IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-199

Filed: 5 January 2016

Carteret County, Nos. 13 CRS 52835-36, 52942

STATE OF NORTH CAROLINA

v.

FRANK HARRY EASTER, JR.

Appeal by Defendant from judgments entered 16 July 2014 by Judge John E. Nobles, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 9 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel L. Spiegel, for Defendant.

STEPHENS, Judge.

I. Factual Background and Procedural History

On 7 October 2013, Defendant Frank Harry Easter, Jr., was indicted by a Carteret County grand jury on two counts of possession with intent to sell or deliver a Schedule II controlled substance; two counts of possession with intent to sell or deliver a Schedule II controlled substance within 1,000 feet of a public park; one count of possession with intent to sell or deliver a Schedule II controlled substance within

1,000 feet of an elementary or secondary school; one count of possession with intent to sell or deliver a Schedule II controlled substance within 1,000 feet of a child care center; and one count of being a registered sex offender unlawfully on premises. These charges were based on allegations that on 19 December 2012 and 11 January 2013, Easter sold oxycodone to a confidential informant working with Morehead City Police Department ("MCPD") Narcotics Detective Daniel Black.

The matter was called for trial on 14 July 2014 during the criminal session of Carteret County Superior Court. Before the trial began, Easter made a motion to allow his court-appointed counsel, Public Defender James Q. Wallace, III, to withdraw from the case so that Easter could represent himself. The trial court granted this motion and appointed Wallace to serve as standby counsel during the trial and all associated proceedings.

During the trial that followed, Detective Black testified that he had heard rumors that Easter was selling prescription pills since Black joined the MCPD as a patrol officer in 2008, and that he decided to set up a controlled buy after a confidential informant named Susan Velasquez, who was a friend of Easter, told him that she could buy oxycodone from Easter. On 19 December 2012, Detective Black met with Velasquez in the parking lot of a strip mall, where he conducted a search of her person and vehicle to verify that she did not possess any contraband, then gave her $60 and an inconspicuous audio/video recording device attached to a key fob in

order to record her controlled buy from Easter. Detective Black then observed from a distance as the controlled buy took place in Easter's vehicle, which was parked approximately 158 feet from a childcare center, 372 feet from a public recreation center, and 438 feet from Saint Egbert Catholic School. As Detective Black explained at trial, he "didn't actually see the deal go down because they were inside a car, so I can't say I saw the deal go down. But I saw the vehicle; I saw Ms. Velasquez get in the car, meet with [Easter]. The money was exchanged. She got out of the car." Detective Black testified that he met with Velasquez shortly thereafter, at which point she returned the recording device and also gave him two 30mg oxycodone tablets she had just purchased from Easter. Detective Black testified further that he arranged for Velasquez to conduct a second controlled buy from Easter on 11 January 2013. Once again, Detective Black met with Velasquez beforehand, conducted a search to verify that she did not possess any contraband, and gave her a recording device. This time, the transaction took place in Easter's home. Afterwards, Velasquez returned Detective Black's recording device and gave him two 5mg oxycodone tablets that Easter had sold to her for $10.

When Velasquez testified at trial, she described both of the controlled buys she conducted with Easter in detail, corroborating Detective Black's testimony about the events. Velasquez testified further that she had been considering moving to Florida for several months and had previously asked Easter to help arrange her

transportation. Four days before the trial was scheduled to begin, Easter told her he was driving to West Palm Beach, Florida with his stepdaughter, Carla Eppard, and this would be Velasquez's "last chance to go down there." Velasquez testified that she accepted Easter's offer and that during the drive, Easter told her he knew she had been working as a confidential informant for Detective Black. In addition, Velasquez testified that on the way to Florida, Easter asked her to write a letter to his court-appointed counsel stating that she had told Easter she was working with Detective Black before the controlled buys ever occurred; that Easter had proposed they stage a fake drug transaction in order to get back at Black by making him "look stupid"; that, as part of this revenge plot, she gave Easter a clandestine signal during the controlled buys and as a result, the two of them performed an empty fist-bump for the camera but Easter never actually gave her any oxycodone tablets; and that the pills she turned over to Detective Black after the controlled buys had been secretly hidden on her person all along in order to trick Black. Velasquez explained that she complied with Easter's request to write the letter because she was scared. Velasquez also stated that the allegations in the letter were false, and that Easter "told me what to write, and I wrote as fast as I could, abbreviated a lot, and everything was—this was [in Easter's] words." Shortly after they arrived in Florida, Easter drove back to North Carolina, leaving Velasquez with no money and no place to stay until the

Carteret County District Attorney's office located her on the day before Easter's trial was scheduled to begin and paid for her plane ticket home.

