IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-916

Filed: 21 April 2015

Guilford County, No. 12-CRS-098772

STATE OF NORTH CAROLINA

v.

ANNA LAURA HUCKELBA

Appeal by Defendant from judgment entered on 3 October 2013 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals on 20 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Edward Eldred for the defendant-appellant.

HUNTER, JR., Robert N., Judge.

Anna Laura Huckelba[1] ("Defendant") appeals from a final judgment of the trial court, based on a jury verdict finding her guilty of three counts of misdemeanor weapon on educational property and one count of felony weapon on educational property pursuant to N.C. Gen. Stat. § 14-269.2(b) (2011). On appeal, Defendant first contends that the trial court committed plain error by instructing the jury that Defendant was guilty of possessing a weapon on educational property even if she did

[1] Although the caption on Defendant's brief and the Record on Appeal spell Defendant's name "Huckleba," the filings with the trial court (including the indictments and judgment) spell Defendant's name "Huckelba." We adopt the spelling of Defendant's name used by the trial court in the judgment.

not know she was on educational property. Second, Defendant argues that her trial counsel was ineffective by failing to argue a fatal variance in the indictment. For the following reasons, we reverse and remand for a new trial consistent with this opinion.

I. Factual & Procedural History

On 11 February 2013, Defendant was indicted on three counts of misdemeanor possession of a weapon on campus or other educational property and one count of felony possession of a weapon on campus or other educational property in violation of N.C. Gen. Stat. § 14-269.2(b). Defendant's case was called for trial in Guilford County Superior Court on 1 October 2013. The evidence presented at trial tended to show the following facts:

On 25 December 2012, Defendant was a senior at High Point University in High Point, North Carolina. Because it was Christmas day, school was not in session, and there were few cars on campus. That evening, sometime after 4:30 P.M., Defendant pulled into a parking spot in front of High Point University's Administration Building. In order to get to this parking spot, Defendant had to drive past a fence, but she did not have to drive through any security gates. Had Defendant chosen to move her car from its location in front of the Administration Building to the residential area of campus, she would have encountered a security gate, and would need a security card to drive into the residences. Instead, Defendant parked her car

in an area that was open to the public, approximately two miles away from "main" campus, where most of the academic buildings are located.

Officer Jeffrey Thomas ("Officer Thomas"), a security officer employed by High Point University, noticed Defendant as she parked. Officer Thomas recognized Defendant because the officers were previously instructed to "be on the lookout" for Defendant for an unspecified reason. The officers were directed to call a Student Life employee if they saw Defendant on campus. Officer Thomas approached Defendant and spoke to her while she was still in her car. He asked her whether she had spoken to anyone in the Student Life department. When Defendant responded that she had not, Officer Thomas escorted her into the lobby of the Administration Building. Defendant's demeanor was calm. Officer Thomas left Defendant in the lobby and Lieutenant Dennis Shumaker ("Lieutenant Shumaker"), another security officer employed by High Point University, joined them in the lobby.

Lieutenant Shumaker contacted the on-duty resident director of Student Life, Lance Dunlap ("Mr. Dunlap"), who arrived at the Administration Building ten to fifteen minutes later. During those ten to fifteen minutes, Lieutenant Shumaker asked Defendant why she was on campus. Defendant responded that she wanted to do her laundry in her townhome-style dorm room on campus. When Mr. Dunlap arrived, he asked Defendant if she had a gun. Defendant responded that she did have a gun in her car. Lieutenant Shumaker told Defendant that he needed to retrieve the

gun from her car. Defendant handed Lieutenant Shumaker her car keys without objection. Before Lieutenant Shumaker left the room, Defendant told him that she had a "concealed carry" permit.

Lieutenant Shumaker went outside to the parking lot of the Administration Building, unlocked and opened Defendant's car. Initially, Lieutenant Shumaker did not see any weapons in the car, only a cardboard box on the back-seat floorboard. Lieutenant Shumaker eventually located a loaded gun[2] in the glove compartment of Defendant's car and three knives in the cardboard box in the back seat. The knives' blades were not exposed. At that point, Lieutenant Shumaker contacted the High Point Police Department and waited for an officer to arrive on the scene. Before leaving for the night, Lieutenant Shumaker wrote a report of the incident. In that report, he documented a direct statement made by Defendant: "I know I'm not supposed to have [the gun] on campus, but I don't take it in my room, or anything."

