NO. COA14-533

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Lenoir County
Nos. 10 CRS 053593, 11 CRS 79-80

COREY DEON FLOYD

Appeal by defendant from judgment entered 30 October 2013 by Judge Jack W. Jenkins in Lenoir County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney Roy Cooper, by Assistant Attorney General Stuart M. Saunders, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for Defendant.

ERVIN, Judge.

Defendant Corey Deon Floyd appeals from judgments entered based upon his convictions for possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and having attained habitual felon status. On appeal, Defendant argues that the trial court erred by denying his motions to dismiss the possession of a weapon by a convicted felon and habitual felon charges on the grounds that these charges were supported by Defendant's previous conviction for an offense that did not exist, effectively determining that Defendant had no

right to insist that his trial counsel pose certain questions to a prosecution witness, and denying his request for dismissal based on the length of the delay between the commission of the offense and the date upon which he was formally charged with committing that offense. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the Defendant's convictions for possession of a firearm by a convicted felon and having attained the status of an habitual felon should be vacated and that Defendant is entitled to a new trial in the case in which he was convicted of possession of a weapon of mass destruction.

I. Factual Background

A. Substantive Facts

On 16 October 2008, the Kinston Police Department received a call from a confidential source indicating that Defendant was "hanging" in the area of Adkin and Macon streets in Kinston while carrying a sawed-off shotgun in his pants. Detective Robbie Braswell and his shift commander, Carey Barnes, set out in a patrol car to locate Defendant. Commander Barnes had had frequent face-to-face contact with Defendant in the past and knew what he looked like.

As Detective Braswell and Commander Barnes approached Adkin Street from the south, Commander Barnes spotted an individual wearing a black hoodie and jeans who fit Defendant's description. When the individual turned around, Commander Barnes recognized him as Defendant. As the officers drove past the point at which Defendant was located, parked, and started walking toward him, Defendant began "inching his way off." At that point, Commander Barnes yelled out, "Corey Floyd, you'd better stop." Although Defendant initially turned toward Commander Barnes, he then took off running.

As the officers pursued Defendant on foot, Defendant jumped a brick wall. At that point, Detective Braswell, who was right behind Defendant, saw Defendant pull a shotgun out of the waistband of his pants and toss it over a high fence into a nearby yard. Upon making this observation, Detective Braswell stopped running and stood by the weapon. Upon his arrival, Commander Barnes secured the shotgun and removed a shotgun shell from the weapon.

B. Procedural History

On 8 November 2010, an arrest warrant was issued charging Defendant with possession of a weapon of mass destruction, resisting a public officer, and possession of a firearm by a convicted felon. On 31 January 2011, the Lenoir County grand

jury returned bills of indictment purporting to charge Defendant with possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and having attained habitual felon status. The charges against Defendant came on for trial before the trial court and a jury at the 28 October 2013 Session of the Lenoir County Superior Court. On 30 October 2013, the jury returned verdicts convicting Defendant of possession of a weapon of mass destruction and possession of a weapon by a convicted felon. On 31 October 2013, the jury returned a verdict convicting Defendant of having attained habitual felon status. At the conclusion of the ensuing sentencing hearing, the trial court entered judgments sentencing Defendant to a term of 151 to 191 months imprisonment based upon his convictions for possession of a weapon of mass destruction and having attained habitual felon status and to a concurrent term of 151 to 191 months imprisonment based upon his convictions for possession of a firearm by a convicted felon and having attained habitual felon status. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Attempted Assault as Predicate Felony

In his first challenge to the trial court's judgments, Defendant contends that the trial court erred by denying his

motion to dismiss the possession of a firearm by a convicted felon charge for insufficiency of the evidence. More specifically, Defendant contends that the trial court should have dismissed the possession of a firearm by a convicted felon charge on the grounds that the prior felony conviction alleged in support of this charge was attempted assault with a deadly weapon and that attempted assault is not a recognized offense in North Carolina. Defendant's contention has merit.