The recordings of both controlled buys were admitted into evidence and played for the jury. The State also presented expert testimony from two North Carolina State Crime Lab analysts who confirmed that the substance Velasquez purchased during the controlled buys was oxycodone. In addition, MCPD Detective Harold Pendergrass testified that Easter had registered as a sex offender with the Carteret County Sheriff's Office in 2009, based on a 1971 rape conviction from Pennsylvania, and had signed a form acknowledging that he understood the limitations imposed on his travel and whereabouts as a result.

For his part, Easter presented testimony from his stepdaughter, who stated that Velasquez did not seem anxious or afraid during the drive to Florida and that she had, in fact, offered to help Easter by volunteering to write the letter to his attorney. When Easter testified on his own behalf, he contended that he had been repeatedly harassed by law enforcement but denied ever selling prescription pills. Easter acknowledged that his wife "had a liver condition, plus sciatica, and she was receiving 120 20-milligram pills a month." Easter testified further that he had begun to carry his wife's prescription bottles with him at all times after he learned that some of his roommates had been stealing her medication, but was quick to emphasize that the dosage of his wife's pills differed from the dosages of the pills recovered after both

the controlled buys. Easter also testified that Velasquez had come to him "upset and scared to death that she was going to jail forever and always" unless she helped Detective Black "set him up" by serving as a confidential informant. According to Easter, at that point, he and Velasquez concocted a plan "to get even with the police for all the garbage they've been dumping on us." As Easter explained:

> . . . I told [Velasquez] what we'd do. You set up a buy, we go in, and all I do is bump hands and then you give [Detective Black] some pills. And basically, that's what happened on the first video [from the 19 December 2012 controlled buy], if you take a look. She gave me money, I gave her money back. I never give her any pills. All right. If you take a real close [look]—you don't see any pills being transferred from one place to the other.
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> In the second video [from the 11 January 2013 controlled buy], I was [not] aware that she was under a wire, until two-thirds of the way through the deal, when she finally gave me a wink to let me know what was going on, so I knew what was going on. So I got up and I made out like I was getting some pills out of a bottle and I put them on the table and left to go. And she took it from there.

Easter subsequently introduced the letter Velasquez wrote during their road trip to Florida into evidence.

At the close of all the evidence, the trial court dismissed the charge of possession with intent to sell or deliver a Schedule II controlled substance within 1000 feet of a child care center and both counts of possession with intent to sell or deliver a Schedule II controlled substance within 1,000 feet of a public park. The trial court submitted the remaining charges to the jury on 15 July 2014. That same day,

the jury returned its verdict finding Easter guilty on all charges, including two counts of possession with intent to sell or deliver a Schedule II controlled substance, one count of possession with intent to sell or deliver a Schedule II controlled substance within 1000 feet of an elementary or secondary school, and one count of being a registered sex offender unlawfully on premises.

On 16 July 2014, the trial court arrested judgment on one of Easter's convictions for possession with intent to sell or deliver a Schedule II controlled substance and then entered a consolidated judgment on the remaining convictions imposing a sentence of 44 to 65 months imprisonment. Immediately following entry of judgment, the court heard another matter involving Easter, in which he pled no contest to one felony count of obstruction of justice arising from his road trip to Florida with Velasquez. Public Defender Wallace represented Easter during that proceeding. After the court entered judgment on his client's plea, Wallace stated, "As to the earlier cases, just to be on the record, [Easter] plans to enter Notice of Appeal. And I believe . . . [the court] would need to find that he's still indigent; I certainly contend that he is. And that will trigger the appointment of the Appellate [Defender]." The trial court agreed, stating, "That's fine. And I'll note the appeal," and entered appellate entries the same day. However, no subsequent written or oral notice of appeal was entered.