High Point Police Officer Ian Stanick ("Officer Stanick") eventually arrived on the scene and immediately secured the weapons in his police vehicle. He later took the weapons to the police department and logged them into evidence. Once the weapons were secure, Officer Stanick arrested Defendant and transported her to the police station. At the station, Defendant waived her *Miranda* rights and made several statements to Officer Stanick about the weapons in her car. Defendant stated

[2] The gun was later identified by police as a Ruger 380 pistol.

again that "[s]he knew she was not supposed to have a gun on campus" because "she was taught that in her concealed carry class." She also indicated that her concealed carry permit was valid on the day of her arrest.[3] Defendant told Officer Stanick that she bought the gun for protection because she works the night shift at a retail clothing store in Winston-Salem. She explained to Officer Stanick that she does not feel safe walking through the dark parking lot after work. Defendant indicated to Officer Stanick that "she did not have anywhere else to keep the weapon so she kept it locked in the glove compartment of the car." Defendant was subsequently charged with one count of felony weapon on educational property for the gun and three counts of misdemeanor weapon on educational property for the knives. She spent thirty-nine days in jail before she was released on bail.

Defendant's case was called for trial in Guilford County Superior Court on 1 October 2013. During her opening statements to the jury, Defendant admitted to the element of possession for each of the four weapons charges, but adamantly denied that she was on educational property. At the close of the State's evidence, Defendant

[3] The evidence suggests that Defendant had a valid permit to carry a concealed handgun at the time of her arrest. We note that had the same incident occurred nine months later, Defendant would have been guilty of no crime—at least with regard to the felony gun charge. Effective 1 October 2013, the North Carolina legislature added the following exemption to the statute prohibiting weapons on educational property: "The provisions of this section shall not apply to a person who has a concealed handgun permit that is valid . . . who has a handgun in a closed compartment or container within the person's locked vehicle." N.C. Gen. Stat. § 14-269.2(k) (2013).

made a motion to dismiss, which the trial court denied. No evidence was presented by Defendant.

During the charge conference, outside the presence of the jury, the trial court proposed to read to the jury North Carolina Pattern Jury Instruction 235.17 for the substantive elements of the offenses charged. Neither party objected. Accordingly, the trial court charged the jury with the following instructions:

> The defendant in this case has been charged with knowingly possessing a Ruger pistol on educational property.
>
> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant knowingly possessed a Ruger pistol.
>
> And second, that the defendant was on educational property at the time she possessed the pistol.
>
> Therefore, if you, the jury, find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant knowingly possessed a Ruger pistol, and that the defendant was on educational property at the time she possessed the pistol, then it would be your duty to return a verdict of guilty of knowingly possessing a Ruger pistol on educational property. On the other hand, if you fail to so find or you have a reasonable doubt as to one or both of these things, then it would be your duty to return a verdict of not guilty as to this charge.

The trial court repeated this instruction to the jury for each additional weapon charge, substituting the words "Ruger pistol" for the names of the three knives found

in Defendant's car. The jury found Defendant guilty of all four weapons charges. At sentencing, because Defendant was a prior record level I with zero points, the trial court imposed a suspended sentence of six to seventeen months imprisonment for the Class I felony gun charge, and a suspended, consolidated sentence of forty-five days imprisonment for the misdemeanor weapons charges.

On 8 October 2013, five days after the judgment against her was entered, Defendant filed a handwritten notice of appeal. The notice states that Defendant "give[s] notice of appeal to the Court of Appeals of Guilford County." The bottom right hand corner of the notice states: "10/8/13 CC DA," suggesting that Defendant possibly gave the District Attorney's office the same notice. On 4 December 2014, the State moved this Court to dismiss Defendant's appeal, citing a violation of Rule 4 of the North Carolina Rules of Appellate Procedure, which requires a defendant-appellant to serve the State with a copy of the notice of appeal. *See* N.C. R. App. P. 4. On 15 December 2014, Defendant filed a response to the State's motion to dismiss, as well as a petition for writ of *certiorari* with this Court. On 16 January 2015 we allowed the State's motion to dismiss the appeal, based on the procedural violations. However, on 21 January 2015, we granted Defendant's petition for writ of *certiorari* to decide this case on the merits.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, which provides for appellate review under the extraordinary writ of *certiorari*. "The 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).

III. Standard of Review

With regard to the first assignment of error, the allegedly erroneous jury instructions, "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). "A party may not make any portion of the jury charge or omissions therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires." N.C. R. App. P. 10(a)(2); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024 (2008). However,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835 (2008). Therefore, an unpreserved issue with the jury instructions in a criminal case may only be reviewed by this Court if we find that the instructions as given by the trial court amounted to plain error. *See State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (noting that the Supreme Court of North Carolina "has elected to review unpreserved issues for plain error when they involve . . . errors in the judge's instructions to the jury[.]").

"The North Carolina plain error standard of review . . . requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). First, "a defendant must demonstrate that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334. Second, "a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Finally, "because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation marks omitted).

