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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-16

Filed: 3 November 2015

Wake County, No. 12 CRS 223754, 13 CRS 185

STATE OF NORTH CAROLINA

v.

WILBERT LEE HOWARD, III

Appeal by Defendant from judgment entered 10 February 2014 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General James D. Concepción, for the State.

Jarvis John Edgerton, IV, for Defendant.

STEPHENS, Judge.

Defendant Wilbert Lee Howard, III, was convicted in Wake County Superior Court on one count of possession of a firearm by a convicted felon following a jury trial during which he was found not guilty on one charge of attempted armed robbery and one charge of second-degree kidnapping. Howard then filed a post-conviction Motion for Appropriate Relief (“MAR”), in which he contended that the trial court committed plain error in its instructions to the jury. After the trial court denied his

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MAR, Howard pled guilty to having attained the status of an habitual felon. On appeal, Howard argues that the trial court's instruction to the jury on the felon in possession of a firearm charge amounted to plain error and was fatally ambiguous because it authorized his conviction based upon an uncharged alternative theory that was not supported by the evidence. After careful deliberation, we hold that the trial court's instruction violated Howard's right to a unanimous jury under Article I, Section 24 of our State Constitution, and we consequently vacate his convictions and remand his case for a new trial.

I. Factual Background and Procedural History

A. Factual Background

At approximately 1:30 a.m. on 24 September 2012, a man with a gun tried and failed to rob the McDonald's at the corner of Six Forks Road and Wake Forest Road in Raleigh.

Ervin Moore had nearly finished unloading his delivery truck, which was parked in the drive-through lane behind the restaurant's kitchen, when a man approached him and asked, "What's up?" The man then reached into his pants, pulled out a gun, and told Moore, "I'm about to rob the place." The man assured Moore that he was serious and that "this wasn't [Moore's] fight," then instructed Moore to turn around and walk inside the store through the back door. After following him inside

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to the kitchen, the man told Moore to lie down on the floor, and demanded that someone “open the register.”

McDonald’s employee Ronnie Chavis had been helping Moore unload the delivery truck that night but had gone inside and was standing in the kitchen with his co-worker Gloria Diaz when Moore entered, followed closely by the armed man. When Chavis saw that the suspect had a gun, he became frightened and “took off as fast as [he] could” to the front of the store, where he warned his co-workers they were being robbed and then ran out to the parking lot through a side entrance. Seconds later, Chavis saw what he later described as a “dark-colored car” speed by. Chavis ran back toward the store and jumped into some bushes to hide.

Diaz was grilling sandwiches in the kitchen when all the commotion started, and although she was not sufficiently fluent in English to understand what the men around her were saying, she could tell something was wrong when she saw Moore get down on the floor after Chavis ran away. Diaz did not know what to do, so she froze where she was standing, roughly seven feet in front of Moore and the armed man, who eventually grew impatient and exited empty-handed through the back door.

DeShawn Jones was the manager on duty that night, and was checking on the cashier near the front of the store when he heard Chavis run by saying, “We’re being robbed. We’re being robbed.” When Jones looked back toward the kitchen, he saw the armed man, who was wearing a hat pulled down over his face, pointing a gun at

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Chavis. This prompted Jones to jump over the counter and run toward the same door through which Chavis had just exited. When he looked outside, Jones saw a car with chrome rims and a two-tone burgundy/red and gray paint job speed by before turning out of the parking lot. At that point, Jones locked the door and called 911.

Detective Steven Snowden of the Raleigh Police Department (“RPD”) took charge of the investigation the next morning. His first step was to review surveillance footage from several in-store security cameras, which showed a black male “wearing all black, black pants, a black hooded sweatshirt, a dark-colored baseball cap [that] looked like a New York Yankees cap” and carrying a silver handgun by his side in his right hand as he entered the McDonald’s. Detective Snowden also reviewed footage from an exterior security camera and determined that the car Jones and Chavis had seen leaving the McDonald’s was a two-tone, early-to-mid-90s Chevy Caprice with chrome rims on its wheels. On 27 September 2012, Detective Snowden issued a be-on-the-lookout (“BOLO”) notice to local police and media with pictures of both the car and the suspect. That same day, Detective Snowden took statements from Jones, Moore, Diaz, and Chavis (collectively, “the eyewitnesses”). The eyewitnesses described the suspect as a black male in his mid-to-late 20s with a slim build and a height of at least six feet.

A potential break-through in the case came on 8 October 2012, when Detective Snowden received a tip in response to the BOLO from a member of the Clayton Police

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Department who had recently seen a Chevy Caprice with a similar paint job to the one in the surveillance video and noted its license tag. Detective Snowden ran the tag number and discovered the car was licensed to a man named Brittain Thomas, who Snowden later testified “did resemble the suspect at McDonald’s.” Detective Snowden created a photo identification lineup using a picture of Thomas and, in keeping with RPD policy, asked RPD Detective J.C. Bais to show it to Jones, who identified Thomas as the man who tried to rob the McDonald’s on 24 September 2012 but also stated that his level of confidence in his identification was only 20 to 30 percent. When Detective Snowden tracked down Thomas’s Chevy Caprice at an address in Clayton, he “could tell it was definitely an older Caprice than what we had in the video” and subsequently excluded both Thomas and the car from his investigation.