II. Analysis

A. Easter's petition for writ of certiorari

On 3 March 2015, Easter's appellate counsel filed a petition for writ of *certiorari* with this Court acknowledging that Easter had inadvertently waived his right to appeal by failing to comply with the timing requirements imposed by Rule 4 of our Rules of Appellate Procedure insofar as he failed to give oral notice of appeal immediately after judgment was entered on his convictions, and there was otherwise "nothing in the record [that] appear[ed] to constitute timely notice of appeal from judgment . . . as required to confer jurisdiction upon this Court." *See, e.g.*, *State v. Robinson*, __ N.C. App. __, __, 763 S.E.2d 178, 180 (2014) (granting *certiorari* after concluding that a defendant who attempted to give notice of appeal after the jury returned its verdict but did not give notice of appeal following entry of the trial court's final judgment had failed to give timely notice of appeal, despite the trial court's indication that it would note the appeal for the record and assign the case to the Appellate Defender's Office), *affirmed as modified*, __ N.C. __, 777 S.E.2d 755 (2015). Although noncompliance with Rule 4 divests this Court of jurisdiction to hear Easter's appeal, *see, e.g.*, *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011), Easter requests *certiorari* review pursuant to Rule 21, which provides that a writ of *certiorari* "may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to

prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). In its response to Easter's petition, the State agrees that Easter's failure to comply with Rule 4 waived his right to appeal but concedes that it is within our discretion to grant Easter's petition. We now choose to do so in order to reach the merits of Easter's appeal.[1]

B. Easter's conviction for violation of section 14-208.18(a)(2)

Easter argues first that his conviction for violating section 14-208.18(a)(2) of our General Statutes must be vacated because the trial court lacked subject matter jurisdiction to convict him for being a sex offender unlawfully on premises. Specifically, Easter contends that the indictment charging him with being a sex offender unlawfully on premises was fatally defective insofar as it failed to allege each essential element of the offense. We agree.

It is the law in this State that a valid indictment must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision

[1] In his brief, Easter's appellate counsel also calls our attention to what he characterizes as a clerical error in this Court's electronic docketing system. Specifically, Easter's counsel asserts that our electronic docket for this case erroneously states that this Court received the evidentiary exhibits introduced at trial by both parties on 25 February 2015 "from [the] Appellate Defender's Office," and he further complains that although he notified the Clerk of Court of this error on 18 March 2015, it had not been corrected by the time Easter filed his appellate brief on 25 March 2015. While counsel appears to be correct insofar as the exhibits were received from the Clerk of Superior Court for Carteret County, rather than directly from the Appellate Defender's Office, this Court's policy is to identify all filings made in conjunction with an appeal by the party responsible for filing them. In the present case, Easter's counsel works for the Appellate Defender's Office and was responsible for requesting that these exhibits be included in the record on appeal.

> clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2013). Our prior cases recognize that

> North Carolina law has long provided that there can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity. Where an indictment is alleged to be invalid on its face, thereby depriving the trial court of subject matter jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court. This Court reviews the sufficiency of an indictment *de novo*. An arrest of judgment is proper when the indictment wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty. The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.

State v. Harris, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (citations, internal quotation marks, and brackets omitted).

Section 14-208.18 of our General Statutes provides in pertinent part that

> (a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
>
> (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

> (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.
>
> . . .
>
> (c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:
>
> (1) Any offense in Article 7A of this Chapter.
>
> (2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

N.C. Gen. Stat. § 14-208.18 (2013). In our recent decision in *Harris*, we observed that because there are two essential elements for the offense defined in section 14-208.18, a proper indictment must allege that the defendant was:

> (1) knowingly on the premises of any place intended primarily for the use, care, or supervision of minors and (2) at a time when he was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense.