In this case, Defendant argues on appeal that the trial court erred by instructing the jury that Defendant was guilty of possessing a gun on educational property even if she did not know she was on educational property. Defendant did

not object at trial to the proposed jury instructions; however, she now specifically and distinctly contends that the instructions amounted to plain error. Therefore, we review the trial court's instructions to the jury for plain error.

With regard to the second assignment of error, the alleged ineffective assistance of counsel, "a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (quotation marks omitted). To establish prejudice, "a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

IV. Analysis

Defendant's two arguments on appeal are: (1) the trial court committed plain error by instructing the jury that Defendant was guilty of possessing a gun on educational property even if she did not know she was on educational property; and (2) Defendant's trial counsel was ineffective by failing to argue a fatal flaw in the indictment. We address each assignment of error in turn.

A. Jury Instructions

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546,

549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

Here, the statute under which Defendant was convicted provides: "It shall be a class I felony for any person knowingly to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school." N.C. Gen. Stat. § 14-269.2(b) (2011). On appeal, Defendant argues that the trial court failed to instruct the jury on the proper mental state for the "on educational property" element of the crime. Specifically, Defendant argues that the trial court should have instructed the jury that it must find Defendant not guilty of the crime if it finds that Defendant was not *knowingly* on educational property.

The issue of whether the word "knowingly," as used in N.C. Gen. Stat. § 14-269.2(b), modifies both clauses "possess or carry" *and* "on educational property" is an issue of first impression for this Court. The plain language of N.C. Gen. Stat. § 14-269.2(b) provides us little guidance in determining which words in the sentence "knowingly" should modify. While the clause "whether openly or concealed" is separated from the rest of the sentence by commas, there is no punctuation

separating the "knowingly to possess or carry" clause from the latter clauses in the sentence.[4]

Our Supreme Court has addressed the issue of which clauses in a statutory sentence the adverbial mental state "knowingly" should modify. However, in that case, the statutory language was much more clear than in the case at bar. In 1964, the Supreme Court of North Carolina analyzed N.C. Gen. Stat. § 18-78.1, which governed licenses to sell alcoholic beverages. *See Campbell v. North Carolina State Bd. of Alcoholic Control*, 263 N.C. 224, 225–26, 139 S.E.2d 197, 199 (1964) (overruled on other grounds by *Nat'l Food Stores v. North Carolina Bd. of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1975)). Section 5 of the statute provided that no licensee shall "sell, offer for sale, possess, or knowingly permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized by law." N.C. Gen. Stat. § 18-78.1(5) (1966). The Supreme Court

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[4] One criminal law treatise describes this grammatical conundrum in a similarly worded statute:

> Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does "knowingly" modify in a sentence from a "blue sky" law criminal statute punishing one who "knowingly sells a security without a permit" from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word "knowingly" is intended to travel—whether it modifies "sells," or "sells a security," or "sells a security without a permit."

W. LaFave & A. Scott, Criminal Law § 27 (1972).

noted that "it appears by the punctuation that the word 'knowingly' does not modify sell, offer for sale, or possess but does modify 'permit the consumption of the licensed premises.' " *Campbell*, 263 N.C. at 226, 139 S.E.2d at 199. This interpretation of the statute is clear from its plain language. The word "knowingly" is placed *after* the clauses "sell, offer for sale, and possess," but *before* the clause "permit the consumption." The statutory language of N.C. Gen. Stat. § 14-269.2(b) is far less clear because the modifying word "knowingly" is placed before all of the other clauses in the statutory sentence. Thus, *Campbell* provides us little guidance in our analysis of N.C. Gen. Stat. § 14-269.2(b).

Although our State court decisions provide little guidance, this issue has been raised several times in the federal courts of appeal and in the United States Supreme Court. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *United States v. Staples*, 511 U.S. 600 (1994); *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. Figueroa*, 165 F.3d 111, 115 (2d Cir. 1998); *United States v. Langley*, 62 F.3d 602, 604 (4th Cir. 1995); *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995). Therefore, we look to these cases as persuasive authority for our inquiry. In all of the cases addressing this issue, the Courts resolve the grammatical ambiguity by looking to other principles of statutory construction.

In accordance with United States Supreme Court and Fourth Circuit cases, and our State law presumptions, we analyze N.C. Gen. Stat. § 14-269.2(b) under the

following principles of statutory construction: (1) the common law presumption against criminal liability without a showing of *mens rea*; (2) the General Assembly's intent in enacting and amending the statute; and (3) the rule of lenity. We hold under each relevant principle of statutory construction, the "knowingly" mental state in N.C. Gen. Stat. § 14-269.2(b) must modify both clauses "possess or carry" and "on educational property."

