "I would kind of ask the same question as [State's counsel]. I'm willing to listen to the [c]ourt's recommendations." The trial court proposed asking the foreperson if there was a numerical division and whether there had been movement since deliberations began. Counsel for both sides agreed.

After giving the jury a brief break, the trial court read an *Allen* charge to the jury, but it did not question the foreperson. After the jury went back to deliberate, the trial court stated he had done so "based on [defense counsel's] comment to me at the bench[,]"—apparently referring to an unrecorded bench conference. The jury remained at an impasse and sent another note to the trial court. The trial court reported to counsel the note contained information counsel "should not be privy to" and preserved the note for appellate purposes. Defense counsel did not object and stated it understood the trial court's ruling. The next morning, before returning to deliberations, a juror asked whether the trial court was going to address the note. The trial court responded it would first speak to counsel about it. Defense counsel agreed with the State that they could not hear "a numerical split and [the] direction to that split or some indication of kind of where [the jurors] are." The trial court suggested uncertainty as to whether counsel could ask or know the numerical split and defense counsel stated: "I'll defer to [State's counsel] and the [c]ourt." The trial court and attorneys continued to discuss how to proceed. Defense counsel told the trial court, "I will defer to the [c]ourt's experience trying cases. The last thing [State's

counsel] and I want to do is cause a mistrial."

After another jury note asking for a new verdict form because "the original was checked prematurely," defense counsel agree to providing a new form if counsel could review the sealed notes after trial. The jury then sent another note that afternoon stating it could not come to a unanimous vote. The trial court suggested giving the jury a break before asking them about the numerical split. Both sides agreed and defense counsel responded, "Whatever the [c]ourt thinks is fair, Your Honor."

Before the jury could be brought back in from break, the foreperson submitted another note, the pertinent portion of which the trial court read to counsel: "I am submitting this note on behalf of juror number 'blank.' Juror number 'blank' is asking to be replaced on the panel. The individual does not feel she can continue." Again, a discussion took place on how to proceed and defense counsel stated he believed an inquiry of the juror "may be premature." He suggested the trial court make the previously discussed inquiry of the jury regarding whether there had been movement in their numerical division since deliberations began. The trial court brought the foreperson in and determined through questioning that the jury had reached a unanimous verdict on one charge but not the other; there had been multiple votes on the remaining charge; and the numerical division had changed over the course of deliberations.

The trial court and counsel continued discussing how to proceed. The State suggested making a "very brief and delicate inquiry" of Juror 6—the juror who had

asked via note to be excused. The State said it believed the questioning would be appropriate in open court, but the State did not object to an in camera discussion "if Your Honor feels like that would be a more truthful or complete inquiry done that way." Defense counsel responded:

> Your Honor, I would request it be done on the record. My heart tells me that I would trust you to have a conversation with a juror in chambers. My brain tells me that that needs to be on the record.

The trial court suggested bringing the foreperson in first, and counsel agreed. After hearing from the foreperson, defense counsel said, "I don't want to use a bad word, but it sounds like a juror is getting worn down . . . That to me is the definition of a hung jury." He did not, however, move for a mistrial, and discussions continued.

The trial court then confirmed, "Okay. So you all both want me to talk to her then?" Defense counsel responded, "Your Honor, I don't have any problems with you talking to [Juror 6], I just think that if she's dug in, we have had kind of I think three notes now that they are dug in." Defense counsel again did not move for a mistrial. The trial court and the parties discussed where this conversation would take place, and defense counsel affirmatively offered to leave the courtroom so it could take place without counsel: "If you want me to leave, I'm fine with that, Judge. I don't have any problem with that. I trust you. I trust the record. I just think it needs to be on the record."

The trial court then had Juror 6 brought into chambers and spoke with her

outside the presence of counsel but with a court reporter, clerk, and bailiff present. Afterward, in the courtroom with counsel, the trial court recounted the broad strokes of the conversation with Juror 6. Although defense counsel had requested the conversation take place on the Record, he did not ask to see the transcript or recording. The trial court determined to reinstruct the jury, and defense counsel responded, "I think based on our conversation, that's appropriate."

When the jury went to deliberate after being reinstructed, the trial court asked if there were any objections "to anything I said or did[.]" Defense counsel made no objection. The jury returned a unanimous verdict of guilt eighteen minutes later.

In sum, defense counsel repeatedly failed to move for a mistrial, even despite himself stating during deliberations that the situation was "the definition of a hung jury." Defense counsel repeatedly acquiesced to various suggestions, including agreeing to the trial court engaging in a conversation with Juror 6 outside the presence of counsel. Defense counsel affirmatively recognized the need for recordation of that conversation, yet failed to take any steps to review a recording or transcript, or even to ask the trial court a single question about the contents of the conversation.

The State asserts N.C.R. App. P. 10 should apply to bar Defendant's arguments on appeal where trial counsel's actions in failing to object to or challenge the trial court's approach with the jury deprived the trial court of the ability to take corrective actions at any stage of the deliberations. Rule 10(a)(1) provides, in general, that

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action . . .

N.C.R. App. P. 10(a)(1). Likewise, our criminal procedure statutes provide: "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2021). "It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (quoting *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003)). Indeed, our Courts recognize a defendant may waive their right to be present at trial. *State v. Buchanan*, 330 N.C. 202, 213-14, 410 S.E.2d 832, 838-39 (1991) (citing *Egger v. United States*, 509 F.2d 745, 747-48 (9th Cir. 1975), *cert. denied*, 423 U.S. 842, 96 S.Ct. 74, 46 L. Ed. 2d 61 (1975)) (noting right to be present may be waived). Likewise, a defendant may waive their right to the presence of counsel. *See, e.g.*, *State v. Lindsey*, 271 N.C. App. 118, 125, 843 S.E.2d 322, 327-28 (2020) (noting a defendant may waive the right to counsel).