219 N.C. App. at 594, 724 S.E.2d at 637 (citation omitted). In *Harris*, we vacated the defendant's conviction for violating section 14-208.18(a)(1) because the indictment against him failed to allege the second element of the offense and was therefore fatally

defective. *Id.* at 596-97, 724 S.E.2d at 638-39. As we explained, "a number of convictions that result in the imposition of a registration requirement . . . do not constitute offenses which are listed in Article 7A of Chapter 14 of the North Carolina General Statutes or involve a victim under the age of 16." *Id.* at 597, 724 S.E.2d at 638. "For that reason, the simple fact that an individual required to register as a sex offender enters the premises of any place intended primarily for the use, care, or supervision of minors does not inevitably mean that a violation of N.C. Gen. Stat. § 14-208.18 has occurred." *Id.* In so holding, we rejected the State's argument that the indictment had sufficiently alleged each essential element of the offense because it alleged that the defendant was a "registered sex offender." As we explained,

> [i]n view of the fact that certain individuals are required to register as sex offenders despite the fact that they did not commit an offense that is listed in Article 7A of Chapter 14 or involved a victim under the age of 16, an allegation that [the d]efendant was "a registered sex offender" does not suffice to allege all of the elements of the criminal offense enumerated in N.C. Gen. Stat. § 14-208.18.

Id. at 597, 724 S.E.2d at 638-39. In our subsequent decision in *State v. Herman*, 221 N.C. App. 204, 726 S.E.2d 863 (2012), we vacated the defendant's conviction for violating section 14-208.18(a)(2) based on the same rationale as we applied in *Harris*. *Id.* at 210-11, 726 S.E.2d at 867. In so holding, we explained that the fact the defendant in *Herman* was charged under a different subsection of the statute was immaterial to our analysis because,

> [a]lthough those charges would have different first elements pursuant to N.C. Gen. Stat. § 14-208.18(a)(1) or (2)[,] both indictments charging those offenses would both have to allege that [the] defendants acted with knowledge, pursuant to N.C. Gen. Stat. § 14-208.18(a), and, pursuant to N.C. Gen. Stat. § 14-208.18(c), would still have to allege that:
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> "at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense."

Id. at 210, 726 S.E.2d at 867 (quoting *Harris*, 219 N.C. App. at 594, 724 S.E.2d at 637). We also observed that "the use of the word 'unlawfully' and the sentence, 'This act was in violation of the law referenced above[,]' in the indictment, just as in the *Harris* indictment, does not, standing alone, provide any notice of the nature of [the d]efendant's allegedly unlawful conduct or the reason that his alleged conduct was unlawful." *Id.* at 211, 726 S.E.2d at 867 (citation and certain internal quotation marks omitted). Thus, just as in *Harris*, we concluded that because the indictment failed to allege each essential element of the offense charged, the trial court lacked subject matter jurisdiction to consider the charge against the defendant. *Id.*

In the present case, the indictment charging Easter with violating section 14-208.18(a)(2) alleged that:

> The jurors for the State upon their oath present that on or about [19 December 2012] and in [Carteret County] the defendant named above unlawfully, willfully and

> feloniously did as a person required to register as a sex offender, go on property located within 300 feet of a location (Child Care Network) intended for the use, care or supervision of minors, when the location is upon premises not primarily intended for such use.

Here, as in *Harris* and *Herman*, the indictment against Easter does not specifically allege that his purported violation of section 14-208.18(a)(2) occurred at a time when he was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A, Chapter 14 of our General Statutes or of an offense involving a victim under 16. Moreover, the State concedes that it is unable to distinguish the facts of the present case from those in *Harris* and *Herman*, and consequently agrees that Easter's conviction must be vacated.

Because the indictment charging Easter with being a sex offender unlawfully on premises failed to allege each essential element of the offense, we hold that the trial court lacked subject matter jurisdiction to consider this charge. We therefore vacate Easter's conviction for violating section 14-208.18(a)(2) "without prejudice to the State's right to attempt to prosecute [Easter] based upon a valid indictment." *See Harris*, 219 N.C. App. at 598, 724 S.E.2d at 639. Because the trial court consolidated all of Easter's convictions into a single judgment for sentencing, we remand for resentencing. In light of our holding on this threshold jurisdictional issue, we need not address Easter's related argument that his conviction on this charge must be

vacated because the State failed to introduce substantial evidence of an essential element of the offense charged.

C. Easter's conviction for violating section 90-95(e)(8)

Easter argues next that his conviction for possession with intent to sell or distribute oxycodone within 1,000 feet of an elementary or secondary school in violation of section 90-95(e)(8) of our General Statutes must be vacated because the State did not explicitly demonstrate that Saint Egbert Catholic School "taught elementary, middle, or high school courses rather than post-secondary, continuing education, or Bible study classes," and therefore failed to introduce substantial evidence of each essential element of the offense charged.[2] We conclude this issue has not been properly preserved for our review.