1. *Mens Rea*

The first principle of statutory construction articulated by the federal courts is the common law presumption that criminal culpability requires a guilty mind, or some knowledge that the actor is performing a wrongful act.[5] *See Staples v. United States*, 511 U.S. 600, 605 (1994) ("[W]e must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded.") (internal citations omitted).

The United States Supreme Court first addressed the issue of the extent to which a mental state requirement should be "read into" a statute in *Liparota v. United States*. 471 U.S. 419 (1985). In *Liparota*, the defendant was convicted under a federal statute which was similarly ambiguous as to how much of the sentence the word "knowingly" should modify. *Id.* at 420. The statute in *Liparota* prohibited the unauthorized use of federal food stamps, and provided that "whoever knowingly uses,

[5] *See* 1 Wharton's Criminal Law § 27 (15th ed. 1993) ("In the ordinary case, an evil deed, without more, does not constitute a crime; a crime is committed only if the evil doer harbored an evil mind.").

transfers, acquires, alters or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations is subject to a fine and imprisonment." *Id*. at 420–21 (quotation marks omitted). The issue, then, was whether the Government must prove *only* knowing use, transfer, acquisition, alteration, or possession of the foods stamps, or whether the Government must *also* prove that the defendant *knowingly* violated the statute or the regulations. *Id*.

The Court held that the Government must prove that the defendant not only knowingly used, transferred, acquired, altered, or possessed food stamps, but also that the defendant knowingly acted in violation of the food stamp statutes. *Id*. at 425. In support of its decision, the Supreme Court cited the "universal and persistent" presumption that "an injury can amount to a crime only when inflicted by intention[.]" *Id*. This presumption is especially true, the Court held, in cases where "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id*.

After *Liparota*, the federal courts of appeal rendered several decisions consistent with that opinion. For example, in 1998, the Second Circuit considered a similarly ambiguously worded statute with a knowingly mental state requirement. *See Figueroa v. United States*, 165 F.3d 111 (1998). In *Figueroa*, the criminal statute at issue was 8 U.S.C. § 1327, which provided that "[a]ny person who knowingly aids or assists any excludable alien . . . to enter the United States" shall be fined or

imprisoned. *Id.* at 114. The issue on appeal was whether the Government was required to prove that the defendant had knowledge of *not only* his act of aiding and assisting entrance to the United States, *but also* of the excluability of the alien to whom he knowingly gave aid or assistance.

Writing for the majority, Judge Sotomayor held that "[a]bsent clear congressional intent to the contrary, statutes defining federal crimes are . . . normally read to contain a mens rea requirement that attaches to enough elements of the crime that together would be sufficient to constitute an act in violation of the law." *Id.* at 116. The Second Circuit held, in accordance with *Liparota*, that because it is normally not a crime to aid or assist an alien in entering the United States *unless* that alien is for some reason "excludable," the "knowingly" mental state must also modify the "excludability" element of the statute. *Id.*

Therefore, in interpreting N.C. Gen. Stat. § 14-269.2(b), we adhere to the presumption that the "knowingly" *mens rea* requirement must attach to enough elements of the statute to make the commitment of that act illegal. In North Carolina, the act of "knowingly possessing or carrying . . . a gun" is not, on its own, a criminal act unless the gun is possessed or carried in violation of one of North Carolina's other gun laws.[6] In fact, the mere act of possessing or carrying a gun in

[6] *See, e.g.*, N.C. Gen. Stat. Ch. 14, Art. 52A (governing sale of weapons); N.C. Gen. Stat. Ch. 14, Art. 53 (governing purchase of weapons); N.C. Gen. Stat. Ch. 14, Art. 54B (governing concealed handgun permits).

accordance with the law is stringently protected by both the United States and North Carolina Constitutions. *See* U.S. Const. amend. II; N.C. Const. art I, § 30. Thus, the "knowingly" *mens rea* requirement in N.C. Gen. Stat. § 14-269.2(b) must attach to the "on educational property" element of the crime in order to sufficiently constitute an act in violation of the law.

There is, however, an exception to the general presumption favoring a *mens rea* requirement which we must address before we may conclude that the "knowingly" mental state should be read to modify the entire statutory sentence in this case. The United States Supreme Court has recognized that in certain cases, where the prohibited activity deals with "public welfare" or "regulatory" offenses, Congress may impose a form of strict criminal liability. Typically, these cases "involve statutes that regulate potentially harmful or injurious items." *Staples*, 511 U.S. at 607. For the following reasons, we hold that the "public welfare" exception does not apply in this case.