1. Standard of Review

"In order to survive a motion to dismiss criminal charges, the State must present 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. Dawkins*, 196 N.C. App. 719, 723, 675 S.E.2d 402, 405 (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)), *disc. review denied*, 363 N.C. 585, 682 S.E.2d 707 (2009). In deciding whether the dismissal motion should be allowed or denied, the evidence should be considered "in the light most favorable to the State and with the State being given the benefit of any inference that may be reasonably drawn from the evidence." *State v. Allah*, __ N.C. App. __, __, 750 S.E.2d 903, 907 (2013) (citing *State v. Davis*, 74 N.C. App. 208, 212, 328

S.E.2d 11, 14, *disc. review denied*, 313 N.C. 510, 329 S.E.2d 406 (1985)). This Court reviews a trial court's decision to deny a motion to dismiss using a *de novo* standard of review. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982).[1]

2. Assault as a Predicate Felony

The essential elements of the offense of possession of a firearm by a convicted felon are that (1) the defendant was previously convicted of a felony and (2) subsequently possessed a firearm. N.C. Gen. Stat. § 14-415.1(a); *Dawkins*, 196 N.C. App. at 725, 675 S.E.2d at 406. According to N.C. Gen. Stat. § 14-415.1(b), "[p]rior convictions which cause disentitlement . . . include: (1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995." Although the predicate felony alleged in the indictment by means of which Defendant was purportedly charged with the offense of possession of a firearm

[1]The standard of review set forth in the text is that applicable to the motion that Defendant actually made before the trial court. The ultimate issue addressed by Defendant's dismissal motion could also have been raised through the making of a motion to dismiss the underlying indictment for failing to charge an offense pursuant to N.C. Gen. Stat. §§ 15A-954(a)(10) and 15A-924(a)(5). However, since the standard of review utilized in connection with challenges to the validity of an indictment is also *de novo*, *State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012), we do not believe that it makes any significant difference whether we treat Defendant's argument as a challenge to the denial of his motion to dismiss for insufficiency of the evidence or a challenge to the denial of a motion to dismiss the indictment for failing to charge an offense.

by a convicted felon and established during the course of the State's evidence was "Attempted Assault With a Deadly Weapon Inflicting Serious Injury" in violation of N.C. Gen. Stat. § 14-32(a), with the offense in question having been "committed on February 16, 2005" and with Defendant having "pled guilty on December 5, 2005," and "sentenced to 25-30 months in the North Carolina Department of Corrections," this Court has previously held that attempted assault with a deadly weapon inflicting serious injury is not a recognized criminal offense in North Carolina. In *State v. Currence*, 14 N.C. App. 263, 188 S.E.2d 10, *cert. denied*, 281 N.C. 315, 188 S.E.2d 898-99 (1972), we explained the logic underlying this principle by noting that an assault consists of "an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another." *Id.* at 265, 188 S.E.2d at 12 (quoting *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). As a result, since the effect of an attempted assault verdict was to find the defendant guilty of an "attempt to attempt" and since "[o]ne cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt," *id.*, we held that an attempted assault is simply not a recognized criminal offense in this jurisdiction.

This Court reaffirmed *Currence* in *State v. Barksdale*, 181 N.C. App. 302, 638 S.E.2d 579 (2007). In *Barksdale*, the trial court instructed the jury concerning the issue of the defendant's guilt of "attempted assault" and the jury convicted the defendant of two counts of attempted assault on a governmental official with a deadly weapon. *Id.* at 305, 638 S.E.2d at 581. Although the defendant's trial counsel did not object to the delivery of the attempted assault instruction, this Court held that the delivery of the attempted assault instruction constituted plain error, stating that "instructing a jury in such a way that the jury convicts the defendant of a nonexistent offense is an unmistakable example of a miscarriage of justice." *Id.* at 309, 638 S.E.2d at 583-84.

The decisions reflected in *Currence* and *Barksdale* to the effect that attempted assault is not a recognized criminal offense in North Carolina have not been overturned and are, for that reason, binding upon us in this case. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating that, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"). Although the State does not appear to dispute the validity of either *Currence* or *Barksdale*,

it does contend that the offense of attempted assault has been recognized in other decisions and that we should treat these decisions as controlling. In support of this assertion, the State cites several decisions from this Court in which an attempted assault conviction was not overturned on appellate review. *See State v. Edwards*, 150 N.C. App. 544, 548-49, 563 S.E.2d 288, 290-91 (2002); *State v. Parks*, 2010 N.C. App. LEXIS 549 (N.C. Ct. App. Apr. 6, 2010) (unpublished); *State v. Carpenter*, 2007 N.C. App. LEXIS 1890 (N.C. Ct. App. Sept. 4, 2007) (unpublished); *State v. Franklin*, 2009 N.C. App. LEXIS 133 (N.C. Ct. App. Feb. 17, 2009) (unpublished). We do not believe that our opinions in these cases support a decision to reach the result that the State deems to be appropriate.