By the following week, Detective Snowden felt that his “leads were kind of exhausted and running short,” so when he received another tip that a two-tone Chevy Caprice had been spotted recently in southeast Raleigh, he emailed the RPD’s listserv with a new request for assistance and a picture taken from the McDonald’s surveillance footage. On 15 October 2012, Detective Snowden received a reply from Officer J.R. Schneider, who informed Snowden that the picture of the Chevy Caprice had reminded him of a vehicle with a similar two-tone paint job and similar chrome rims that he had previously encountered while patrolling the area near Dallas Street in southeast Raleigh, and that when he checked to verify if the vehicle was still in the

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area, he found it parked at 1713 Dallas Street. Based on research conducted via Google Earth and the pictures Schneider included in his reply email of the car—which had chrome rims on its wheels and appeared to have recently been repainted primer gray—Detective Snowden concluded “that it was that car. The same car that we were able to recover pictures of from McDonald’s.” In his email, Officer Schneider also advised Detective Snowden of the car’s North Carolina license tag number, from which Snowden was able to determine that it was a 1993 Chevy Caprice registered to Angela Hunter Howard. According to Detective Snowden’s research, Ms. Howard was one of only two adults who resided at 1713 Dallas Street; the other person was her son, Defendant Wilbert Lee Howard, III. Detective Snowden found pictures of Howard in several RPD databases, compared them against surveillance footage of the suspect at McDonald’s wearing a hat that covered most of his face, and concluded that the images “appeared to match up.”

Later that same day, Detective Snowden created a photo identification lineup featuring Howard’s picture and returned to the McDonald’s with Detective Bais, who showed the lineup to Jones and Diaz and served as a translator for her. Diaz chose Howard’s photograph from the lineup and, when asked what degree of certainty she had that the man whose picture she selected had attempted to rob the McDonald’s on 24 September 2012, Diaz stated, “I’d say 70 percent.” Jones, on the other hand, expressed a low degree of certainty in his ability to make any identification from the

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lineup and ultimately chose one of the filler photographs. On 17 October 2012, hoping for further confirmation of the suspect's identity and reasoning, "out of everybody that maybe [Moore,] because he'd come face-to-face with [the suspect,] I thought maybe it would be good to try to get him to look at a lineup," Detective Snowden decided to show a photographic lineup to Moore. Moore did not choose the photograph of Howard from the lineup, but stated that his level of confidence in the filler photograph he selected was 85 percent.¹ Based on all this evidence, Detective Snowden obtained a warrant for Howard's arrest for attempted armed robbery and second-degree kidnapping, as well as a warrant to search 1713 Dallas Street for any related property or evidence that might be at the residence.

On 18 October 2012, Detectives Snowden and Bais executed the search warrant for 1713 Dallas Street while a SWAT team assisted them in securing the residence. Members of the SWAT team located Howard and several other men standing in the front yard of the residence and discovered that Howard was carrying a small amount of marijuana, but failed to detain him. Inside, Detective Snowden spoke to Howard's mother, who informed him that the front bedroom of the residence belonged to her and the back bedroom belonged to her son. Detective Bais searched the front bedroom and found a chrome .357 Rossi pistol with a black handle wrapped in a towel behind a laundry basket inside a closet. Meanwhile, Detective Snowden

¹ At trial, Detective Snowden testified that the man whose photograph Moore selected had been incarcerated at the time of the robbery.

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searched the back bedroom and found Howard's Department of Correction ("DOC") identification card lying on a dresser. Outside, officers found a Chevy Caprice parked two houses up the block at 1717 Dallas Street. Although the scope of the search warrant only included vehicles within the curtilage of Ms. Howard's residence, Detective Snowden obtained written consent from her to search and impound it. Detective Snowden observed that the Chevy Caprice had chrome rims and "looked like it had been painted primer gray quickly" because "some spots were still not covered." Inside the vehicle, Detective Snowden found several baggies of marijuana and a citation issued to Wilbert Howard on 28 September 2012 by Wake County ABC Agent Scott Broadwell.²

B. Procedural History

On 19 October 2012, Detective Snowden obtained a warrant for Howard's arrest on one count of possession of a firearm by a felon with the date of offense listed as 24 September 2012. On 11 February 2013, after having previously indicted Howard on one count of attempted armed robbery and one count of second-degree kidnapping for the McDonald's incident, a Wake County grand jury returned a separate indictment charging Howard with possession of a firearm by a felon "on or

² At trial, Agent Broadwell testified that on 28 September 2012, he was performing an undercover stakeout at a gas station near Walnut Creek when he observed Howard and three other men behaving suspiciously in a parked Chevy Caprice; that Howard was behind the wheel and unsuccessfully attempted to drive away as ABC agents approached; and that the agents searched the vehicle and found marijuana. Broadwell testified further that he did not recall what color the Chevy Caprice was painted and that the agents did not find any weapons during the search.

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about September 24, 2012.” The next day, Howard was indicted for attaining the status of an habitual felon.