In *United States v. Freed*, the United States Supreme Court upheld a criminal conviction without requiring the Government to prove that the defendant had a culpable mental state for one element of the offense. In *Freed*, the defendant was indicted for possession of unregistered grenades in violation of 26 U.S.C. § 5861(d), which makes it unlawful for any person "to receive or possess a [grenade] which is not registered to him." *United States v. Freed*, 401 U.S. 601 (1971). The defendant

argued that, in accordance with the presumption favoring a *mens rea* requirement for every criminal act, the Government must prove *not only* knowing receipt or possession of a grenade, *but also* knowledge that the grenade was unregistered. *Id.* at 607.

The Court agreed that the Government must prove knowledge of receipt or possession of the grenade, but the Court refused to read the *mens rea* requirement into the registration element. *Id.* at 612. The Court held that the Government need *only* prove that the defendant knew that the items in his possession were grenades—not that the defendant knew that the grenades were unregistered. *Id.* at 609. The Court identified the statute requiring grenade registration as "a regulatory measure in the interest of public safety." *Id.* Thus, with regard to knowledge of registration, the Court reasoned that proof of a guilty mind was not required, because "one would hardly be surprised to learn that possession of a hand grenade is not an innocent act." *Id.*

Later, though, in *Staples v. United States*, the United States Supreme Court explicitly refused to extend its holding in *Freed* to statutes criminalizing certain gun use. *Staples*, 511 U.S. 600. In *Staples*, the defendant was convicted under a federal statute that required certain "automatic" firearms to be registered under the National Firearms Act. *Id.* at 602. The evidence presented at trial showed the defendant knew he possessed a firearm, but did not know about the firearm's

automatic firing capabilities. *Id.* at 603–04. The Government asked the Court to rule in accordance with *Freed* that no proof of *mens rea* regarding the "automatic" qualities of the gun is required because the defendant should have known that possession of a gun is not an innocent act. The Court refused, holding that

> the gap between *Freed* and this case is too wide to bridge. In glossing over the distinction between grenades and guns, the Government ignores the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would "criminalize a broad range of apparently innocent conduct."

Id. at 610 (quoting *Liparota*, 471 U.S. at 426). The Court went on to explain that "there is a long tradition of widespread lawful gun ownership by private individuals in this country," *id.*, and "[e]ven dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." *Id.* at 611. Thus, in *Staples*, the United States Supreme Court specifically removed gun possession from the category of "public welfare" or "regulatory" offenses that would allow for strict criminal liability.

Six months after *Staples*, the United States Supreme Court once again read a "knowingly" mental state requirement into a statute prohibiting dissemination of child pornography, even though the statute was ambiguous. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). In *X-Citement Video*, the defendant was convicted under a statute providing:

> Any person who . . . knowingly receives, or distributes, any visual depiction . . . if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct . . . shall be punished as provided in [this statute].

18 U.S.C. § 2252 (1988). The defendant argued that the Government must prove *not only* knowing receipt or distribution of the prohibited depiction, *but also* that the defendant knew that the depiction involved a minor. The Supreme Court agreed. *Id.* at 78. The Court first pointed out that the crime in *X-Citement Video* is not a public welfare offense because "[p]ersons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation. In fact, First Amendment constraints presuppose the opposite view." *Id.* at 71. Next, the Court cited *Liparota* and *Staples*, and held that the "knowingly" mental state must modify the "minor engaging in sexually explicit conduct" element because "the age of the performers is the crucial element separating legal innocence from wrongful conduct." *Id.* at 73.

Immediately following the United States Supreme Court's decisions in *Staples* and *X-Citement Video*, the Fourth Circuit Court of Appeals heard three cases on this issue. *See United States v. Cook*, 76 F.3d 596 (4th Cir. 1996); *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995); *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995). Our decision today is in line with that trilogy of Fourth Circuit cases.

First, in *United States v. Langley*, the Fourth Circuit considered the mental state requirement for a federal statute prohibiting felons from possessing firearms which have been shipped or transported through interstate commerce. *See Langley*, 62 F.3d 602. The issue in *Langley* was whether a mental state requirement should be read into the statute, and if so, whether the mental state requirement should be read into *only* the possession element, or all three elements of the crime: (1) possession of a firearm; (2) status as a felon; and (3) movement of the firearm through interstate commerce. *Id*. at 604–05. The Fourth Circuit read a mental state requirement into the "possession" element, but refused to read a mental state requirement into the other two elements of the crime. *Id*. at 606. The Court reasoned in *Langley* that courts across the country have consistently and explicitly "rejected the notion that the Government is required to prove either knowledge of felony status or interstate nexus" in prosecutions under this statute. *Id*. at 606. The Court stated that "[i]f Congress intended such a revolutionary change in the law, a change that involves the perniciousness of felons possessing firearms, it would have made clear the intention to do so." *Id*. With regard to the congressional intent of the statute, the Court noted that "it is highly unlikely that Congress intended to make it *easier* for felons to avoid prosecution." *Id*.