As an initial matter, we note that none of the cases upon which the State relies directly addressed the validity of a conviction for attempted assault, given that the defendant did not raise the issue of the existence of such a crime for the Court's consideration. Secondly, all but one of the decisions upon which the State relies were unpublished and do not, for that reason, have any precedential value for purposes of our consideration of this issue. Although this Court does allow the citation of unpublished opinions when they have "precedential value to a material issue in the case and . . . there is no

published opinion that would serve as well," N.C. R. App. P. 30(e)(3), our decision in this case must be based on published decisions like *Currence* and *Barksdale*, in which this Court has clearly held that attempted assault is not a recognized criminal offense in North Carolina, rather than on other decisions, all but one of which were unpublished, in which the validity of an attempted assault conviction was never directly decided by the reviewing court. As a result, the decisions upon which the State relies do not provide a legitimate basis for a determination that attempted assault is, in fact, a recognized offense in North Carolina.

Having concluded that, in light of *Currence* and *Barksdale*, attempted assault is not a recognized criminal offense in North Carolina, we must determine what, if any, is the legal effect of a judgment purporting to rest on an attempted assault conviction. According to well-established North Carolina law, "[j]udgments may be void, irregular or erroneous." *Carter v. Rountree*, 109 N.C. 29, 32, 13 S.E. 716, 717 (1891) (defining void, irregular, or erroneous judgments and describing the legal effect of the entry of each type of defective judgment). A judgment is void if the court in which that judgment was imposed lacked jurisdiction over the parties or the subject matter of the case or had no authority to render the judgment in question.

Windham Distributing Co. v. Davis, 72 N.C. App. 179, 181-82, 323 S.E.2d 506, 508 (1984) (citing *In re Brown*, 23 N.C. App. 109, 110, 208 S.E.2d 282, 283 (1974)), *discr. review denied*, 313 N.C. 613, 330 S.E.2d 617 (1985)). "[A void judgment] is a nullity and may be attacked either directly or collaterally, or may simply be ignored." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986); *see also Stroupe v. Stroupe*, 301 N.C. 656, 661, 273 S.E.2d 434, 438 (1981) (stating that "[a] void judgment is not a judgment at all, and it may always be treated as a nullity because it lacks an essential element of its formulation").

As this survey of the applicable law indicates, a judgment entered in a case in which the trial court lacked jurisdiction over the subject matter is void and may safely be ignored. "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). N.C. Gen. Stat. § 14-1 describes a "felony" as a crime which "(1) [w]as a felony at common law; (2) [i]s or may be punishable by death; (3) [i]s or may be punishable by imprisonment in the State's prison; or (4) [i]s denominated as a felony by statute." As a result of the fact that, as *Currence* and *Barksdale* clearly establish, attempted assault with a deadly weapon inflicting

serious injury does not fall into any of these categories, a trial court lacks jurisdiction to enter a judgment that is based in any way on the understanding that the defendant has been convicted of that alleged offense.

In its brief, the State points to the fact that Defendant pled guilty to attempted assault as part of a negotiated plea agreement.[2] The fact that Defendant's attempted assault conviction stemmed from a guilty plea rather than a jury verdict does not, however, affect the required jurisdictional analysis. *See State v. Oliver*, 186 N.C. 329, 331, 119 S.E. 370, 371 (1923) (stating that "[j]urisdiction of the offense [can] neither be waived nor conferred by consent"); *see also Harkness v. State*, 771 So.2d 588, 589 (Fla. Dist. Ct. App. 1st Dist. 2000) (stating that "[c]onviction of a non-existent crime is fundamental error

[2]In its brief, the State argues that a decision in Defendant's favor would undercut the plea negotiation process, which is an integral part of the criminal justice system, and argues that Defendant may, in fact, be worse off than he otherwise would be if he succeeds in overturning the trial court's judgment in the case in which he was convicted of possession of a firearm by a convicted felon and having attained habitual felon status. Although the plea negotiation process is a recognized part of the criminal justice system and although we are unable to say that there is no risk that Defendant would not be better off in the long-term if he had refrained from advancing the argument that is discussed in the text, neither of these arguments provides any legal justification for a decision to find that Defendant should not be afforded relief based upon his attack on the use of an attempted assault conviction to support his convictions for possession of a firearm by a convicted felon and attaining habitual felon status.