On 27 January 2014, a jury trial began in Wake County Superior Court. The State presented testimony from Moore, Chavis, Diaz, and Jones, who offered varying descriptions of the suspect who attempted to rob the McDonald’s on 24 September 2012.

Moore testified that the suspect wore a black jacket or sweater and carried an old black gun³ but admitted that he never got a good look at the suspect’s face because it was too dark outside the store and, once inside, the suspect was always standing behind him. On cross-examination, Moore acknowledged having selected a photograph of someone other than Howard with 85 percent certainty during the 17 October 2012 lineup identification. When Howard’s trial counsel asked whether Moore had previously described the suspect as “six feet two inches to six feet three inches” in height, Moore denied having ever given an exact height in his prior statements to police. However, Moore estimated his own height at 6-1 and, when asked how tall he believed the suspect was, stated “I would say maybe 5-11, somewhere around there.”

³ Although Moore testified that the suspect’s gun was black, the State also offered testimony from RPD Officer T.M. Williams, who was among the first officers dispatched to the McDonald’s on 24 September 2012 and testified that when he took a statement from Moore, Moore initially told him the gun was silver.

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Diaz testified through an interpreter that the suspect wore a black sweater and had “little braids on his hair” but stated that she could not see his hands and thus did not know whether he was carrying a gun. Diaz testified further that she selected the photograph of a man she believed was the suspect during the 15 October 2012 identification lineup but also told Detective Bais that she “wasn’t completely sure but about 70 percent.” The State did not ask Diaz to make an in-court identification of Howard. On cross-examination, Diaz stated that she was confident that the suspect “was a little taller than [Moore] but skinnier” and that the photographs in the lineup Detective Bais showed her did not offer any indication of height.

Jones testified that the suspect wore a blue hat and a blue or black hooded sweatshirt and was armed with a black revolver. However, Jones also testified that he never got a good look at the suspect’s face because “the only thing I saw was the hat pulled over his head. He had a hat on and he had the gun pointed. I was focused on—I wasn’t focused on the face. I was focused on the gun.” Jones testified further that during the photographic lineups on 8 and 15 October 2012, he was told to “just take a guess. And I took a guess. But I wasn’t really sure of the face.” On cross-examination, Jones acknowledged that he did not select Howard’s photograph from either of the lineups, stated that he remembered telling the police that the suspect

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was about six feet tall, and described the suspect as “tall and slender” and “taller than me.”

Chavis testified that the suspect wore a hat and carried a black pistol but stated he could not remember the suspect’s face and did not notice anything about his hair. Chavis testified further that he saw the suspect standing next to Moore when they first entered the kitchen and then explained that in his statements to police, “I just remembered [the suspect] was a lot taller than me. I believe I’m around 5-10, maybe 5-11. So I’m pretty sure he was maybe 6, 6-4, 6-3, 6-4, around that height.” On cross-examination, Chavis had the following exchange with Howard’s trial counsel:

Q. You think he was about 6-3 or 6-4?

A. Yes.

Q. What was his build like, was he fat, slim or what?

A. He was slim.

Q. Do you have any idea as to how tall I may be?

A. I would say maybe 6, maybe 6-1.

Q. All right. Which one of us is taller, me or this man to my right? [*Defendant stands up*]

A. You are.

Q. This man here is Mr. Howard, who’s on trial, correct?

A. Okay.

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Q. Was the man you saw standing with [Moore] as tall as I am?

A. Yes sir.

The State also presented testimony from Detective Snowden, who summarized the details of his investigation and explained how he utilized the surveillance footage from the McDonald's security cameras to track down the Chevy Caprice and determine that it was Howard who attempted to rob the store on 24 September 2012. When the surveillance videos were received into evidence and played for the jury, Detective Snowden attempted to explain the discrepancies between the eyewitnesses' varying accounts of the suspect's height by testifying:

Q. Now Detective Snowden when you looked at the video, were you looking at anything in particular to try to determine [the] relative height[s] of Mr. Moore and the guy with the gun?

A. Mr. Moore is a pretty tall guy. I'd say he's almost my height, around 6-4. When I looked at the video—I know we've discussed—I know height has been talked about a good bit. If you watch the video it appears Mr. Moore has an inch or two on the suspect.

On top of that the suspect's wearing a baseball cap. So that's probably going to be why people are so—witnesses are so off on their height.

Detective Snowden then explained how he used a shiny metal tube that appears in the background of the surveillance tapes when Moore and the suspect entered the kitchen to compare their relative heights. However, on cross-examination, Detective

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Snowden stated that he “really couldn’t give an estimate” of the suspect’s height based on the video but acknowledged that “Mr. Moore appears to be taller, an inch or two maybe taller. And Mr. Moore is six foot two.” As he continued to press Detective Snowden for a height estimate, Howard’s trial counsel focused on the DOC identification card Snowden found in Howard’s bedroom:

Q. That is an official document of some sort issued by [DOC], correct?

A. I believe they give this when somebody is released.

Q. Okay. It lists my client’s height as five feet eight inches, correct?

A. Correct, it does.

Q. Is that accurate as far as your observations have been of my client?

A. I really didn’t get a chance to see when he stood up next to you the other day. [*Defendant and his trial counsel stand up; Detective Snowden addresses counsel*] May I ask how tall you are, sir?

