IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-169

Filed: 21 November 2017

Rutherford County, No. 15 CRS 50532

STATE OF NORTH CAROLINA

v.

TYLER DALE McCURRY

Appeal by defendant from judgment entered 22 April 2016 by Judge Robert G. Horne in Rutherford County Superior Court. Heard in the Court of Appeals 5 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General K. D. Sturgis, for the State.

Gilda C. Rodriguez for defendant-appellant.

DAVIS, Judge.

Tyler Dale McCurry ("Defendant") appeals from his conviction for second-degree murder. On appeal, he argues that the trial court erred by (1) denying his motion to dismiss; (2) classifying his prior conviction as a Class 1 misdemeanor rather than a Class 3 misdemeanor during sentencing; and (3) determining that no juror misconduct occurred during trial. Alternatively, he contends that he was deprived of

effective assistance of counsel. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from error but remand for resentencing.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: L.J.R. ("Leo")[1] was born to Jennie Reynolds ("Jennie") and her husband Derek Reynolds ("Derek") on 19 July 2014. Shortly after Leo was born, Derek was incarcerated, and the Department of Social Services ("DSS") became involved with the family due to Jennie's abuse of methadone pills. In the fall of 2014, Leo and his three-year-old sister ("Jane") were removed from Jennie's care and placed in the custody of Jennie's mother, Lisa Bell ("Ms. Bell"). Around the time Derek became incarcerated, Jennie began a romantic relationship with Defendant. Defendant lived in Jennie's house and slept in the guest bedroom.

The events leading up to Leo's death occurred during the weekend of Friday, 9 January 2015 to Sunday, 11 January 2015. At this time, Leo was almost six months old. On Friday, Jennie dropped off Leo and Jane with a babysitter named Marah Alexander ("Marah") between 5:00 p.m. and 6:00 p.m. Marah noticed that Leo had "milk bumps" or "irritation" on his neck and decided to "give him his bath that night." During this bath, she did not notice "any bruising anywhere else on [Leo.]"

[1] Pseudonyms and initials are used to protect the identities of the minor children and for ease of reading.

On Saturday morning, Marah called Jennie multiple times to determine when she needed to bring the children back to Jennie's house. At some point that morning, she drove the children to the house and knocked on the door, but nobody answered. She returned to Jennie's house at 1:30 p.m. and knocked on the door. Jennie opened the door and stated that "she had been asleep" and "wasn't feeling well." After "stay[ing] and talk[ing] to her for about five minutes just to make sure Jennie was awake and coherent," Marah dropped off Leo and Jane with Jennie and left the house.

After Marah left, Jennie watched Leo and Jane while Defendant remained asleep in his bedroom. At some point, Jennie's friends, Kenjerian Littlejohn ("K.J.") and Lauren Taylor ("Lauren"), came to the house. Lauren took a shower at the house while Jennie and K.J. were watching the children. Shortly thereafter, K.J. and Lauren left, and Jennie and Jane were playing with Leo on the floor trying to feed him sweet potatoes. Leo was "really fussy because he was tired . . . ."

At this point, Defendant woke up and came into the living room area. He heard Leo crying and stated, "I will get him. Fix him a bottle." Jennie prepared a bottle with formula, and Defendant sat with Leo on the couch. Jennie then fed Leo the bottle until he fell asleep while Defendant was holding him. Once he was asleep, Jennie placed Leo into a swing in the living room and buckled him in.

Jennie realized she did not have enough baby formula and texted her mother, Ms. Bell, to ask if she could "have some money to go get him some formula[.]"

Defendant left the house to purchase cigarettes. However, because he forgot to take money with him, Defendant returned shortly thereafter and then left again to go to the store. At that point, Jennie was alone with the children. She was in the bathroom getting ready to go to the store while Leo was in the swing and Jane was sitting on the couch watching television.

When Defendant returned, Jennie and Jane went to the grocery store to buy baby formula. Ms. Bell had dropped off $40 on Jennie's porch for this purpose, but Jennie forgot to buy the formula while she was at the store. On the drive home, she called Defendant "to have him just run back out and get it . . . because it was getting late . . . [and she was] supposed to stay home with the kids[,]" but he did not answer the phone call.