Rule 10(a)(3) of our Rules of Appellate Procedure provides, in pertinent part, that a criminal defendant "may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial." N.C. R. App. P. 10(a)(3); *see also State v. Williams*, __ N.C. App. __, __, 760 S.E.2d 382, 384 (2014)

[2] On 27 April 2015, in response to Easter's argument, the State filed a motion requesting that this Court take judicial notice of public records from the North Carolina Department of Administration, Division of Non-Public Education, that list Saint Egbert Catholic School as teaching grades K-5. Easter opposes this motion, arguing that if he is correct that the State failed to establish an essential element of the offense charged during his trial, it would be improper for this Court to judicially notice a fact that should have been proven to the jury. However, in light of our conclusion that Easter's challenge to the sufficiency of the evidence introduced at trial has not been properly preserved for our review and must be dismissed, we deny the State's motion for judicial notice as moot.

(dismissing the defendant's argument that the State failed to present sufficient evidence of the charge against him because the defendant "did not move to dismiss that charge either at the close of the State's evidence or at the close of all of the evidence" and finding that, as a result of his failure to comply with Rule 10, "[t]he question of the sufficiency of the State's evidence is therefore not preserved for appellate review").

In the present case, the record indicates that at trial, Easter failed to make any motion to dismiss the charge brought against him under section 90-95(e)(8). However, Easter argues based on this Court's decision in *State v. Hargett*, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003), *abrogation recognized by State v. Williams*, 215 N.C. App. 412, 425, 715 S.E.2d 553, 561 (2011), as well as our Supreme Court's decision in *State v. Canady*, 330 N.C. 398, 401-02, 410 S.E.2d 875, 878 (1991), that this issue is automatically preserved for *de novo* review, even without an objection at trial, because it involves a sentencing error.

We find Easter's reliance on *Hargett* and *Canady* wholly misplaced. In *Hargett*, the defendant argued that the trial court "erred in convicting and sentencing him for both larceny and possession of the same goods." 157 N.C. App. at 92, 577 S.E.2d at 705. Although we noted that the defendant had failed to object to this sentencing error at trial, we nevertheless reviewed his argument because "[o]ur Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose

of [Rule 10(b)(1)]."[3] *Id.* (citation omitted). In so holding, we relied on our Supreme Court's decision in *Canady*. There, the defendant argued that the trial court erred in finding an aggravating factor during his sentencing hearing. The State contended that the defendant's failure to preserve the issue by timely objection as required by the then-extant version of Rule 10(b)(1) should bar him from raising the issue on appeal. The *Canady* Court disagreed, explaining:

> [Rule 10(b)(1)] is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal.

330 N.C. at 401, 410 S.E.2d at 878 (citation omitted). Given its conclusion that the defendant had no opportunity to object during trial to an error that occurred after his conviction during sentencing, the Court concluded that Rule 10(b)(1) was inapplicable and ultimately held that the defendant was entitled to a new sentencing hearing. *Id.* at 403, 410 S.E.2d at 878.

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[3] At the time, Rule 10(b)(1) provided, "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of the proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal." Although this Rule has since been revised and re-codified as Rule 10(a)(1), its substance remains largely the same.

We note here that, unlike the alleged violations of Rule 10(b)(1) at issue in *Hargett* and *Canady*, the preservation issue in the present case arises from Easter's failure to comply with Rule 10(a)(3), which specifically requires that a criminal defendant who seeks to challenge the sufficiency of the evidence introduced against him at trial must do so through a timely motion to dismiss. *See* N.C.R. App. P. 10(a)(3). Further, in contrast to the defendants' arguments in *Hargett* and *Canady*, Easter's argument here focuses entirely on the sufficiency of the evidence presented at trial, rather than on any error that allegedly occurred after his conviction during sentencing. We therefore conclude that *Hargett* and *Canady* are inapposite to the present case. Moreover, Easter's characterization of this issue as an automatically preserved sentencing error is further undermined by the cases he cites in support of his substantive contention that the State failed to introduce substantial evidence of each essential element required to convict him for violating section 90-95(e)(8). Specifically, Easter relies on this Court's prior decisions in *State v. Alderson*, 173 N.C. App. 344, 349, 618 S.E.2d 844, 848 (2005) (holding that the trial court did not err in denying the defendant's motion to dismiss the charge of manufacturing methamphetamine within 300 feet of a school where the evidence showed that "the defendant's residence is within 300 feet of an elementary school"); *State v. Alston*, 111 N.C. App. 416, 420, 432 S.E.2d 385, 387 (1993) (rejecting the defendant's argument that the State failed to prove an essential element to support his conviction under