Q. About six one and a half.

A. Okay, I guess [the defendant would] be around 5-8 or 5-9. The DMV listed him at 5-11.

Q. Do you have any documentation from DMV?

A. No, I just checked his driver’s license.

Q. Okay.

A. Last time he was arrested he was listed as 5-9, so I

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can't really say exactly how tall he may be.

Q. Well, he's a number of inches shorter than I am, is he not?

A. He appears to be about 4 or 5 inches shorter, correct.

On re-direct, Detective Snowden testified that he was not troubled by the differing descriptions the eyewitnesses had given of the suspect's height because in his 15 years of experience as a police officer, he had encountered many witnesses who had difficulty making height estimates, "especially when a person comes in at gunpoint."

As for the gun, Detective Snowden offered direct testimony that police found "a .357 [Rossi], silver or chrome in color with a black handle" in Howard's mother's closet, which Snowden believed appeared to be the same type of gun shown in the McDonald's surveillance tape because, "Just looking at the videotape and being raised around weapons or guns, my initial thought was it was a .357." On cross-examination, Detective Snowden further described the gun found in Howard's mother's closet as "kind of an old-school revolver" based on the curvature of its sight. When Howard's counsel replayed the surveillance tapes and asked Detective Snowden to compare the two guns and explain whether he noticed "any of those distinctive markings of the old-school stuff you described," Snowden replied, "I guess what made me think that this was a .357 initially, it just seems like this sight's up and down here, I mean—taking my initial, before I even knew about Mr. Howard or anything." Detective Snowden also acknowledged that the handle of the gun in the

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surveillance tape was never visible, that there was no way to tell exactly how long its barrel was, and that he did not know “if the video is exact to scale.” When Howard’s counsel pointed out that the chrome barrel of the gun the officers found in Howard’s mother’s closet appeared to be at odds with testimony from Jones and Chavis, who both testified that the suspect was carrying a black gun, Detective Snowden noted that Moore had originally described the gun to police at the scene as being silver. However, apart from this testimony as to the similarities between the two guns in caliber and appearance, no testimony or evidence was introduced to show that Howard ever actually or constructively possessed the gun found in his mother’s closet on 18 October 2012, nor did Detective Snowden or any other witness ever testify that it was the same gun as the one shown in the surveillance tapes of the attempted robbery of McDonald’s on 24 September 2012.

At the close of the State’s evidence, Howard moved to dismiss all the charges based on a lack of substantial evidence that he was the perpetrator. After the motion was denied, Howard informed the court that he did not intend to present any evidence and renewed his motion to dismiss for insufficiency of the evidence, which the court also denied.

During the Rule 21 charge conference that followed, the State raised concerns about the jury instruction for the second-degree kidnapping charge, but the parties otherwise agreed for the trial court to use the pattern instructions for the attempted

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armed robbery and felon in possession of a firearm charges. Consequently, the trial court instructed the jury, in pertinent part, that:

Under Count Number 3, the defendant has been charged with possessing a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt. First that on March 30, 2006 in Wake County . . . [Superior Court] the defendant pled guilty to the felony of possession with intent to sell and deliver cocaine, that was committed on June 17, 2005 in violation of the laws of the State of North Carolina.

And second, that thereafter the defendant possessed a firearm. A Rossi .357 caliber is a firearm. So I charge if you find from the evidence beyond a reasonable doubt that the defendant was convicted of a felony in Wake County Superior Court, and that the defendant thereafter possessed a firearm it would be your duty to return a verdict of guilty.

If you do not so find, or have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of not guilty.

Shortly after the jury began its deliberations, it sent a note to the trial court requesting to see the surveillance videos, Howard's DOC identification card, and the photographs used in the identification lineups. The court agreed to send the photographs and DOC identification card back to the jury room, and stated it would replay the surveillance videos again in the courtroom. As the jurors viewed those videos, the following exchange occurred:

FOREPERSON: Can you stop when the gentlemen are in front of the shelf?

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[Video stopped]

FOREPERSON: Okay, can you move one frame?

[Video playing]

FOREPERSON: Does anybody want to see it again?

JUROR: If we could see the inside again.

[Video played]

FOREPERSON: I think you need to back it up if you can.

[Video finished]

FOREPERSON: Thank you.

The jury resumed its deliberations and then sent another note back to the trial court requesting to see the stills from the surveillance tapes and inquiring whether it would be possible to pull a still off the tape. The trial court agreed to allow the jurors to view the stills that had been admitted into evidence, but declined their request to pull an additional still off the tape.

On 30 January 2014, the jury returned its verdict finding Howard not guilty on the charges of attempted armed robbery and second-degree kidnapping, but convicting Howard on the charge of possession of a firearm by a convicted felon. At that point, the State sought to proceed with the habitual felon charge. However, the trial court had to continue those proceedings when it was discovered that the State needed to send a superseding habitual felon indictment to the grand jury because its

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original habitual felon indictment only alleged that Howard had committed armed robbery and second-degree kidnapping and was silent as to the only charge for which he was actually convicted.