When Jennie arrived home, she saw Lauren's car parked in front of her house and K.J. walking up to the front door. She entered the house behind K.J. and discovered Leo was no longer sitting in his swing in the living room.

Jennie walked into Defendant's room, and Defendant stated to Jennie that "he had a bad dream and wanted [her] to stay in there with him." He also told her that while she was out he had moved Leo "from the swing into [Jennie's] bed so that we wouldn't wake him up coming in and out that night." When Jennie asked if Leo had woken up or cried, Defendant responded, "No, he didn't wake up, but I changed him -- changed his clothes and he is asleep." Jennie asked Defendant, "[D]id he have

diarrhea? Because I had fed him sweet potatoes, and he never ate sweet potatoes before, so I was wondering if it gave him diarrhea." Defendant responded, "[N]o, it was normal." He stated again that "he changed him and put him to bed." Jennie testified that she never went into her bedroom to check on Leo.

Defendant then asked Jennie if she would take him "to get some dope[.]" K.J. offered to watch the children while Jennie and Defendant left to buy drugs. Before he left the house, Defendant instructed K.J. not to go into Jennie's bedroom and not to let Jane go into the bedroom unless Leo was crying so as not to wake him up.[2] As Jennie and Defendant were leaving the house, Jennie's friend Amanda Greene ("Mandy") arrived with Lauren's dog. Mandy told Jennie that she would help K.J. watch the children.

While Jennie and Defendant were out of the house, Mandy went to Jennie's bedroom door "two or three times at the most because [Jane] and [her] were cooking chicken nuggets." She "peeked in" to check on Leo but never walked up to the bed or tried to wake him up. She never heard him cry or saw him wake up. She observed that a bottle "was propped in the baby's mouth with a blanket laying under it [and t]here was a pillow or maybe another blanket or something beside . . . him."

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[2] We note that during Defendant's cross-examination of K.J., K.J. testified that after Jennie returned from the grocery store and before she left with Defendant to purchase drugs, K.J. observed Jennie move Leo to the bedroom. K.J. gave a statement to detectives that was read into evidence during cross-examination stating that "Jennie pick[ed] [Leo] up out of the swing and t[ook] [Leo] into her bedroom. [Defendant] followed her back there. [Defendant] and Jennie were in the bedroom a minute and came out."

K.J. was playing video games in Defendant's bedroom during this time. He went into Jennie's bedroom "periodically" to check on Leo but "just went probably two or three steps just to peek over the bed . . . ." He never heard Leo cry or make noise and did not observe anything unusual while Jennie and Defendant were out of the house. He also noticed a bottle propped up in Leo's mouth on the bed.

K.J. and Mandy both texted Defendant to inform him that Jane wanted Jennie to return home. On their way home from buying drugs, Defendant called K.J. and told him to make sure Jane was ready to go to the grocery store because Jennie needed to buy baby formula. Jennie dropped Defendant off at the house and waited for Jane to come out to the car, but Defendant returned and informed Jennie that Jane did not want to go with her to the store again. Jennie then drove to Walmart to buy baby formula.

When Defendant returned to the house, he asked Mandy and K.J. to stay with him and play video games. They declined, and Mandy "thought he was [acting] weird because he wanted [us] to stay and play . . . ." K.J. also believed Defendant "was acting weird" so he asked Defendant, "Are you okay?" to which Defendant responded, "I'm all right man." K.J. later testified that at that point "I kn[e]w something was wrong with him. I just did." K.J. and Mandy left the house, and Defendant was alone with Leo and Jane.

Jennie received a text from Defendant stating that "K.J. and Mandy had left, but they were acting weird." When Jennie returned home, she noticed Leo in her bedroom with a blanket on him and that it "looked like he was peacefully asleep." She did not walk up to the bed at that point but noticed there was a four-ounce bottle of milk that was "about halfway full" propped up in his mouth. She went to Defendant's room and fell asleep in his bed with him.