Although the case at bar and *Langley* both involve firearm possession, this case is distinguishable from *Langley*. Here, there is no similar history of courts

consistently providing for strict criminal liability under the statute. Additionally, the "perniciousness of felons possessing firearms" concern articulated by the Court is simply not present here.

Second, in *United States v. Forbes*, the Fourth Circuit analyzed a federal statute making it unlawful for "any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm . . . or receive any firearm . . ." *Forbes*, 64 F.3d at 931. The issue was whether the Government must prove the defendant's knowledge of being "under indictment." Although the statute in *Forbes* lacked a specific *mens rea* requirement, the Fourth Circuit held that "[t]he defendant must have knowledge of the fact or facts that convert this innocent act into a crime. Here, that fact is the existence of a pending indictment." *Id*. at 932.

This case presents essentially the same issue as *Forbes*. In this case, the fact that "convert[s] th[e] innocent act into a crime" is Defendant's presence on educational property. Thus, in accordance with *Forbes*, the State must be required to prove knowledge of such a fact at trial.

Finally, in *United States v. Cook*, the Fourth Circuit considered a federal statute that provided: "It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally . . . receive a controlled substance from a person under 18 years of age, other than an immediate family member." 21 U.S.C. § 861

(1996); *see also Cook*, 76 F.3d at 598. In *Cook*, the evidence showed that the defendant sold crack cocaine in partnership with another person who was under the age of eighteen; he was convicted under the statute. *See id.* at 598–99. The defendant alleged on appeal that the he did not know that his criminal cohort was under eighteen years old. *See id*. He asked the Fourth Circuit to overturn his conviction because the trial court did not instruct the jury as to any mental state requirement for the "under eighteen years of age" element of the crime. The Fourth Circuit refused, distinguishing the case from *X-Citement Video* because the statute in *Cook* "applies to persons who should be well aware that their conduct is subject to public regulation, *i.e.*, those receiving illegal drugs." *Id*. at 601. The Court also noted that "the statute does not impinge on constitutionally protected conduct." *Id*.

This case is easily distinguishable from *Cook*. Here, N.C. Gen. Stat. § 14-269.2(b) does not implicate conduct that is subject to public regulation (lawful gun possession, as described in *Staples*), and the statute here *does* impinge on constitutionally protected conduct (lawful gun possession pursuant to the Second Amendment of the United States Constitution and Section 30 of the North Carolina Constitution).

Therefore, in accordance with United States Supreme Court and Fourth Circuit precedent, as well as the well-settled presumption favoring proof of *mens rea* for criminal liability, we cannot allow for a conviction under N.C. Gen. Stat. § 14-

269.2(b) without proof that Defendant *both* knowingly entered educational property *and* knowingly possessed a firearm or prohibited weapon when she did so. As the age of the performers was the "crucial element separating legal innocence from wrongful conduct" in *X-Citement Video*, here, the actor's presence on educational property is the crucial element, and thus the State must be required to prove a defendant's guilty mind for that element of the offense. *See X-Citement Video*, 513 U.S. at 73.

Such a reading of the N.C. Gen. Stat. § 14-269.2(b) not only adheres to our age-old principles of criminal law, but it is also entirely workable within our criminal justice framework. With regard to the burden of proof that the Government must bear in these cases, the Supreme Court held in *Liparota* that

> the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations. This holding does not put an unduly heavy burden on the Government in prosecuting violators of § 2024(b)(1). To prove that petitioner knew that his acquisition or possession of food stamps was unauthorized, for example, the Government need not show that he had knowledge of specific regulations governing food stamp acquisition or possession. Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate petitioner's state of mind. Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal.

Liparota, 471 U.S. at 419.

Under our reading of N.C. Gen. Stat. § 14-269.2(b), the State is not saddled with an unduly heavy burden of proving a defendant's subjective knowledge of the boundaries of educational property. Rather, the State need only prove a defendant's knowledge of her presence on educational property "by reference to the facts and circumstances surrounding the case." If, for example, the evidence shows that a defendant entered a school building and interacted with children while knowingly possessing a gun, the State would have little difficulty proving to the jury that the defendant had knowledge of her presence on educational property. If, however, the evidence shows that a defendant drove into an empty parking lot that is open to the public while knowingly possessing a gun—as in this case—the jury will likely need more evidence of the circumstances in order to find that the defendant knowingly entered educational property.