section 90-95(e)(8) where only verbal testimony, rather than maps or plats, was offered to prove that he sold drugs to a police officer within 300 feet of Lenoir Middle School); and *State v. Ussery*, 106 N.C. App. 371, 374, 416 S.E.2d 610, 611 (1992) (holding the trial court did not err in denying the defendant's motion to dismiss where both the principal and superintendent testified that he sold drugs within 300 feet of the property boundary for Chaloner Middle School). While the defendants in *Alderson*, *Alston*, and *Ussery* made similar arguments to the one Easter attempts to raise here, nothing in our analysis from those cases indicates that such issues should be treated as sentencing errors. Instead, we analyzed those defendants' claims that the evidence was insufficient to sustain their convictions for violating section 90-95(e)(8) by examining the sufficiency of the evidence presented at trial.

We therefore conclude that Easter's argument that this issue involves a sentencing error that is automatically preserved for our review is without merit. We further conclude that because Easter failed to preserve his challenge to the sufficiency of the evidence by making a timely motion to dismiss as required by Rule 10(b)(3), this issue is not properly before us. Easter also requests that we review his challenge to the sufficiency of the evidence pursuant to Rule 2, which provides this Court with the discretion to suspend the Rules of Appellate Procedure in order to prevent manifest injustice. However, our Supreme Court has made clear that Rule 2 is only to be used on rare occasions and for exceptional cases, *see, e.g.*, *State v. Hart*, 361 N.C.

309, 316, 644 S.E.2d 201, 205 (2007), and we do not believe that Easter's unpreserved sufficiency challenge presents such a case. This argument is dismissed.

D. Prosecutor's closing argument

Easter argues next that the trial court committed reversible error by failing to intervene *ex mero motu* during the State's closing argument. Specifically, Easter takes issue with the prosecutor's statements that his defense was "absurd" and a "whopper of a story," and that the reason Easter was representing himself was because his court-appointed counsel was ethically precluded from presenting his defense. We disagree.

Because Easter failed to object to the State's closing argument at trial, our review is limited to assessing "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Oakes*, 209 N.C. App. 18, 22, 703 S.E.2d 476, 480 (citations and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 365 N.C. 197, 709 S.E.2d 920 (2011). "Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *Id.* "To establish such an abuse, [the] defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.*

(citation omitted). Moreover, our Supreme Court has made clear that "in order to constitute reversible error, the prosecutor's remarks must be both improper and prejudicial." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107-08 (2002) (citation omitted).

In the present case, during the State's closing argument, the prosecutor stated:

> Mr. Easter, he's going to have to explain a lot. Why doesn't he have [Public Defender] Wallace represent him? He's given you his reason. I'll give you my reason. It's because [Public Defender] Wallace ain't going to sit up here as a professional and put this kind of show on. He can't present this case, ethically. He can't present a case that is all a big, made-up show on behalf of Frank Easter, because there's an ethical duty not to do that. And that's why he is sitting back there, and that's why [Easter], who is under no ethical duty of any sort, is doing it himself.

Easter argues that this statement was improper because it argued facts not in evidence, implied that Easter's appointed counsel had personal knowledge that Easter's testimony was false, and—combined with the prosecutor's characterization of Easter's defense as "absurd" and "a whopper of a story"—impermissibly expressed the prosecutor's personal opinion about the veracity of Easter's testimony and the strength of his case. For its part, the State contends that in light of the audio/video recordings of the controlled buys and other evidence in the record, the prosecutor's argument was an accurate statement of Rule 3.3 of the North Carolina Rules of Professional Conduct, which prohibits a lawyer from knowingly "offer[ing] evidence that the lawyer knows to be false." N.C. Rev. R. Prof. Conduct 3.3(a)(3). The State

also argues that the prosecutor's statement came in direct response to a statement Easter made during his own closing argument about the reason for his *pro se* representation:

> Okay. As you-all know, I am representing myself, and there's a couple reasons there. . . .
>
> [Public Defender] Wallace and I have become friends over the years. And I really didn't like the idea of him representing me and possibly failing and having to take the burden onto himself. I know he's going to represent me as well as he can, but there's always the possibility that he might believe the State. Hopefully, not this time.