which requires reversal, regardless of whether the error was invited by the defendant"); *Upshaw v. State*, 665 So.2d 303, 303-04 (Fla. Dist. Ct. App. 2d Dist. 1995) (holding that defendant's conviction, which stemmed from a *nolo contendere* plea, for committing a nonexistent offense constituted reversible fundamental error); *State v. Tarrer*, 140 Wash. App. 166, 169-70, 165 P.3d 35, 37 (Wash. Ct. App. 2007) (holding that defendant's plea to a nonexistent offense was invalid when entered and must be set aside); *State v. Briggs*, 218 Wis. 2d 61, 65, 68, 74, 579 N.W.2d 783, 786-87, 789 (Wis. Ct. App. 1998) (rejecting the State's argument that, even if, as the defendant contended, the crime of attempted felony murder was not a recognized offense, the defendant had waived his right to challenge the validity of the conviction by entering a guilty plea to that offense on the grounds that "[s]ubject matter jurisdiction cannot be conferred on the court by consent," so that "an objection to it cannot be waived," and concluding that, "[b]ecause the circuit court had no subject matter jurisdiction over a non-existent crime, even though the charge was filed as part of an amended information pursuant to a plea agreement, Briggs's conviction for attempted felony murder must be vacated and the order denying him postconviction relief must be reversed"). As a result, given that Defendant's attempted assault conviction is a nullity and

cannot serve to support Defendant's conviction for possession of a firearm by a felon, the trial court's judgment stemming from Defendant's conviction for possession of a firearm by a felon must be vacated.[3]

B. Attempted Assault as Basis for Habitual Felon Finding

In his second challenge to the trial court's judgments, Defendant contends that the trial court erred by allowing the use of his attempted assault conviction to support the determination that he had attained habitual felon status. In

[3]The State also argues that Defendant is not entitled to collaterally attack the validity of his attempted assault conviction in this case and appears to suggest that Defendant is relegated to the filing of a motion for appropriate relief instead. However, the State has not presented any authority tending to show that the argument that Defendant has advanced in this case is not cognizable on appeal and we know of none. Admittedly, the Supreme Court has held that a defendant is not entitled to argue that the trial court lacked jurisdiction to impose the underlying judgment in a revocation proceeding. *State v. Pennell*, __ N.C. __, __, 758 S.E.2d 383, 387 (2014) (stating that "a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence"). As a result of the fact that we have found no decisions indicating that the principle enunciated in *Pennell* and similar cases has been extended beyond the probation revocation context and the fact that, as we have already noted, the parties are generally entitled to treat a void judgment as a nullity, we do not believe that a defendant is precluded from challenging the trial court's jurisdiction to enter an earlier judgment based upon a conviction for a nonexistent offense in a proceeding in which a conviction for that nonexistent offense was used to establish the existence of an element of an offense or charge that has been lodged against the defendant on direct appeal in that case and is not limited to asserting such a claim by means of a motion for appropriate relief or petition for the issuance of a writ of habeas corpus.

view of the fact that, for the reasons set forth above, attempted assault is not a recognized criminal offense in North Carolina, it cannot serve as support for an habitual felon allegation or conviction in this case. As a result, the trial court's judgment in the case in which Defendant was convicted of possession of a firearm by a convicted felon and sentenced as an habitual felon must be vacated and this case must be, for the reasons discussed in more detail below, remanded to the Lenoir County Superior Court for further proceedings not inconsistent with this opinion.

C. Defendant's Right to Input on Cross-Examination

In his third challenge to the trial court's judgments, Defendant contends that the trial court violated his constitutional right to control the nature of the defense that was presented on his behalf. More specifically, Defendant contends that the trial court erred by failing to adequately address an impasse between Defendant and his trial counsel concerning the extent to which certain questions should be posed to a prosecution witness during the trial. Once again, we conclude that Defendant's contention has merit.

1. Standard of Review

An alleged violation of a constitutional right involves a question of law and is reviewed *de novo* by this Court. *State v.*

Gardner, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988). "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 and citation omitted). A federal or state constitutional violation requires an award of appellate relief in the absence of a demonstration by the State that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b).

As the Supreme Court stated in *State v. Barley*, 240 N.C. 253, 255, 81 S.E.2d 772, 773 (1954), the attorney-client relationship

> rests on principles of agency, and not guardian and ward. While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld.