Between 2:00 a.m. and 5:00 a.m. on Sunday morning, K.J., Mandy, Lauren, and Lauren's boyfriend ("Calhoun") returned to Jennie's house to retrieve Lauren's dog and Mandy's phone charger. They knocked on the door loudly, but nobody answered. Mandy peeked through the bedroom window and saw that Leo was still on Jennie's bed. Jennie eventually answered the door and told them to keep quiet so as not to wake the children. Mandy, Lauren, and Calhoun all walked into Defendant's bedroom while K.J. lingered in Jennie's bedroom. After they retrieved Lauren's dog and Mandy's phone charger, the four guests left, and Jennie fell asleep on the couch in the living room.

On Sunday at approximately 11:00 a.m., Jennie realized that Leo had not woken up in the middle of the night. She went to her bedroom to check on him and found him "in the middle of the bed . . . ." She picked him up and discovered he was dead. Defendant came into the room because he heard Jennie crying and screaming, and she told him the baby was dead.

Jennie told Defendant to call 911. He responded, "Jennie, we are not ready for this[.]" Jennie picked up the phone and called Ms. Bell. When she told Ms. Bell that Leo was dead, Ms. Bell said, "You call 911." Jennie hung up the phone and called 911. Law enforcement officers arrived at the scene at approximately noon.

On 23 February 2015, Defendant was charged with first-degree murder. A jury trial was held beginning on 18 April 2016 in Rutherford County Superior Court. Jennie, Ms. Bell, Mandy, K.J., and Marah testified for the State as to the events of the weekend at issue. Other witnesses for the State were the DSS social worker investigating Leo's death, officers and detectives who arrived at the scene and worked on the case, and Dr. Loraine Lopez-Morell, a forensic pathologist who had conducted an autopsy of Leo. Defendant did not testify on his own behalf or present any evidence.

At the close of the State's evidence, Defendant moved to dismiss the charge against him for insufficiency of the evidence. The trial court denied this motion. At the close of all of the evidence, Defendant renewed his motion to dismiss. The transcript does not indicate that the trial court ever ruled on the motion.

During the charge conference, the trial court determined that there was insufficient evidence to support a charge of first-degree murder and instructed the jury solely on second-degree murder. On 22 April 2016, the jury found Defendant

guilty of second-degree murder. The court sentenced him to 276 to 344 months imprisonment. Defendant gave oral notice of appeal.

Analysis

On appeal, Defendant argues that (1) the trial court erred by denying his motion to dismiss; (2) the trial court did not adequately investigate possible juror misconduct; (3) he received ineffective assistance of counsel; and (4) his prior conviction for possession of drug paraphernalia was erroneously classified as a Class 1 misdemeanor during the sentencing hearing. We address each argument in turn.

I. Denial of Motion to Dismiss for Insufficiency of Evidence

Defendant argues that the trial court erred by denying his motion to dismiss. We first address the State's contention that this issue was not properly preserved for appeal.

Rule 10 of the North Carolina Rules of Appellate Procedure states as follows:

> (1) *General.* In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. *It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.* Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action . . . may be made the basis of an issue presented on appeal.

N.C. R. App. P. 10 (emphasis added).

Here, Defendant made a motion to dismiss at the close of the State's evidence and at the close of all of the evidence. Although the trial court denied the motion at the close of the State's evidence, the trial court did not rule on the motion to dismiss made at the end of all of the evidence.

However, assuming *arguendo* that Defendant has failed to adequately preserve this issue for appellate review, we elect — in the interests of justice — to exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review his argument. *See State v. Davis*, 198 N.C. App. 146, 149, 678 S.E.2d 709, 712 (2009) (invoking Rule 2 to review merits of defendant's argument where defendant failed to preserve issue for appeal by renewing his motion to dismiss for insufficient evidence at close of evidence).

"The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal." *State v. Pressley*, 235 N.C. App. 613, 616, 762 S.E.2d 374, 376 (citation omitted), *disc. review denied*, __ N.C. __, 763 S.E.2d 382 (2014). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is . . . evidence . . . a reasonable mind

might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). In reviewing challenges to the sufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted).

"Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted). When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

> Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. For a defendant to be guilty of second degree murder, the State must prove beyond a reasonable doubt that: 1. defendant killed the victim; 2. defendant acted intentionally and with malice; and 3. defendant's act was a proximate cause of the victim's death.