In North Carolina, prosecutors are generally "given wide latitude in the scope of their [closing] argument[s] and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (citations and internal quotation marks omitted), *cert. denied*, __ U.S. __, 182 L. Ed. 2d 176 (2012). However, while a prosecutor "can argue to the jury that they should not believe a witness," *see, e.g.*, *State v. Sexton*, 336 N.C. 321, 363, 444 S.E.2d 879, 903, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994), during closing arguments an attorney "may not . . . express his personal belief as to the truth or falsity of the evidence." N.C. Gen. Stat. § 15A-1230(a) (2013). Prosecutors are likewise prohibited from arguing facts not introduced into evidence during closing arguments because, as our prior holdings demonstrate, "[f]rom the earliest time, traveling outside the record in jury argument has been disapproved by our courts."

State v. Caldwell, 68 N.C. App. 488, 489, 315 S.E.2d 362, 363 (citation and internal quotation marks omitted) (finding prejudice and granting a new trial where the prosecutor stated during closing arguments that the defendant's co-conspirator had not testified because he was already in jail and uncooperative, since "the jury could have easily inferred therefrom that [the co-conspirator] was in jail because he had been convicted of the offenses that [the] defendant was being tried for"), *disc. review denied*, 312 N.C. 86, 321 S.E.2d 901 (1984). It has also been held improper for a prosecutor to imply during closing arguments that defense counsel "had personal knowledge of both the validity and the damaging nature of the State's evidence" or the veracity, or lack thereof, of a witness's testimony. *See, e.g.*, *State v. Rivera*, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999).

We recognize that *pro se* defendants often pose uniquely frustrating challenges for prosecutors, and that in the present case, those challenges were likely exacerbated not only by Easter's lack of familiarity with the rules of evidence and criminal procedure, but also by his efforts to render one of the State's key witnesses, Velasquez, unavailable for trial by driving her to Florida and leaving her there without any money or any way to return home. Nevertheless, we agree with Easter that the prosecutor's statement that his court-appointed counsel was ethically precluded from representing him was improper. The statement was based on matters outside the evidence, referenced Easter's appointed counsel's personal knowledge of

the case, and—when combined with the prosecutor's characterization of Easter's defense as "a big, made-up show"—invited the jury to infer that Easter was being dishonest in his arguments and his testimony to the court. Such statements do not comport with the high standards of prosecutorial professionalism that our case law demands in even the most challenging and frustrating cases.

However, this conclusion does not end our inquiry, as our Supreme Court has made clear that we must consider the prosecutor's improper statement in the context of all the facts and circumstances revealed in the record and that it is the defendant's burden to show that the statement was prejudicial. *See Sexton*, 336 N.C. at 363, 444 S.E.2d at 903 (concluding that the defendant was not entitled to a new trial because although the prosecutor's characterization of the defendant as a liar was improper, the defendant was unable to demonstrate any prejudice in light of the "overwhelming evidence against [him]"). To that end, Easter argues that the prosecutor's statement was prejudicial, and likely tipped the scales toward the jury finding him guilty, because the State's case "was hardly overwhelming and resulted in dismissals of almost half the charges" against him. We note here that although the printed record includes orders dismissing three of the charges, there is no reference to these dismissals or the reasons for them in the trial transcript. It appears from our review that the trial court dismissed these charges during an off-the-record conference it conducted in chambers after the close of the evidence to discuss the jury instructions.