"[T]actical decisions – such as which witnesses to call, which motions to make, and how to conduct cross-examination – normally lie within the attorney's province." *State v. Brown*, 339 N.C. 426, 434, 451 S.E.2d 181, 187 (1994), *cert. denied*, 516 U.S. 825, 116 S. Ct. 90, 133 L. Ed. 2d 46 (1995). "However, when counsel and a fully informed criminal defendant client reach an

absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Id.* (quotation marks and citation omitted). In the event that such an impasse occurs, "[t]he attorney is bound to comply with her client's lawful instructions, and her actions are restricted to the scope of the authority conferred." *State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991) (quotation marks and citation omitted). As a result, when an impasse occurs and the attorney's client insists upon proceeding in a certain manner contrary to the attorney's advice, "the client's wishes must control" and "defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Id.* at 404, 407 S.E.2d at 189.

2. Relevant Facts

At the conclusion of the testimony of Detective Braswell on recross examination, Defendant stated "I need to say something to the witness." After denying Defendant's request, the trial court asked the jury to step out of the courtroom,[4] at which point the following proceedings occurred:

[4]As the State notes, the record clearly reflects that Defendant had exhibited less than exemplary behavior throughout earlier portions of the trial proceedings, including having

[Defendant]: You won't ask him what I need to ask him.

The Court: Thank you. All right, let the record reflect that the twelve members of the jury and the alternate juror have left the courtroom. Let the record reflect that while the jurors were in here, [Defendant] started asking questions. I called [Defendant's trial] counsel to the bench, asked counsel . . . to go back and talk to [Defendant], privately, to determine what [Defendant's] questions were or what [Defendant] wanted to present to the jury. [Defendant's trial counsel] attempted to do so. In the meantime, [Defendant] began speaking out on his own volition in the presence of the jury, and so the Court immediately sent the jury out of the courtroom. And, [Defendant], I can't let you disrupt this trial, and I've already warned you --

[Defendant]: I mean, I can -- I can question the witness.

The Court: Your lawyer questions the witness. You don't --

[Defendant]: Then I'll represent myself. I'm firing my lawyer.

The Court: No. No, you can't do that, I'm sorry.

[Defendant]: See, I can represent myself.

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rejected the trial court's suggestion that he refrain from wearing jail clothes in the courtroom, rejecting what may well have been a favorable plea agreement against his trial counsel's advice, and repeatedly contending that the charges that had been lodged against him should be dismissed because of the fact that the State had delayed initiating charges against him, among other things.

> The Court: No, I'm sorry. In my discretion, I'm not allowing you to do that.
>
> [Defendant]: I can represent myself. I can represent myself. It ain't -- ain't no kind of mess like that, because he ain't questioned him what I'm going to question him.
>
> The Court: Well, you ask [Defendant's trial counsel] what you want to ask the --
>
> [Defendant]: I done told him, and ain't none of that stuff been done, and I'm going for the --
>
> The Court: You ask [Defendant's trial counsel] what questions you want to present to the witnesses in front of the jury.

At this point in the exchange, the prosecutor requested the trial court to determine if Defendant should be held in contempt of court and asked that Defendant be removed from the courtroom. In view of the fact that Defendant interrupted the prosecutor on a number of occasions, the trial court instructed Defendant to stop engaging in that sort of behavior and to wait his turn before speaking. At that point, Defendant made additional comments concerning the questions that he wanted his trial counsel to pose to Detective Braswell:

> [Defendant:] I waited till it was our turn to question this witness, and now I ain't even questioned him.
>
> The Court: Well, but the way the process works, you don't ask the questions, your attorney asks the questions.

> [Defendant]: He didn't ask -- I told him to ask him. Things wasn't stated. It was things I needed -- I needed to them to hear.
>
> The Court: He is a professional. He is--
>
> [Defendant]: The truth be told about --
>
> The Court: -- very experienced. He knows what he's doing. The manner in which he asks questions is part of the expertise provided by counsel. It's part of the assistance of counsel that's provided. And you are not an attorney, and you are relying on his [assistance].
>
> [Defendant]: I know the law. I know the law.
>
> The Court: -- and you can talk to him and confer with him and let him know what questions you think should be asked, but he asks the questions, not you.
>
> [Defendant]: He got -- he got to ask them, then, and put things out. That's the thing, I'll represent myself. I don't even need a counsel.

At that point, the trial court reiterated its denial of Defendant's request to represent himself and, after admonishing Defendant for the disruptive behavior in which he had engaged throughout the trial, ordered that Defendant be removed from the courtroom. In response, Defendant again expressed his concerns about the manner in which Detective Braswell had been questioned:

> [Defendant]: Well, see, I'll tell him the question, to ask him something, and he don't do it. Come on, man.
>
> The Court: Sir, you're doing it now, and I have not held you in contempt. In my discretion, I have not done that. The State has not brought any obstruction charges --
>
> [Defendant]: Well, I'm -- I'm gonna give him -- I'm gonna have -- I'm gonna talk to him so he can say what I would say?
>
> The Court: That's how it works, sir.
>
> [Defendant]: Exactly. And he didn't do it. That's what I'm talking about.
>
> The Court: Well, that's between you and [Defendant's trial counsel] --
>
> [Defendant]: I'm gonna get another attorney.
>
> The Court: -- that's not for me to interject.