State v. Bostic, 121 N.C. App. 90, 98, 465 S.E.2d 20, 24 (1995). Our Supreme Court has held that "[w]here an adult has exclusive custody of a child for a period of time and during such time the child suffers injuries which are neither self-inflicted nor accidental, the evidence is sufficient to create an inference that the adult inflicted an injury." *State v. Perdue*, 320 N.C. 51, 63, 357 S.E.2d 345, 353 (1987).

At trial, Dr. Lopez-Morell testified that multiple blunt force injuries inflicted on Leo's head caused his death and that these fatal injuries were inflicted within 36 hours of when the police arrived at Jennie's house. She opined that these injuries were likely due to blunt force trauma to the back of the baby's head and "would have required a significant amount of force that can occur with accidental injury as well as non-accidental injury . . . ." She further testified that as a result of these injuries, Leo may have lost consciousness, suffered from sleepiness, or been mildly irritable. She also noticed several bruises on Leo's chin that were "consistent with fingerprints" and that she believed had occurred three to seven days prior to his death. There was also bruising on his groin.

Defendant argues that because (1) he did not have exclusive custody over Leo for the entire period of time during which Leo could have sustained his fatal injuries; and (2) other adults in the house had custody of the child throughout this 36-hour period of time, the State's evidence was insufficient to create an inference that he inflicted the child's fatal injuries. We disagree.

In support of his argument, Defendant cites several cases in which our appellate courts have held the mere fact that a defendant was alone with a child prior to the child's death or injury was insufficient to raise an inference that the defendant caused the injury. *See, e.g.*, *State v. Byrd*, 309 N.C. 132, 140, 305 S.E.2d 724, 730 (1983) (holding that circumstances surrounding child's injuries did not support inference that defendant was responsible because three other adults besides defendant were living in house when child was injured and record was "cloudy" as to when she was injured), *overruled on other grounds by State v. Childress*, 321 N.C. 226, 232-33, 362 S.E.2d 263, 267 (1987); *State v. Reber*, 71 N.C. App. 256, 260, 321 S.E.2d 484, 486 (1984) (where child with several illnesses died from internal brain hemorrhage while in defendant's care, defendant's guilt could not be inferred due to peculiar type of injury and lack of evidence of external trauma causing injury), *disc. review denied*, 313 N.C. 335, 327 S.E.2d 897 (1985).

However, our courts have since distinguished *Byrd* and *Reber* on a number of occasions in holding that a motion to dismiss was properly denied where a defendant had exclusive custody over a child victim prior to the child's injury or death. *See, e.g.*, *Perdue*, 320 N.C. at 57, 357 S.E.2d at 349 (defendant had exclusive care of child on day infant died of blunt force injury to head); *State v. Campbell*, 316 N.C. 168, 173, 340 S.E.2d 474, 477 (1986) (defendant had sole custody and control of child at time she suffered severe burns from submersion in bathtub full of hot water); *State v.*

Perry, 229 N.C. App. 304, 321, 750 S.E.2d 521, 534 (child victim suffered abusive head trauma while in defendant's exclusive custody), *disc. review denied*, 367 N.C. 262, 749 S.E.2d 852 (2013); *State v. Parker*, 185 N.C. App. 437, 442-43, 651 S.E.2d 377, 382 (2007) (defendants had "sole care and supervision" of child during three-and-a-half-hour time period during which child developed brain injury), *appeal dismissed and disc. review denied*, 362 N.C. 91, 657 S.E.2d 26 (2007); *State v. Qualls*, 130 N.C. App. 1, 5, 502 S.E.2d 31, 34 (1998) (defendant had exclusive custody over child during time of injury, he told social worker he may have "accidentally kicked or tripped on the victim[,]" and expert witness testified trauma was not accidentally inflicted), *aff'd per curiam*, 350 N.C. 56, 510 S.E.2d 376 (1999); *State v. Evans*, 74 N.C. App. 31, 35, 327 S.E.2d 638, 642 (1985) (child suffered from malnutrition and dehydration and defendant had exclusive custody of child during five-hour period following her last appearance as a healthy child), *aff'd per curiam*, 317 N.C. 326, 345 S.E.2d 193 (1986).