Our Supreme Court has specifically held a defendant may waive his right to be present during private conversations between judge and juror by failing to object

to the process or request disclosure of the discussions. *State v. Tate*, 294 N.C. 189, 198, 239 S.E.2d 821, 827 (1978). The Court cautioned, "We are of the opinion that the trial court's private conversations with jurors were ill-advised. The practice is disapproved. At least, the questions and the court's response should be made in the presence of counsel." *Id.* Nevertheless, the Court ruled: "The record indicates, however, that defendant did not object to the procedure or request disclosure of the substance of the conversation. Failure to object in apt time to alleged procedural irregularities or improprieties constitutes a waiver." *Id.*

Defendant, however, contends that, to the extent he argues his right to a unanimous jury verdict was undermined by the trial court's discussion with Juror 6, this issue is preserved as a matter of law. *See State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 329-30 (2009). Defendant further argues his counsel was unaware of the substance of the discussion with Juror 6 and, as such, was not able to object. *See State v. Colbert*, 311 N.C. 283, 286, 316 S.E.2d 79, 80-81 (1984) (granting new trial where defense counsel was absent for portion of jury selection, even absent objection by trial counsel, because trial counsel was "in the dark" regarding what happened in his absence).

In *Wilson*, our Supreme Court held where a defendant on appeal challenged a trial court's instruction of a lone juror to the exclusion of the other jurors as a violation of the right to a unanimous jury verdict, the challenge was automatically preserved for appellate review absent any objection by trial counsel. *Wilson*, 363 N.C. at 486,

681 S.E.2d at 331. The Court distinguished its decision in *Tate* on the basis that in *Tate*, the defendant had only argued the trial court's private conversations with jurors violated the right to counsel at critical stages of proceedings, not the right to a unanimous jury verdict. *Id.* at 485-86, 681 S.E.2d at 330-31. In *Colbert*, the Court, without substantively addressing the preservation issue, reviewed the issue of whether a defendant had been deprived of the presence of counsel during jury selection. The Court reaffirmed the principle " '[w]aiver of counsel may not be presumed from a silent record.' " *Colbert*, 311 N.C. at 285, 316 S.E.2d at 80 (quoting *State v. Morris*, 275 N.C. 50, 59, 165 S.E.2d 245, 251 (1969)).

The case *sub judice* falls at the intersection of *Tate*, *Wilson*, and *Colbert*. Defendant argues both violation of his right to counsel and right to a unanimous jury verdict. Here, however, unlike *Colbert*, the Record is not silent. The Record reflects Defendant's trial counsel affirmatively consented to the trial court's discussion with Juror 6 without counsel present. Moreover, to the extent counsel was "in the dark" about the actual substance of the in camera discussion, counsel made no effort to review the transcript made by the court reporter after the fact. To the extent Defendant's arguments on appeal regarding the trial court's discussion with Juror 6 are grounded in his right to his or his counsel's presence, those arguments were waived by trial counsel's actions. *Tate*, 294 N.C. at 198, 239 S.E.2d at 827. Moreover, trial counsel's failure to object or, subsequently, seek review of the transcript of the in camera discussion also deprived the trial court of any opportunity to issue any

necessary curative instructions to the jury. Thus, even to the extent the trial court's discussion with Juror 6 implicated Defendant's right to a unanimous jury verdict or issues of whether Juror 6 was improperly instructed separately from other jurors under *Wilson*, these issues arise as a result of decisions made at trial by his counsel.

The Record in this case, however, is silent as to the extent to which Defendant himself consented to his trial counsel's approach of declining to move for a mistrial, allowing the private discussion between the trial court and Juror 6, or deciding to allow further jury deliberations without reviewing the transcript of the in camera discussion or seeking additional curative instructions to the jury. In that vein, specifically limited to the facts of this case, we view Defendant's argument on appeal as an ineffective assistance of counsel claim under the Sixth Amendment.

The Sixth Amendment of the United States Constitution and Article I, §§ 19 and 23 of the Constitution of North Carolina entitle every criminal defendant to the assistance of counsel. *State v. McNeill*, 371 N.C. 198, 217, 813 S.E.2d 797, 812 (2018) (citing *State v. Sneed*, 284 N.C. 606, 611, 201 S.E.2d 867, 871 (1974)). "This right is not intended to be an empty formality but is intended to guarantee effective assistance of counsel." *Sneed*, 284 N.C. at 612, 201 S.E.2d at 871 (citations omitted). To this end, "[r]epresentation of a criminal defendant entails certain basic duties." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984). "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to

consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id.* Likewise among these duties is "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 63-64, 77 L. Ed. 158, 165 (1932)).

Defendant has not, however, raised an ineffective assistance of counsel claim on direct appeal. Further, the Record requires more development on trial counsel's trial strategy in this regard or Defendant's consent to such strategy. Consequently, we dismiss Defendant's argument on appeal without prejudice to the filing of a Motion for Appropriate Relief in the trial court.

Conclusion

Accordingly, for the foregoing reasons, we conclude the trial court did not plainly err by denying Defendant's Motion to Suppress and the trial court did not err by denying Defendant's Motion to Dismiss. We further dismiss Defendant's arguments with respect to the alleged defective jury procedures consented to by his trial counsel without prejudice to the filing of a Motion for Appropriate Relief in the trial court.

NO PLAIN ERROR IN PART; NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges GORE and GRIFFIN concur.

Report per Rule 30(e).