Thus, when considering a conviction under N.C. Gen. Stat. § 14-269.2(b), a jury must consider whether the defendant was knowingly on educational property by analyzing the facts and circumstances surrounding the event. In this case, the trial court precluded exactly that type of analysis in its instructions to the jury.

2. Legislative Intent of N.C. Gen. Stat. § 14-269.2(b)

The second principle of statutory construction that we consider in analyzing the *mens rea* requirement of N.C. Gen. Stat. § 14-269.2(b) is the probable legislative intent of the statute. In North Carolina, the "cardinal principle of statutory interpretation is to ensure that the legislative intent is accomplished." *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490 (1994). Generally, "[t]he intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). As we discussed above, the plain language of the statute is ambiguous—it does not make clear which clauses the mental state "knowingly" should modify. Therefore, in interpreting the *mens rea* requirement of N.C. Gen. Stat. § 14-269.2(b), we look to the legislative history of the statute and "the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *State ex rel. North Carolina Milk Comm'n v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967). For the following reasons, we hold that both the legislative history of the statute and the plain purpose of its enactment require proof of *mens rea* for the "on educational property" element.

In 1993, the North Carolina legislature amended the existing gun laws to make bringing a gun onto educational property a Class I felony. The 1993 version of N.C. Gen. Stat. § 14-269.2(b) read as follows: "it shall be a Class I felony for any person to

possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind . . . on educational property." 1993 N.C. Sess. Laws 558, HB 1008. Notably, the 1993 version of the statute contained no mental state requirement. In 2003, though, after the United States Supreme Court's rulings in *X-Citement Video*, *Staples*, and *Liparota*, and the Fourth Circuit's rulings in *Forbes*, *Langley*, and *Cook*, the issue of whether a mental state requirement should be "read into" N.C. Gen. Stat. § 14-269.2(b) was litigated in this Court. *See State v. Haskins*, 160 N.C. App. 349, 585 S.E.2d 766 (2003).

In *Haskins*, the defendant, a licensed "bail runner," was in pursuit of a fugitive facing felony drug charges. *Id.* at 351, 585 S.E.2d at 767. The defendant followed the fugitive onto an elementary school campus with a gun in his holster, entered the school building, and asked a faculty member if she had seen anyone. *See id.*, 585 S.E.2d at 768. School personnel called the police, and the defendant was arrested and eventually convicted under N.C. Gen. Stat. § 14-269.2(b). *See id.* Haskins argued that "although N.C. Gen. Stat. § 14-269.2(b) does not explicitly contain an element of criminal intent or *mens rea*, willfulness or unlawfulness should be read into the statute because . . . strict liability offenses are disfavored in our criminal justice system." *Id.* This Court disagreed.

In *Haskins*, we refused to read any mental state requirement into N.C. Gen. Stat. § 14-269.2(b). In support of our holding, we cited the "public health, safety, and

welfare" exception—despite the United States Supreme Court's holding in *Staples* which arguably removed lawful gun possession from that exception.[7] *See id.* at 352, 585 S.E.2d at 768. We reasoned that the statute was enacted "because of the increased necessity for safety in our schools," and therefore, it falls under the subset of crimes for which "the U.S. Supreme Court has upheld the imposition of criminal penalties without the finding of criminal intent." *Id.* The Supreme Court of North Carolina subsequently denied review,[8] and our holding in *Haskins* remained undisturbed for eight years.

In 2011, though, the General Assembly passed a bill that greatly expanded many rights regarding individual use of firearms in our State.[9] *See* 2011 N.C. Sess. Laws 268, HB 650. Among other things, the bill added the "knowingly" mental state requirement to N.C. Gen. Stat. § 14-269.2(b), as follows: "It shall be a Class I felony for any person *knowingly* to possess or carry, whether openly or concealed, any gun,

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[7] *Staples* is not cited by the Court in *Haskins*.

[8] Haskins petitioned the Supreme Court of North Carolina for discretionary review of his case under N.C. Gen. Stat. § 7A-31. He also moved to appeal his case under N.C. Gen. Stat. § 7A-30 on the grounds that it involved a substantial constitutional question. The State opposed the petition for discretionary review and moved to dismiss the appeal for lack of a substantial constitutional question. The Supreme Court of North Carolina denied Haskins' petition for discretionary review and allowed the State's motion to dismiss the appeal. *See State v. Haskins*, 357 N.C. 580, 580, 589 S.E.2d 356, 356 (2003).