In the present case, the State presented evidence that (1) Leo died from blunt force injuries that were inflicted within 36 hours of the time his death was discovered; (2) Marah saw no bruising on Leo's body on Friday evening while she was bathing him; (3) Defendant was completely alone with Leo in Jennie's house for a period of time on 10 January 2015 while Jennie and Jane went to the grocery store; (4) when Jennie and Jane returned, Defendant told Jennie he had moved Leo from the swing in the living room to Jennie's bed in the bedroom; (5) Defendant told Jennie that he

moved Leo because he needed changing although he also said that Leo never woke up or cried during this time; (6) Defendant also told Jennie he had experienced a "bad dream[;]" (7) no other adult was completely alone in the house with Leo during the time frame when the injury occurred because either Jane or another adult was present in the residence during the remainder of the key time period; (8) Defendant specifically instructed K.J. not to go into the bedroom where he had placed Leo; (9) both Mandy and K.J. believed Defendant was acting "weird" when he told them to stay with him at the house while Jennie was gone later Saturday night; and (10) when he was informed by Jennie that Leo was dead and she asked him to call 911, Defendant did not do so and instead responded that "we're not ready for this . . . ."

While this is a close case, viewing this evidence in the light most favorable to the State, a reasonable inference can be drawn that Defendant caused Leo's injuries, which resulted in his death. Leo was never conclusively seen alive again after the period of time when Defendant had exclusive custody over him. Moreover, while admittedly some of the portions of the testimony summarized above would not by themselves be sufficient to allow the charge to go to the jury, the State's evidence — when considered cumulatively — allowed the jury to rationally infer that Defendant's unusual behavior was the result of his awareness that he had inflicted serious injury upon Leo. Accordingly, we affirm the trial court's denial of his motion to dismiss.

II. Juror Misconduct

Defendant next argues that the trial court erred by failing to adequately investigate alleged juror misconduct. We disagree.

While the jury was deliberating, the trial court was informed of possible juror misconduct. Defense counsel informed the court that Defendant's mother, Amy McCurry, and her brother, Wesley Laughter, had overheard a conversation between one of the jurors and the boyfriend of Derek Reynolds' sister[3] during a break. The trial court questioned Ms. McCurry and Mr. Laughter regarding the matter, learned that the juror and the boyfriend went to the same church, and ultimately determined that there was no misconduct to further investigate.

"In general, the trial court possesses broad discretionary powers to conduct a fair and just trial." *State v. Garcell*, 363 N.C. 10, 44, 678 S.E.2d 618, 639 (citation and quotation marks omitted), *cert. denied*, 558 U.S. 999, 175 L. Ed. 2d 362 (2009). "When there is a *substantial* reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *Id.* (citation and quotation marks omitted). However, "[a]n inquiry into possible juror misconduct is generally required only where there are reports indicating that some prejudicial conduct has taken place." *Id.* (citation, quotation marks, and brackets omitted). "An abuse of discretion occurs only where a trial court's ruling was

[3] At times, this individual is referred to in the transcript as "Ashley's boyfriend" or "Derek Reynolds' sister['s] boyfriend [or] husband."

manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hurt*, 235 N.C. App. 174, 182, 760 S.E.2d 341, 348 (citation, quotation marks, and brackets omitted), *disc. review denied*, 367 N.C. 807, 766 S.E.2d 679 (2014).

As an initial matter, the State argues that Defendant failed to preserve this issue for appeal because he did not inform the trial court of this conversation before jury deliberations began. *See State v. Najewicz*, 112 N.C. App. 280, 291, 436 S.E.2d 132, 139 (1993) (defendant failed to preserve issue of juror misconduct where he waited until trial was over before raising question of whether jury had prematurely begun deliberations), *disc. review denied*, 355 N.C. 563, 441 S.E.2d 130 (1994). However, because Defendant has raised an ineffective assistance of counsel claim based on his attorney's failure to properly preserve this issue, we elect to reach the merits of Defendant's argument. *See State v. Marion*, 233 N.C. App. 195, 202, 756 S.E.2d 61, 67-68 (addressing merits of defendant's argument despite counsel's failure to preserve issue because this issue was basis of ineffective assistance of counsel claim), *disc. review denied*, 367 N.C. 520, 762 S.E.2d 444 (2014).

