An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-511

No. COA20-781

Filed 21 September 2021

Lincoln County, No. 17 CRS 53484-85

STATE OF NORTH CAROLINA

v.

ROBERT BRADLEY CRANFORD

Appeal by defendant from judgment entered 27 February 2020 by Judge Lisa C. Bell in Lincoln County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant

TYSON, Judge.

¶ 1 Robert Bradley Cranford ("Defendant") appeals from a judgment entered after the trial court found him guilty of two counts of disseminating an obscenity. We affirm.

I. Background

¶ 2 Defendant and Lori Wallace were involved in a romantic relationship from

2012 until July 2017. During this time, Defendant and Wallace photographed and documented sexual acts they engaged in individually and with each other using a cellular phone's camera. Wallace sent photos of herself in various stages of undress and engaging in individual sexual acts to Defendant. Upon sending the photos, Wallace deleted the pictures from her cellular phone's camera memory.

¶ 3 Defendant and Wallace ended their relationship in July 2017. Defendant requested Wallace to respond to friends' and acquaintances' inquiries about why they had ended their relationship with "It didn't work out." Around 27 July 2017, Defendant contacted Wallace via Facebook Messenger and threatened to publish the photographs described above to mutual friends if she did not respond as instructed. Wallace blocked Defendant from communicating with her on Facebook Messenger. Defendant continued to attempt to contact her through emails, text messages, and by driving to her workplace.

¶ 4 On 3 September 2017, William Church, a mutual friend of Wallace and Defendant received the above-described unsolicited photographs of Wallace through Facebook Messenger from Defendant. Defendant included the text "I warned her" with the photographs.

¶ 5 Bennett Johnson also received unsolicited photographs of Wallace via a text message around the same time. Defendant included the text "I warned her" along with the photographs.

¶ 6 Johnson notified Wallace of the subject matter in the photographs and deleted the photographs sent by Defendant in front of her. Defendant was indicted on two counts of felonious dissemination of obscenities on 21 May 2018.

¶ 7 During a recess in jury selection, Defendant's counsel and the State attended a chamber conference to discuss Defendant's requested waiver of his right to a jury trial. Upon returning to open court and on the record, Defendant waived his right to a jury trial. Defendant and his counsel both signed the detailed waiver of jury trial. At the close of the State's evidence, Defendant moved to dismiss all charges. The trial court denied Defendant's motion.

¶ 8 Following trial, the court entered a verdict of guilty of both charges and imposed a suspended sentence of 4 to 14 months and placed Defendant on 24 months of supervised probation. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

¶ 9 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issues

¶ 10 Defendant argues the trial court: (1) erred by holding an insufficient colloquy with Defendant regarding the waiver of his right to a jury trial, allowed Defendant to consent to a bench trial without a knowing and voluntary waiver of his rights, and held a bench trial within the N.C. Gen. Stat. § 15A-1201(e) (2019) ten-day period to

revoke his waiver; (2) made insufficient findings of fact to support its determination the photographs were "obscene" within the meaning of N.C. Gen. Stat. § 14-190.1 (2019) and the First Amendment; and, (3) erred by denying his motion to dismiss because the photographs were not "obscene" within the meaning of N.C. Gen. Stat. § 14-190.1 and the First Amendment.

IV. Waiver of Jury Trial

¶ 11 The North Carolina Constitution provides the accused with the option and right to a bench trial subject to the trial court's approval. *See* N.C. Const. art I, § 24. Our General Assembly amended N.C. Gen. Stat. § 15A-1201 to allow criminal defendants in non-capital cases to waive the right to a trial by jury in superior court. In 2015, the statute was further amended to include provisions requiring advance notice, a revocation period, and judicial consent to a bench trial. N.C. Gen. Stat. § 15A-1201 (2019).

A. Standard of Review

¶ 12 This Court conducts a *de novo* review of a question of law to determine whether a trial court has violated a statutory mandate. *State v. Mumma*, 257 N.C. App. 829, 835, 811 S.E.2d 215, 220 (2018), *aff'd as modified*, 372 N.C. 226, 827 S.E.2d 288 (2019).

B. Colloquy to Determine a Knowing and Voluntary Waiver

¶ 13 Defendant argues the trial court conducted an improper inquiry into whether

his waiver of a jury trial was knowing and voluntary. Defendant asserts the trial court's colloquy with him consisted of a single question, failed to explain the charges he was facing or the possible punishments, did not explain the function of the trial court in a bench trial, or Defendant's rights in a jury trial.