On 5 February 2014, Howard indicated he would not contest his status as an habitual felon and would instead stipulate to his convictions. On 10 February 2014, Howard pled guilty to the charge of having attained the status of an habitual felon. The trial court then entered a Judgment and Commitment sentencing Howard as an habitual felon for possession of a firearm by a convicted felon to a term of 101 to 134 months imprisonment.

That same day—before filing written notice of appeal to this Court on 20 February 2014—Howard filed an MAR with the trial court alleging that it had committed plain error by instructing the jury that it could convict him of being a felon in possession of a firearm if it found that he possessed a firearm at any point after he originally became a convicted felon in 2006. Given the evidence in the record, Howard contended that the court’s instruction invited a fatally ambiguous verdict, thereby depriving him of his fundamental right to a unanimous jury verdict based on legally sufficient evidence and thus entitling him to a new trial. In a response filed 7 April 2014, the State argued that the instruction was proper and that if any error occurred, it was invited by Howard’s failure to timely object. On 17 April 2014, the trial court entered an order denying Howard’s MAR based on its conclusion that “the charge

given to the jury was in accordance with the Law of the State of North Carolina, was consistent with the Pattern Jury Instructions, and was not objected to by the defendant when provided opportunity to object or request further or additional instructions.”

II. Analysis

Howard argues that the trial court’s order denying his MAR failed to address the merits of his claim that the trial court committed plain error because its jury instruction on the felon in possession of a firearm charge was fatally ambiguous insofar as it authorized his conviction based upon an uncharged alternative theory that was not supported by the evidence and therefore violated his right to a unanimous jury verdict under Article I, Section 24 of our State Constitution. We agree.

We review a trial court’s order denying a defendant’s MAR

to determine whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court. While [an appellate court] is bound by the findings of fact made by the [trial court] if supported by evidence, it is not bound by that court’s conclusions of law based on the facts found. Accordingly, we review the trial court’s conclusions of law *de novo*.

State v. Rhodes, 366 N.C. 532, 535-36, 743 S.E.2d 37, 39 (2013) (citations and internal quotation marks omitted).

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Because Howard did not object to the jury instructions at trial, the standard of review is plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Thus, in order to prevail, Howard

must demonstrate that a fundamental error occurred at trial. To 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. (citations, internal quotation marks, and brackets omitted).

The right to a unanimous jury verdict in a criminal proceeding is guaranteed by Article I, Section 24 of our State’s Constitution, which provides that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.” N.C. Const. art. 1, § 24; *see also* N.C. Gen. Stat. § 15A-1237(b) (2013) (reiterating and codifying this right). Consequently, “jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged.” *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982) (citation omitted). Thus, “[a] fatally ambiguous jury instruction violates a defendant’s constitutional right to a unanimous verdict.” *State v. Haddock*, 191 N.C. App. 474, 480, 664 S.E.2d 339, 344 (2008). It is therefore well established that “where the trial court erroneously submits the case to the jury on alternative theories, one of which is

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not supported by the evidence,” and “it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles [the] defendant to a new trial.” *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (citation omitted). Under such circumstances, our Supreme Court has consistently held that it “cannot assume the jury adopted a theory favorable to the [S]tate; instead, the Court has construed the ambiguity in favor of [the] defendant.” *State v. Belton*, 318 N.C. 141, 162, 347 S.E.2d 755, 768 (1986), *abrogated on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997).

In the present case, Howard contends—and our review of the record confirms—that the only disputed issue at trial was whether or not he was, in fact, the perpetrator of the attempted robbery and second-degree kidnapping offenses at McDonald’s on 24 September 2012 which the jury ultimately found him not guilty of committing. The State has conceded, in both its memorandum in opposition to Howard’s MAR and in its appellate brief to this Court, that Howard was indicted for possession of a firearm by a convicted felon based *exclusively* on the theory that Howard was the perpetrator of the attempted armed robbery and second-degree kidnapping offenses committed at McDonald’s on 24 September 2012. The State also concedes that this was the only theory of Howard’s guilt that it pursued at trial. However, in light of the fact that the evidence introduced at trial included testimony

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from Detectives Snowden and Bais about the gun they found in Howard's mother's closet on 18 October 2012, nearly one month after the incident that gave rise to the charges against him, Howard argues that the trial court's instruction to the jurors—essentially, that they could convict him of possessing a firearm as a convicted felon if they found that he ever possessed a firearm at any point after his 2006 felony conviction—was fatally ambiguous because it permitted his conviction based on a theory that the State never charged him with or pursued at trial and which, even if properly developed with sufficient evidentiary support, would have required an additional instruction on constructive possession.

Unanimity issues most commonly arise when the trial court instructs the jury disjunctively on alternative theories of the defendant's culpability. *See, e.g., State v. Davis*, 188 N.C. App. 735, 740, 656 S.E.2d 632, 635, *cert. denied*, 362 N.C. 364, 664 S.E.2d 313 (2008). In assessing whether such an instruction resulted in a fatally ambiguous verdict, our Supreme Court has drawn a distinction between instructions “which allow[] the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*,” and instructions which charge the jury to decide between “various alternative acts *which will establish an element of the offense*[.]” *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991). While the latter do satisfy the requirement of unanimity, the former are “fatally ambiguous because it is impossible to determine whether the jury

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unanimously found that the defendant committed one particular offense.” *Id.* In determining which of these two categories a particular jury instruction falls under, our analysis is guided by an examination of “the gravamen of the offense” which our General Assembly intended to prevent. *Id.* at 307, 412 S.E.2d at 314. We must then “examine the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed.” *State v. Petty*, 132 N.C. App. 453, 461-62, 512 S.E.2d 428, 434, *appeal dismissed and disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999).