The State highlights the fact that during sentencing, the trial court arrested judgment on one of Easter's convictions after expressing concerns it might otherwise result in a double jeopardy issue, and the State further suggests that the court's decision to dismiss three of the charges before submitting the case to the jury was rooted in similar concerns. Whatever the case may be, our review of the record does not support Easter's argument that the State's case against him on the remaining charges was "hardly overwhelming." Indeed, apart from his improper statement regarding Easter's *pro se* representation, the majority of the prosecutor's closing argument focused on summarizing the State's evidence, which included testimony from Velasquez and Detective Black about the controlled buys on 19 December 2012 and 11 January 2013, as well as audio/visual recordings of those controlled buys, and expert testimony confirming that the substance Velasquez purchased from Easter was oxycodone.

In light of the overwhelming evidence the State introduced against Easter, we conclude that he is unable to meet his burden of showing that the prosecutor's improper statement was prejudicial. *See Sexton*, 336 N.C. at 363, 444 S.E.2d at 903. We therefore hold that the trial court did not commit reversible error by failing to intervene *ex mero motu* during the State's closing argument.

E. Easter's prior record level

Finally, Easter argues that the trial court erred in calculating his prior record level during sentencing by using his out-of-state felony conviction absent a proper showing of substantial similarity to a North Carolina offense. We agree.

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation omitted), *disc. review denied*, __ N.C. __, 691 S.E.2d 414 (2010). "It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Id.* (citations omitted).

Under North Carolina law, a defendant's prior record level "is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2013). Section 15A-1340.14(b) of our General Statutes specifies the number of prior record points the trial court shall assign for each class of felony and misdemeanor offense. "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). The statute further provides that a prior conviction may be proven by

> (1) [s]tipulation of the parties[, or] (2) [a]n original copy of the court record of the prior conviction[, or] (3) [a] copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts[, or] (4) [a]ny other method found by the court to be reliable.

Id. Section 15A-1340.14(e) governs classification of offenses from other jurisdictions and provides that,

> [e]xcept as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e). "Whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law involving comparison of the

elements of the out-of-state offense to those of the North Carolina offense." *State v. Burgess*, 216 N.C. App. 54, 57, 715 S.E.2d 867, 870 (2011) (citation omitted). This Court has repeatedly held that when the trial court erroneously increases a defendant's prior record level based on an out-of-state conviction that the State has not proved by a preponderance of the evidence was substantially similar to a North Carolina offense, the case must be remanded for resentencing. *See id.*; *see also State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (remanding for resentencing to determine whether the defendant should be a prior record level V or VI after the trial court erroneously assigned one prior record level point to an out-of-state conviction without any showing that it was substantially similar to a North Carolina offense).

In the present case, during Easter's sentencing hearing, the prosecutor informed the trial court that Easter was on the North Carolina sex offender registry "for a first-degree rape out of Pennsylvania in 1971. I have placed this—given this only six points and put it down as a second-degree rape in an abundance of caution, and I would argue that that's a Class D felony in North Carolina or the equivalent thereof." Easter stipulated to the existence of this out-of-state conviction, but the State did not offer any proof of its substantial similarity to any North Carolina offense. Nevertheless, the trial court assigned Easter six prior record level points based on this out-of-state conviction and determined that Easter was a level V

offender with 14 prior record level points. The record before us indicates that absent this out-of-state conviction, Easter would have had only 8 prior record level points—based on North Carolina convictions for one Class F, one Class H, and one Class I felony—which would classify him as a level III offender. Because the State failed to prove that Easter's out-of-state conviction was substantially similar to a North Carolina offense, we hold that the trial court erred in its calculation of Easter's prior record level. *See Burgess*, 216 N.C. App. at 57, 715 S.E.2d at 870; *Fortney*, 201 N.C. App. at 671, 687 S.E.2d at 525.

We have already concluded that this case must be remanded for resentencing in light of our holding that Easter's conviction for being a sex offender unlawfully on premises in violation of section 14-208.18(a)(2) must be vacated. In light of its unsupported determination that Easter is a level V offender, we instruct the trial court on remand to allow the parties to offer whatever evidence is necessary in order to determine whether Easter's out-of-state conviction was substantially similar to a North Carolina offense and recalculate his prior record level accordingly.

VACATED in part; DISMISSED in part; NO PREJUDICIAL ERROR in part; REMANDED for resentencing.

Judges MCCULLOUGH and ZACHARY concur.

Report per Rule 30(e).