At that point, the trial court had Defendant removed from the courtroom and instructed the jury that it should not hold Defendant's conduct or his absence from the courtroom against him.

3. Trial Court's Response to the Impasse

Although the record does not disclose the nature of the questions that Defendant wanted his trial counsel to pose to Detective Braswell,[5] the transcript clearly demonstrates that

[5]In his brief, Defendant asserts that the questions that Defendant wanted his trial counsel to ask Detective Braswell

Defendant wanted his trial counsel to pose certain questions to Detective Braswell that were never asked. In addition, an examination of the record reveals that, in the aftermath of Defendant's continued insistence that certain questions be posed to Detective Braswell, Defendant's trial counsel failed to "make a record of the circumstances, [his] advice to the [D]efendant, the reasons for the advice, the [D]efendant's decision and the conclusion reached." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. Finally, the record clearly establishes that the trial court failed to make inquiry of Defendant and his defense counsel concerning the nature of the questions that Defendant wanted to have posed to Detective Braswell on cross-examination. As a result, given that the questions upon which his request was based were never posed despite his insistence that that be done, Defendant was denied his right to decide "how to conduct cross examination[]." *Id.*

In attempting to persuade us that Defendant has failed to establish that a violation of his right to control his defense occurred, the State points to our decision in *State v. Williams*, 191 N.C. App. 96, 662 S.E.2d 397 (2008), *disc. review denied*, __ N.C. __. 684 S.E.2d 158 (2009) in which we determined that the

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related to the two-year delay between the date upon which Defendant allegedly possessed the shotgun and the date upon which he was initially charged with unlawfully possessing that weapon.

defendant and his trial counsel had not reached an absolute impasse with respect to the manner in which the defendant's peremptory challenges should be exercised and that the disagreement between the defendant and his trial counsel "centered on Defendant's dissatisfaction with the fact that Defendant was required stand trial at all" rather than upon a disagreement over a specific tactical issue. *Id.* at 99, 662 S.E.2d at 399. In concluding that "Defendant's aggressive, violent and abrasive behavior did not rise to the level of an absolute impasse regarding the specific decision as to peremptory challenges," we noted that:

> First, Defendant did not advise defense counsel which six jurors he desired to excuse; in fact, Defendant did not advise defense counsel as to any particular juror he desired to excuse; Defendant tended to show displeasure with the process itself, rather instead of any particular juror in the *voir dire* proceedings; when asked to elaborate in the jury selection process as to which jurors to excuse, Defendant had nothing to add, but deferred to defense counsel. After Defendant was escorted from the courtroom, due to his disruptive behavior, defense counsel excused only four jurors. The court again stated, "now, again, the counsel will have an occasion to talk to the defendant [regarding which jurors to excuse,]" but given the opportunity to speak, Defendant did not dispute defense counsel's use of four peremptory challenges instead of six, and "didn't want to say anything to [his attorney] about this last four[,]" again deferring decisions in the selection process

> to defense counsel. After Defendant was escorted back into the courtroom, the court directly stated, "your lawyer has questioned the four new jurors, but he hasn't made any decision yet as to who he wants to exclude because . . . he wanted to have a chance to talk with you[.]" When asked whether he "want[ed] to talk to [his] lawyer about the exclusion of these four new jurors[,]" Defendant replied, "No, sir[,]" deferring the decision to defense counsel. In fact, Defendant repeatedly deferred to defense counsel's decision with regard to peremptory challenges, beginning with his initial statement: "[w]hatever six he [sic] talking about, I don't want them[.]" When either defense counsel or the court asked for Defendant's further input in the selection process, Defendant stated multiple times, in his usual combative and contentious manner, that he did not wish to further discuss the selection process at all, thus, deferring the decision to defense counsel.

Id. at 103-04, 662 S.E.2d at 402. Based upon this analysis, we concluded that the only arguably specific impasse relating to a tactical decision revealed by the *Williams* record stemmed from Defendant's desire to impermissibly exercise his peremptory challenges based on racial grounds and held that the defendant's trial counsel was not bound to comply with Defendant's instructions to engage in such constitutionally prohibited conduct. *Id.* at 104-05, 662 S.E.2d at 402-03.