Although the jury instruction in Howard’s case was not phrased disjunctively, we proceed with our analysis based on the framework established in *Lyons* given our conclusion that the trial court’s instruction here had the same practical effect as a disjunctive instruction. *See Davis*, 188 N.C. App. at 740, 656 S.E.2d at 635 (observing that the jury instruction the defendant argued was fatally ambiguous was not phrased disjunctively but nevertheless proceeding to examine the gravamen of the offense according to *Lyons*). Section 14-415.1 of our General Statutes provides that “[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]” N.C. Gen. Stat. § 14-415.1(a) (2013). As our prior holdings demonstrate, “the State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) [the] defendant was previously convicted of a felony; and (2) thereafter possessed a

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firearm.” *State v. Perry*, 222 N.C. App. 813, 818, 731 S.E.2d 714, 718 (2012) (citation omitted), *disc. review denied*, 366 N.C. 431, 736 S.E.2d 188 (2013). Possession of the firearm “may be actual or constructive. Actual possession requires that a party have physical or personal custody of the [firearm]. A person has constructive possession of [a firearm] when the [firearm] is not in his physical custody, but he nonetheless has the power and intent to control its disposition.” *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted), *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 587 S.E.2d 505 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). However, where a defendant does not have “exclusive control of the location where the [firearm] is found, constructive possession of the [firearm] may not be inferred without other incriminating circumstances.” *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (citation and internal quotation marks omitted).

In construing section 14-415.1, this Court has previously determined that “[t]he extent to which [a d]efendant is guilty of single or multiple offenses hinges upon the extent to which the weapons in question were acquired and possessed at different times.” *State v. Wiggins*, 210 N.C. App. 128, 138, 707 S.E.2d 664, 672, *disc. review denied*, 365 N.C. 189, 707 S.E.2d 242 (2011). Thus, in *Wiggins*, we held that the defendant could only be convicted of one count of possession of a firearm by a convicted felon because the record clearly established that he took possession of

multiple firearms at the same time and then used them to commit a series of similar substantive crimes within a two-hour period in a limited geographical area. *See id.* By contrast, as we subsequently clarified, “[i]f the evidence shows that the defendant possessed a weapon on different days and in different locations, the holding from *Wiggins* is not controlling, and the defendant can be charged with multiple possession offenses” if warranted by the specific factual circumstances. *State v. Lee*, 213 N.C. App. 392, 399, 713 S.E.2d 174, 179 (2011) (rejecting the defendant’s argument that the trial court erred in denying his motion to dismiss multiple felon in possession of a firearm charges based on *Wiggins* because “each possession of the weapon was separate in time and location” given that “the offenses in the instant case were committed in nine different locations on ten different days over the course of a month”).

Based on our review of section 14-415.1 and the relevant case law, it is readily apparent that the gravamen of this offense is the possession of a firearm by a convicted felon. Section 14-415.1(a) enumerates a range of alternative actions, any one of which would satisfy the possession element of the offense. Thus, under *Lyons*, if a trial court were to disjunctively instruct a jury that a defendant could be convicted of this offense for either “purchasing” or “owning” a firearm—assuming such an instruction was sufficiently supported by the indictment and the evidence and arguments presented at trial—there would be no unanimity problem because the

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instruction, like the statute, would merely present the jurors with a choice between “various alternative acts which will establish an element of the offense.” 330 N.C. at 302-03, 412 S.E.2d at 312. Similarly, because actual and constructive possession function as alternative means of establishing the possession element of this offense, a jury instruction that a defendant could be convicted if he either actually or constructively possessed a firearm within a distinct timeframe and location would not be fatally ambiguous so long as the record supported it.

Our prior unpublished opinion in *State v. Miller*, __ N.C. App. __, 643 S.E.2d 677 (unpublished), *available at* 2007 WL 1246916, *appeal dismissed*, 361 N.C. 434, 649 S.E.2d 640 (2007), provides a further illustration of how the gravamen of this offense factors into our analysis. In *Miller*, the evidence tended to show that at approximately 1:00 a.m. on 5 March 2004, the defendant committed armed robbery with a firearm outside a billiards hall after emerging from the driver’s side door of a white sedan. *Id.* at *1. Roughly 23 hours later, police found the defendant seated in the driver’s seat of a similar vehicle and, after taking him into custody, found a similar firearm under the driver’s seat. *Id.* at *2. After a jury convicted him of three counts of armed robbery and one count of possession of a firearm by a convicted felon, the defendant argued on appeal to this Court that because the evidence “tended to show [his] possession of a firearm at two separate times on the day of the incident,” his conviction for violating section 14-415.1 should be vacated based on his argument