As discussed above, Defendant's attorney informed the court after jury deliberations had begun that Defendant's mother had witnessed one of the jurors having a two- or three-minute conversation with Derek's sister's boyfriend. Ms. McCurry only heard the boyfriend say, "I'll see you at church." Mr. Laughter testified

that "[i]t was something to the effect -- I can't say for sure -- something to the effect of I will see you in church." Defendant argues that the court did not thoroughly investigate the matter because it did not question the juror about the conversation.

However, the trial court did investigate the matter on its own and ultimately determined that no actual misconduct had been alleged based on this conversation. The court questioned Ms. McCurry and Mr. Laughter regarding the conversation. The trial court then stated, in pertinent part, the following:

> What [Ms. McCurry] indicated she saw was that there was some brief conversation. She said a few minutes, and then she said maybe three minutes, and that she moved over closer to the juror to attempt to hear what was being said. *That all she heard was one of the parties say, "I will see you at church." No comment about the case. Nothing about any matter related, even remotely, related to the case.* She was very specific. She identified the juror as having a blue shirt. This after she had just seen the jurors in the courtroom not minutes before.
>
> . . . .
>
> The Court found Ms. McCurry's -- did not find Ms. McCurry's testimony, first, to be credible. She makes no allegation of any -- other than a few words being spoken. There is certainly no allegation of anything with regard to the case mentioned to this person who has an extended connection. The Court having -- first of all, it was said by both Ms. McCurry and Mr. Laughter that it was on the second break yesterday. The Court would note there was one morning break yesterday, at which time the jury was excused from the courtroom. All other breaks -- there were two other breaks, they went back into the jury room and remained in the jury room while the Court heard questions

> of law, and then they were released on a bunch [sic] break. They did not receive an afternoon break.
>
> . . . .
>
> The Court does not find that there is sufficient evidence to warrant further investigation or calling individual jurors out to make inquiry with regard to that. Mr. Laughter testified, in essence, the same thing that Ms. McCurry indicated. He, too, heard no statements with regard to the case, nothing that would cause prejudice or the appearance of prejudice.
>
> In fact, Ms. McCurry never mentioned the presence of a second juror being present. Mr. Laughter says there was a second juror present. Never did Ms. McCurry mention that in her testimony yesterday, nor for that matter today when she testified that I recall. The Court finds that there is no -- and Mr. Laughter is adamant that he told in his testimony that he reported this contact to defense counsel. I certainly understand this is a stressful time and all counsel is occupied in regard to that. But, again, the Court doesn't find Mr. Laughter's testimony credible either.
>
> The Court, therefore, would find that I have conducted an investigation. I do not find a basis to find any prejudice in regard to the matter, don't find any misconduct on behalf of any juror, and the Court finds no further investigation is necessary.

Thus, the trial court took steps to investigate the matter and determined that nothing was actually discussed that related to Defendant's trial. For this reason, it concluded that no juror misconduct had actually occurred.

While perhaps the better practice would have been for the trial court to have questioned the juror and Derek's sister's boyfriend regarding the precise nature of

their alleged conversation, we cannot say — based on the record currently before us — that the court abused its discretion with regard to this issue. *See State v. Harris*, 145 N.C. App. 570, 578, 551 S.E.2d 499, 504 (2001) ("While we concede that a better course of action might have been for the trial court to have conducted a *voir dire* of juror Boulton here, the trial court was by no means required to do so, and we hold that no abuse of discretion occurred, because we discern no substantial or irreparable harm to defendant's case resulting from the juror's notes."), *appeal dismissed and disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002).

III. Ineffective Assistance of Counsel

Defendant contends, in the alternative, that he was denied effective assistance of counsel due to his trial counsel's failure to adequately preserve for appeal his arguments relating to the denial of his motion to dismiss and the juror misconduct issue. In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

> probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

We need not decide the first prong of the ineffective assistance of counsel test because our analysis of the second prong demonstrates the invalidity of this claim. *State v. Boozer*, 210 N.C. App. 371, 382-83, 707 S.E.2d 756, 765 (2011) ("In considering IAC claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." (citation and quotation marks omitted)), *disc. review denied*, 365 N.C. 543, 720 S.E.2d 667 (2012).