In contrast to the situation addressed in *Williams*, the record developed in this case clearly reveals that Defendant reached an absolute impasse concerning a specific tactical

issue--the extent to which specific questions should be posed to Detective Braswell on cross-examination. Although Defendant repeatedly informed the trial court that he wanted his trial counsel to ask certain questions of Detective Braswell and that his trial counsel had not asked these questions, the trial court simply told Defendant that he should discuss this subject with his trial counsel without taking any further action despite Defendant's insistence that he had already done what the trial court had told him to do. Although the trial court in *Williams* provided multiple opportunities for the defendant to discuss the extent to which certain prospective jurors should be peremptorily challenged and clearly indicated that the defendant's lawful wishes with respect to this subject would be honored, Defendant's trial counsel never described the nature of the questions that Defendant wanted posed to Detective Braswell and the trial court never inquired what those questions might be nor instructed Defendant's trial counsel to ask the questions that Defendant wanted put to Detective Braswell. Thus, we do not believe that *Williams* sheds significant light on the proper resolution of this case.

In addition, the State argues that the disagreement between Defendant and his trial counsel, instead of representing an impasse over a specific tactical issue, involved nothing more

than a generalized complaint by Defendant about the manner in which his trial counsel represented him during the trial. As the State correctly notes, Defendant made numerous complaints about the quality of the representation that he received from his trial counsel during the course of the trial, with these complaints including the expression of Defendant's belief that his attorney had not adequately addressed his disability and the manner in which he had been treated in jail and that his trial counsel was "going with the DA." The fact that Defendant made such generalized complaints about the representation that he received from his trial counsel during the trial does not in any way establish that Defendant had not reached an absolute impasse with his trial counsel concerning the manner in which the cross-examination of Detective Braswell should be conducted. Instead, as we have already noted, the transcript of Defendant's trial demonstrates beyond reasonable contradiction that Defendant and his trial counsel reached an impasse with respect to the issue of whether certain specific questions should be posed to Detective Braswell. In light of Defendant's repeated statements that his trial counsel had refused to ask the questions that Defendant wanted posed to Detective Braswell; the trial court's erroneous statement that "that's between you and Mr. Herring" and that it's not its place "to interject"; and that the trial

court failed, when the existence of the impasse between Defendant and his trial counsel was brought to its attention, to inquire into the nature of the impasse and order defense counsel "to comply with [his] client's lawful instructions," *Ali*, 329 N.C. at 403, 407 S.E.2d 189, we find the State's second response to this aspect of Defendant's challenge to the trial court's judgment unpersuasive as well.

Finally, the State has not argued that the trial court's error was harmless beyond a reasonable doubt and we would be unable to make such a determination even if the State had advanced a harmless error argument. *See* N.C. Gen. Stat. § 15A-1443(b) (stating that "[t]he burden is on the State to demonstrate, beyond a reasonable doubt, that the error [violating Defendant's constitutional rights] was harmless"). As a result of the fact that no inquiry was conducted into the nature of the impasse that Defendant and his trial counsel had reached concerning the manner in which the cross-examination of Detective Braswell should be conducted, including the nature of the exact questions that Defendant wanted his trial counsel to pose to Detective Braswell, we have no basis, apart from mere speculation, for finding that the State has established that the

error at issue here was harmless beyond a reasonable doubt.[6] As a result, we have no choice except to conclude that Defendant is entitled to a new trial in the case in which he was convicted of possessing a weapon of mass destruction.[7]

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[6]Even if we were to assume, in accordance with the unsupported contention advanced in Defendant's brief, that the impasse between Defendant and his trial counsel concerned questioning related to the delay between the date of the incident and the arrest warrant, we could not properly conclude that the error was harmless beyond a reasonable doubt. As a result of the fact that the suspect was not apprehended at the time of the commission of the alleged offense and the fact that the shotgun was not linked to Defendant on the basis of any sort of physical evidence, such as fingerprints, the only evidence identifying Defendant as the individual in possession of the shotgun on the occasion in question was the testimony of Detective Braswell and Commander Barnes. Admittedly, Commander Barnes positively identified Defendant based on his long-standing acquaintance with him. However, the officers' descriptions of the incident in question varied substantially, with Commander Barnes having testified that it occurred between "7:30 and eight o'clock" and that it was "more dark than it was light," while Detective Braswell asserted that "I know it was daylight," "maybe mid-afternoon, three, four o'clock." As a result of the length of time that elapsed between the date upon which Defendant allegedly possessed the shotgun and the date upon which Defendant's case was called for trial, coupled with the inconsistencies between the testimony of Detective Braswell and Commander Barnes, we are unable to conclude beyond a reasonable doubt that the outcome at Defendant's trial would have been the same had the trial court addressed the impasse between Defendant and his trial counsel in a different way.