¶ 14 Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor any case from our Supreme Court or this Court has "established a script for the colloquy that should occur between a superior court judge and a defendant seeking to exercise his right to waive a jury trial." *State v. Rutledge*, 267 N.C. App. 91, 97, 832 S.E.2d 745, 748 (2019).

¶ 15 N.C. Gen. Stat. § 15A-1201(d)(1) requires a trial court to "Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury." N.C. Gen. Stat. § 15A-1201(d)(1). In *Rutledge*, this Court declined to "read such further specifications into" N.C. Gen. Stat. § 15A-1201(d)(1). *Rutledge*, 267 N.C. App. at 98, 832 S.E.2d at 748.

¶ 16 Here, Defendant appeared in court with his attorney on the scheduled day of trial. Defendant's attorney initiated and informed the trial court during jury selection of Defendant's desire to waive a jury trial and proceed with a bench trial during a chamber conference between the attorneys and the trial court. Defendant and his attorney both signed a written waiver of jury trial form. The trial court conducted the following exchange:

> [THE COURT]: Before I ask you all to resume, [Defendant], I just had a conference in chambers with your attorney, . . . and [the State], and there's been representation to me with regard to how the matter will proceed, and [your attorney] had your permission and you agree with what he has represented to me as to how the matter will proceed; is that right?
>
> DEFENDANT: Yes, ma'am.

¶ 17 The record does not indicate the representations Defendant's counsel made during the chamber conference. The better practice is to further describe on the record Defendant's request to waive trial by jury and exercise his right to a bench trial. Even if we were to presume error in the violation of the statutory mandate, N.C. Gen. Stat. § 15A-1201(d)(1), Defendant cannot establish prejudice to warrant a new trial.

C. Ten-Day Revocation Period

¶ 18 Defendant argues the trial court erred by conducting the bench trial the day after he waived his right to jury trial, within the ten-day period provided by N.C. Gen. Stat. § 15A-1201(e).

¶ 19 N.C. Gen. Stat. § 15A-1201(e) provides "Once waiver of a jury trial has been made and consented to by the trial judge . . . , the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice[.]" Defendant asserts this language must be interpreted as a "mandatory cooling-off period." Defendant's interpretation is inconsistent with the plain language of our

General Statutes, the intent of the Legislature, and his trial strategy. *See* An Act to Establish Procedure for Waiver of The Right to a Jury Trial in Criminal Cases in Superior Court: Hearing on H.B. 215 Before the Subcomm. on the Judiciary III of the H. Comm. on the Judiciary, 2015 Leg.

¶ 20 Defendant's interpretation would allow a defendant to force a mandatory ten-day continuance at the scheduled trial, even during jury selection. Nothing in our General Statutes, prior precedents, or in the legislative history shows an intention for the revocation period to create or allow a mandatory continuance at or near a scheduled trial and incur unnecessary delays. *See Rutledge,* 267 N.C. App. at 99, 832 S.E.2d at 749.

¶ 21 The intent of the General Assembly was to prevent a defendant from forcing undue delays by invoking the revocation provision as late as the day of their trial and effecting a ten-day continuance. *See* An Act to Establish Procedure for Waiver of The Right to a Jury Trial in Criminal Cases in Superior Court: Hearing on H.B. 215 Before the Subcomm. on the Judiciary III of the H. Comm. on the Judiciary, 2015 Leg. (Proposed amendment to allow the defendant the right to withdraw waiver of jury trial up to when the first witness testified failed.).

D. Prejudice

¶ 22 Were we to presume Defendant could show the trial court erred by granting his request for waiver of a jury trial, he must also show the actions of the trial court

prejudiced him in order to receive a new trial. *See State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240-41 (2006) ("However, a new trial does not necessarily follow a violation of [a] statutory mandate. Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation.") (internal citations omitted).

¶ 23 N.C. Gen. Stat. § 15A-1443 places the burden upon Defendant to show a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." N.C. Gen. Stat. § 15A-1443(a) (2019).

¶ 24 Presuming, without deciding, the trial court's grant of Defendant's requested waiver was error under N.C. Gen. Stat. § 15A-1201, Defendant cannot show he suffered reversible prejudice under N.C. Gen. Stat. § 15A-1443. Defendant waited until the day of trial and during jury selection to formally announce his intention to and request to waive his right to trial by jury. Defendant and his attorney both signed a written waiver.

¶ 25 Defendant made the choice to request a bench trial, signed the AOC-CR-405 Waiver of Jury Trial form indicating he was informed of the potential consequences of his request, and proceeded to a bench trial. Defendant fails to show why the trial court's grant of this request, even if shown to be a violation of N.C. Gen. Stat. § 15A-2101, was prejudicial. Defendant's arguments are overruled.