that because the trial court “failed to specify a particular time for possession of the firearm, there was no certainty that all twelve jurors reached the same conclusion as to the time of possession.” *Id.* at *3. In assessing this argument, we first examined the plain language of section 14-415.1 and found that it enumerates a range of alternative actions—“purchas[ing], own[ing], possess[ing], or [the defendant] hav[ing] in his custody, care or control”—that each satisfy the possession element for this offense. *Id.* We then examined the record and concluded that because the defendant was only charged with one count of possessing a firearm and “[t]he State’s theory in this case and the evidence presented indicated that on a single day, [the] defendant possessed a single gun,” there was “no basis for finding that [the] defendant committed multiple violations” of section 14-415.1. *Id.* Reasoning that “[b]ecause we are not confronted with the potential for two or more discrete and separate wrongs,” we held there was no risk of a non-unanimous verdict. *Id.* (citation omitted).

Although *Miller* was decided before both *Wiggins* and *Lee*, its holding fits well within in the framework established by the latter cases for determining whether a defendant can be convicted of one or multiple violations of section 14-415.1, insofar as the defendant in *Miller* was charged with and convicted of one offense based on evidence of his activities over a 24-hour period. Therefore, it was of no consequence whether the jurors determined that he possessed a firearm during the robbery or that

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he possessed one when he was subsequently apprehended by police, because—consistent with *Lyons*—either determination would support a conviction for the same, singular offense. This highlights a critical distinction between *Miller* and the present facts. Here, Howard could have been charged with and convicted of two violations of section 14-415.1 based on actual possession of a firearm as the alleged perpetrator of the attempted robbery at McDonald’s on 24 September 2012, and constructive possession of the firearm found during the search of his mother’s closet on 18 October 2012. Indeed, our holding in *Lee* compels our conclusion that the latter constitutes a distinct and separate offense. To be clear, in order to convict Howard of possessing a firearm as a convicted felon based on the 18 October 2012 search, the State would have been required to request an instruction on constructive possession, *see Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318, and also would have been required to present evidence of additional incriminating circumstances, *see Clark*, 159 N.C. App. at 525, 583 S.E.2d at 683. However, as noted *supra*, the State concedes that the only theory of Howard’s culpability it pursued at trial was based on the 24 September 2012 attempted robbery. We have no trouble in concluding that if the trial court had provided the jurors with a disjunctive instruction that allowed them to find Howard guilty based on the robbery *or* the search, it would have “erroneously submit[ted] the case to the jury on alternative theories, one of which [was] not supported by the evidence.” *Lynch*, 327 N.C. at 219, 393 S.E.2d at 816.

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Nevertheless, as it stands, we believe the practical effect of the non-disjunctive jury instruction the trial court actually did provide was essentially the same: the record before us includes evidence that would support Howard's conviction based on a separate, uncharged alternative theory that was never developed at trial, and our case law makes clear that by broadly authorizing the jurors to convict Howard if they found he possessed a firearm at any point after his original felony conviction, the court supplied an instruction that was fatally ambiguous because it "allow[ed] the jury to find [Howard] guilty if he commit[ted] either of two underlying acts, either of which is in itself a separate offense," and one of which was not supported by the indictment or the evidence and arguments presented at trial, thereby making it "impossible to determine whether the jury unanimously found" that Howard committed the particular offense for which he was actually charged and prosecuted. *Lyons*, 330 N.C. at 302-03, 412 S.E.2d at 312.

This determination does not end our inquiry, as we must also "examine the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed." *Petty*, 132 N.C. App. at 461-62, 512 S.E.2d at 434. While our review of the record here does clarify some of the ambiguity surrounding the jury's verdict, it also further confirms our conclusion that the trial court's instruction was fatally ambiguous. For its part, the State insists that there was "overwhelming evidence" to support Howard's conviction and urges this Court to

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refrain from second-guessing the jury's verdict or speculating improperly as to the rationale behind it. However, we find the record here clear enough that we need not attempt to read the minds of the jurors in order to evaluate the merits of Howard's argument that the trial court's instruction permitted them to convict him based on an alternative theory that was never charged in the indictment, pursued at trial, or properly supported by evidence.

Howard was convicted of possessing a firearm as a convicted felon based on an indictment alleging that he committed this offense at McDonald's on 24 September 2012 as the perpetrator of the attempted armed robbery and second-degree kidnapping offenses. An attempted armed robbery occurs "when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *State v. White*, 322 N.C. 506, 515-16, 369 S.E.2d 813, 818 (1988) (citation omitted). Second-degree kidnapping occurs when a person "unlawfully confine[s], restrain[s], or remove[s] from one place to another, any other person 16 years of age or over without the consent of such person" for the purpose of "[f]acilitating the commission of any felony" so long as "the person kidnapped was released in a safe place" and was not seriously injured or sexually assaulted. *See* N.C. Gen. Stat. § 14-39 (2013).