[7]As a result of our decision to grant Defendant a new trial based upon the trial court's failure to resolve the impasse between Defendant and his trial counsel in the manner required by North Carolina law, we need not address Defendant's alternative argument that the trial court erred by rejecting Defendant's request to be allowed to proceed *pro se*.

D. Pre-Indictment Delay

Finally, Defendant contends that the trial court erred by denying his motion that the charges that had been lodged against him be dismissed on the basis of an excessive period of pre-indictment delay. More specifically, Defendant contends that the two year period that elapsed between the date upon which he allegedly possessed the shotgun and the date upon which he was formally charged with committing the offenses at issue in this case violated his constitutional rights. We do not find Defendant's argument persuasive.

1. Standard of Review

As we have already noted, an alleged violation of a constitutional right raises a question of law that is subject to *de novo* review on appeal. *Gardner*, 322 N.C. at 594, 369 S.E.2d at 596. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (quotation marks and citation omitted).

2. Applicable Legal Principles

As an initial matter, we note that "the Speedy Trial Clause of the Sixth Amendment . . . applie[s] only to delay following indictment, information or arrest." *State v. Davis*, 46 N.C. App. 778, 781, 266 S.E.2d 20, 22, *disc. review denied*, 301 N.C.

97, __ S.E.2d __ (1980). A challenge to a pre-indictment delay is, instead, predicated on an alleged violation of the due process clause of the Fourteenth Amendment to the United States Constitution. *Id.* "To prevail, a defendant 'must show both actual and substantial prejudice from the pre-indictment delay and that the delay was intentional on the part of the state in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant.'" *State v. Graham*, 200 N.C. App. 204, 215, 683 S.E.2d 437, 444 (2009) (quoting *Davis*, 46 N.C. App. at 782, 266 S.E.2d at 23), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). "The test for prejudice is whether significant evidence or testimony that would have been helpful to the defense was lost due to delay." *State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54-55 (1990) (citing *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976)).

A careful review of the record demonstrates that Defendant has failed to show that he sustained actual and substantial prejudice as a result of the two year delay between the date upon which he allegedly possessed the shotgun and the date that he was formally charged with committing that offense. Although Defendant had sustained a gunshot wound to the head a few months prior to the October 2008 incident and contends, in reliance

upon that fact, that he was suffering from a significant visual impairment at the time of the incident underlying this case and that the existence of this condition undermined the validity of the State's claim that he successfully fled from Detective Braswell and Commander Barnes on 16 October 2008, we do not find this contention persuasive. Assuming, without deciding, that Defendant does, in fact, suffer from the visual impairment upon which he relies in an attempt to make the necessary showing of prejudice, Defendant has not shown that the nature and extent of his visual limitations had changed between the date upon which he allegedly possessed the shotgun and the date upon which he was formally charged with committing the offenses at issue in this case or that any other development would have rendered a visual assessment conducted after the date upon which he was formally charged insufficient to effectively advance the argument upon which he now seeks to rely. As a result, since Defendant has not shown that "significant evidence or testimony that would have been helpful to the defense was lost due to delay," *id.*, we have no hesitation in concluding that Defendant is not entitled to relief from the trial court's judgments on the basis of his pre-indictment delay claim.

III. Conclusion

Thus, for the reasons set forth above, we hold that the trial court erred by denying Defendant's motions to dismiss the possession of a firearm by a convicted felon and habitual felon charges and that the trial court failed to address the impasse that arose between Defendant and his trial counsel during the testimony of Detective Braswell in the manner required by North Carolina law. However, we further conclude that the trial court correctly denied Defendant's motion to dismiss the charges that had been lodged against him on the basis of excessive pre-indictment delay. As a result, the trial court's judgment based upon Defendant's convictions for possession of a firearm by a felon and attaining habitual felon status should be, and hereby are, vacated and Defendant should be, and hereby is, awarded a new trial in the case in which he was convicted of possession of a weapon of mass destruction.

VACATED IN PART; NEW TRIAL IN PART.

Judges BRYANT and ELMORE concur.