V. Obscenity

¶ 26 Defendant argues the trial court erred in denying his motion to dismiss the charges of disseminating obscenity because the images and material depicted in the photographs were not "obscene" within the meaning of N.C. Gen. Stat. § 14-190.1 and the First Amendment.

A. Standard of Review

¶ 27 "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated.").

B. Analysis

N.C. Gen. Stat. § 14-190.1 classifies a material as "obscene" if:

> (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
>
> (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
>
> (3) The material lacks serious literary, artistic, political, or scientific value; and
>
> (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C. Gen. Stat. § 14-190.1(b)(2019).

¶ 28 While the State possesses the burden to prove the material is obscene, the State is not required to offer affirmative testimony addressing each of the N.C. Gen. Stat. § 14-190.1(b) criteria. The materials entered into evidence can "speak for themselves" and when admitted are sufficient evidence for the court to determine the question of obscenity. *See Paris Adult Theatre I v. Slaten*, 413 U.S. 49, 37 L. Ed. 2d 446, *reh'g denied*, 414 U.S. 881, 38 L. Ed. 2d 128 (1973). "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it[.]" *Jacobellis v. Ohio*, 378 U.S. 184, 197, 12 L. Ed. 2d 793, 803-04 (1964) (Stewart, J., concurring).

¶ 29 Our General Statutes define "sexual conduct" as:

> (1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or
>
> (2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or
>
> (3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

N.C. Gen. Stat. § 14-190.1(c) (2019).

¶ 30 Each of the twenty-four photographs was entered into evidence and depicted "sexual conduct" as is defined by N.C. Gen. Stat. § 14-190.1(c). The photographs

depicted Wallace engaged in sexual acts with Defendant and by herself, including oral intercourse, masturbation, and exposed genitals. Testimony before the trial court asserted these photographs were not taken nor disseminated for the purpose of promoting "serious literary, artistic, political or scientific value." N.C. Gen. Stat. § 14-190(b)(3). The "average person applying contemporary community standards" could find each of the photographs "appeals to the prurient interest in sex."

¶ 31 This Court has reasoned:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, *excretory functions* and lewd exhibition of the genitals.

Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 562, 351 S.E.2d 305, 316 (1986) (emphasis original) (citation omitted).

¶ 32 The content depicted in the twenty-four photographs falls under each category above. N.C. Gen. Stat. § 14-190.1 is "aimed at the *dissemination* of obscenity which is not protected by any constitutional guarantees." *Id.* at 557, 351 S.E.2d at 314 (emphasis original). Defendant's argument is overruled.

VI. Findings of Fact

¶ 33 Defendant argues the trial court made incomplete findings of fact to support its determination the photographs were "obscene."

A. Standard of Review

> In reviewing a trial judge's findings of fact, we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

State v. Williams, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); s*ee also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

B. Analysis

¶ 34 Defendant asserts the trial court failed to find the photographs appealed to a "prurient" interest in sex, the images lacked any "serious literary, artistic, political, or scientific value," and that the photographs are not protected or privileged under the Constitution of the United States or the North Carolina Constitution.

¶ 35 Defendant does not challenge any testimony or exhibit. In a criminal bench trial, a trial court does not have to make detailed findings of fact or conclusions of law and can merely enter a general verdict. "In a criminal bench trial, the trial court is not required to set forth the law it will follow in the form of jury instructions or to make detailed findings of fact and conclusions of law." *State v. Cheeks*, 267 N.C. App. 579, 591-92, 833 S.E.2d 660, 670 (2019). Sufficient facts were presented to the trial court to find the above elements of the crimes and conclude they were proven beyond a reasonable doubt. Defendant's argument is overruled.

VII. Conclusion

¶ 36 Defendant clearly initiated his choice for a bench trial on the day of trial. He has failed to show his own strategic choice to waive his right to a jury trial on the day of trial during jury selection prejudiced him in any way. The evidence was sufficient to support the trial court's findings and conclusions of law the photographs were obscene under N.C. Gen. Stat. § 14-190.1 and the First Amendment. The trial court properly denied Defendant's motion to dismiss.

¶ 37 The trial court did not make incomplete findings of fact or unsupported conclusions of law. Defendant's convictions and the judgment entered thereon are affirmed. *It is so ordered.*

AFFIRMED.

Judges CARPENTER and GRIFFIN concur.

Report per Rule 30(e).