As explained above, even had Defendant's counsel properly preserved those two issues, he would not have been entitled to relief.[4] Thus, because Defendant cannot show that any deficiency in his counsel's performance prejudiced his case, he has failed to establish a claim for ineffective assistance of counsel. *See State v. Roache*, 358 N.C. 243, 326, 595 S.E.2d 381, 433 (2004) (dismissing ineffective assistance of counsel claim where defendant failed to show prejudice).

IV. Classification of Prior Conviction

[4] We reject Defendant's contention that he was prejudiced either by his trial counsel's failure to notify the trial court earlier of the possible juror misconduct or his counsel's description of Ms. McCurry's story as "inchoate."

Finally, Defendant argues that the trial court erred in calculating his prior record level by erroneously classifying his 2012 conviction for possession of drug paraphernalia as a Class 1 — rather than a Class 3 — misdemeanor. "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), *disc. review denied*, __ N.C. __, 691 S.E.2d 414 (2010).

N.C. Gen. Stat. § 15A-1340.14(f) states, in pertinent part, as follows:

> (f) **Proof of Prior Convictions.** — A prior conviction shall be proved by any of the following methods:
>
> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.
>
> *The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists . . . .*

N.C. Gen. Stat. § 15A-1340.14(f) (2015) (emphasis added).

During the sentencing hearing, the State presented evidence that Defendant had two prior drug-related convictions — a 2008 conviction for possession of marijuana and a 2012 conviction for possession of drug paraphernalia. "In determining the prior record level, the classification of a prior offense is the

classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." N.C. Gen. Stat. § 15A-1340.14(c). Therefore, because Defendant's murder conviction was for an offense committed on 10 January 2015, the proper classification for his prior conviction for possession of drug paraphernalia in 2012 is the classification assigned to that offense on 10 January 2015.

As of 1 December 2014, possession of drug paraphernalia used for marijuana consumption has been classified as a Class 3 misdemeanor, *see* N.C. Gen Stat. § 90-113.22A (2015), while possession of drug paraphernalia used for other drug consumption has been classified as a Class 1 misdemeanor, *see* N.C. Gen. Stat. § 90-113.22 (2015). Therefore, the key issue is whether Defendant's 2012 conviction for possession of drug paraphernalia related to marijuana consumption (in which case it would be properly classified as a Class 3 misdemeanor) or to the consumption of methamphetamine or some other drug (in which case it would be properly classified as a Class 1 misdemeanor).

The State sought to classify Defendant's 2012 conviction as a Class 1 misdemeanor, contending that Jennie's testimony during trial regarding Defendant's methamphetamine use in 2015 controlled the trial court's determination on this issue. Defendant argues that this testimony failed to prove that his 2012 conviction was associated with methamphetamine consumption rather than marijuana

consumption, contending that the judgment for the 2012 conviction did not contain information specifying the type of drug associated with the offense. The trial court ultimately agreed with the State and classified Defendant's 2012 conviction as possession of drug paraphernalia relating to methamphetamine consumption.

During the sentencing hearing, the State did not present any actual evidence that the drug that was associated with Defendant's conviction in 2012 was methamphetamine rather than marijuana or any evidence that Defendant used methamphetamine in 2012. Instead, the prosecutor simply referenced Defendant's use of methamphetamine in 2015 based solely on Jennie's testimony during trial.

We conclude that the State failed to meet its burden of showing by a preponderance of the evidence that Defendant's 2012 conviction related to methamphetamine consumption as opposed to marijuana consumption. Therefore, the trial court erred in classifying this prior conviction as a Class 1 misdemeanor rather than a Class 3 misdemeanor. Accordingly, we remand for resentencing. *See State v. Jeffery*, 167 N.C. App. 575, 582, 605 S.E.2d 672, 676 (2004) (remanding for resentencing where State failed to prove defendant's prior record level by preponderance of the evidence).

Conclusion

For the reasons stated above, we conclude Defendant received a fair trial free from error but remand for resentencing.

NO ERROR AT TRIAL; REMANDED FOR RESENTENCING.

Judges BRYANT and INMAN concur.

Report per Rule 30(e).