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At trial, the evidence indicated that the perpetrator (1) was armed with a gun, which he used to threaten at least one of the eyewitnesses when he demanded that they open the cash register, thereby satisfying the elements of attempted armed robbery; and (2) forced Moore to stop unloading the delivery truck, move to inside the kitchen, and lie down on the floor against his will in order to facilitate the attempted armed robbery before releasing him unharmed in a safe place, thereby satisfying the elements of second-degree kidnapping. The only element of either offense that Howard disputed was whether or not he was, in fact, the perpetrator. Although the State introduced evidence linking Howard to the two-tone Chevy Caprice shown speeding away from the McDonald's in the surveillance tapes, and offered testimony that Diaz selected Howard's photograph during the 15 October 2012 identification lineup, none of the eyewitnesses provided in-court testimony identifying Howard as the perpetrator. Indeed, two of the eyewitnesses testified that during identification lineups, they selected photographs of men other than Howard, one of whom also owned a two-tone Chevy Caprice. Moreover, considered collectively, the eyewitness testimony tended to suggest that Howard is significantly shorter than the suspect. Even Detective Snowden acknowledged on cross-examination that Howard "appear[ed] to be four or five inches" shorter than his trial counsel, who is approximately the same height as Moore, whom Diaz and Chavis both saw standing beside the suspect and testified was shorter than the suspect. Detective Snowden also

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testified that eyewitnesses are often inept when it comes to judging characteristics such as height, especially when their attention is focused primarily on the presence of a gun. Here, however, the jury also had the opportunity to verify the eyewitnesses' accounts by viewing for itself the McDonald's surveillance tapes, Howard's DOC identification card, and the lineup photographs during trial. Indeed, the jurors specifically interrupted their deliberations in order to view the video again, frame-by-frame, before they acquitted Howard of attempted armed robbery and second-degree kidnapping.

That being the case, we simply cannot agree with the State's argument that the jury's verdict was based on "overwhelming evidence" that Howard actually possessed a firearm as a convicted felon while attempting to rob the McDonald's on 24 September 2012. In fact, even if we agreed with the State's characterization of the evidence, our Supreme Court has made clear that where a trial court's instructions allow for conviction based on uncharged or unsupported alternative offenses, we "cannot assume, simply because the jury *could* have found a fact to exist, that it did so." *Belton*, 318 N.C. at 165, 347 S.E.2d at 769. Thus, based on our case law and in light of the unique circumstances this case presents, we cannot and will not assume that the jurors somehow found that Howard possessed a firearm during an attempted armed robbery and second-degree kidnapping that they ultimately determined Howard did not commit. This is especially true in light of the evidence in the record

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that could have supported Howard’s conviction of the separate, uncharged offense of constructively possessing the firearm Detectives Snowden and Bais found in his mother’s closet on 18 October 2012. While this evidence could have been developed to support an additional charge, the State declined to pursue such a theory at trial and, apart from Detective Snowden’s testimony that the gun he found in Howard’s mother’s closet looked similar in caliber and appearance to the one shown in the surveillance tapes, there was no evidence introduced to directly link the gun to the robbery or to Howard himself, and the jury was never instructed on constructive possession. Instead, the trial court instructed the jurors to convict Howard if they found that he had previously been convicted of a felony and “that thereafter [Howard] possessed a firearm.”⁴

Based on the record before us, it is clear that the trial court should have narrowly limited the second element of its instruction for the felon in possession of a firearm charge to focus the jury’s attention exclusively on the arguments and evidence presented at trial—namely, whether Howard had actual possession of a firearm on 24 September 2012. Thus, while we recognize that the trial court utilized a pattern jury instruction and that we are typically reluctant to find error, let alone plain error, in a court’s reliance thereupon, *see, e.g., State v. Warren*, 348 N.C. 80,

⁴ The breadth of the trial court’s instruction on this charge stands in marked contrast to the instructions it provided the jurors on attempted armed robbery and second-degree kidnapping, which made clear that the jurors should convict Howard “if [they] find from the evidence beyond a reasonable doubt that *on or about the alleged date*” Howard committed those offenses.

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113, 499 S.E.2d 431, 449, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998), we cannot escape the conclusion that under these unique circumstances, the trial court's instruction was fatally ambiguous insofar as it invited the jurors to convict Howard based upon an alternative theory of his culpability for a separate, uncharged and unproven offense in violation of his constitutional right to a unanimous verdict.⁵ Because we conclude that this fatally ambiguous instruction "had a probable impact on the jury's finding that [Howard] was guilty," *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334, we hold that the trial court committed plain error. Consequently, we hold that the trial court also erred in denying Howard's MAR. In light of these holdings, we need not reach the additional arguments Howard raises on appeal. Accordingly, we hold that Howard's convictions for possession of a firearm by a convicted felon and attaining the status of an habitual felon must be vacated, and that Howard is entitled to a

NEW TRIAL.

Judge DIETZ concurs. Judge BRYANT concurs in the result only.

Report per Rule 30(e).

⁵ For its part, the State argues that by failing to request an instruction on constructive possession at trial, Howard has waived any right to raise this issue on appeal. This argument misapprehends the procedural posture of this case and is without merit. While the State certainly could have asked for an instruction on constructive possession had it developed and supported such a theory at trial, the State elected not to do so, and we know of no authority to support the premise of the State's argument on appeal that it is somehow a criminal defendant's duty to unilaterally expand the potential bases of his own culpability during a Rule 21 charge conference.