[9] Most significantly, the bill provided for the codification of the "Castle Doctrine," guaranteeing the right of citizens to use deadly force in defense of one's home, motor vehicle, or workplace, and abolishing the duty to retreat. *See* 2011 N.C. Sess. Laws 268, HB 650, at Section 1. The bill also expanded the rights of individuals with concealed handgun permits, allowing permit holders to carry guns at State parks and State-owned rest stops, *see id.* at Section 14, and allowing certain non-law enforcement State officials to carry concealed handguns without regard to many of the limitations to which other permit holders are subject. *See id.* at Section 22(b).

rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school." 2011 N.C. Sess. Laws 268, HB 650, at Section 4 (emphasis added).[10] The 2011 version of the statute is the version under which Defendant in this case was convicted.

The General Assembly's 2011 addition of the word "knowingly" in front of "possess or carry" reflects a clear intent to prevent convictions under N.C. Gen. Stat. § 14-269.2(b) where the actor *unknowingly possesses or carries* a gun, and brings that gun onto educational property. In that instance, because of the unknowing possession, the actor harbors no evil mind. She could not maliciously use the gun if she does not know that she possesses it. The same must be true, then, for an actor who unknowingly enters educational property. She may not be convicted under the 2011 statute if she knowingly possesses or carries a gun, but *unknowingly* brings that gun onto land which the statute happens to deem "educational property."[11]

It is particularly instructive here that—in the same breath—the legislature expanded the right to use and possess guns in North Carolina and also added the "knowingly" mental state requirement to N.C. Gen. Stat. § 14-269.2(b). The spirit of the 2011 act was to enhance the Second Amendment rights of North Carolina citizens,

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[10] The bill was ratified on 17 June 2011 and became effective on 1 December 2011.

[11] The statute provides that "educational property" is defined as "[a]ny school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education or school board of trustees, or directors for the administration of any school." N.C. Gen. Stat. § 14-269.2(a)(1) (2013).

not to hinder those rights by allowing for convictions under the statute without proof of an evil mind. Therefore, the legislative history of the statute reveals an intent that the word "knowingly" modify both the "possess or carry" element and the "on educational property" element of N.C. Gen. Stat. § 14-269.2(b). We hold that the 2011 version of N.C. Gen. Stat. § 14-269.2(b) outlaws the act of bringing a gun—which the actor knowingly possesses or carries—onto property which she knows is educational property, or to a curricular or extracurricular activity which she knows is sponsored by a school.

Furthermore, the spirit and purpose of N.C. Gen. Stat. § 14-269.2(b) instructs that we should read a mental state requirement into the "on educational property" element of the crime. After all, the plain reason that the General Assembly enacted N.C. Gen. Stat. § 14-269.2(b) was to prevent the *presence of guns on educational property*—not to prevent individuals from possessing or carrying guns. The actor's presence on educational property is the very crux of the criminal act. The General Assembly could not have simultaneously intended to expand the rights of individuals to use and possess guns while also permitting strict liability for unknowing violators of one of our State's gun laws.

Finally, we note that our holding in *Haskins* was at least abrogated by the General Assembly's 2011 addition of the mental state requirement to N.C. Gen. Stat.

§ 14-269.2(b). To the extent that *Haskins* conflicts with this opinion, it is now overruled.

3. The Rule of Lenity

The third and final principle of statutory construction under which we analyze N.C. Gen. Stat. § 14-269.2(b) is the rule of lenity. The rule of lenity provides additional support for our conclusion that the "knowingly" mental state must modify the presence on educational property element.

The rule of lenity is a principle of statutory construction that only applies when an appellate court is charged with interpreting an ambiguous criminal statute. "[W]hen applicable, the rule of lenity requires that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity[.]' " *State v. Heavner*, ___ N.C. App. ___, ___, 741 S.E.2d 897, 901–02 (2013) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)); *see also State v. Abshire*, 363 N.C. 322, 332, 677 S.E.2d 444, 451 (2009) ("The rule of lenity requires that we strictly construe ambiguous criminal statutes."). However, in order for the rule of lenity to apply, there must be more than one "plausible reading that comports with the legislative purpose in enacting [the statute]." *See Abshire*, 363 N.C. at 332, 677 S.E.2d at 451 (refusing to apply the rule of lenity after determining that there was only one plausible construction of the statute).

Here, the question is whether the "knowingly" mental state requirement in N.C. Gen. Stat. § 14-269.2(b) modifies both clauses of the sentence: "possess or carry" and "on educational property." As discussed above, based on the word's placement in the sentence, it is plausible that the legislature either: (1) intended for "knowingly" to modify only the clause immediately following it, which is "possess or carry," or (2) intended for "knowingly" to modify both clauses following it in the sentence, "possess or carry" and "on educational property." *See* N.C. Gen. Stat. § 14-269.2(b) (2011).

Because there are at least two plausible ways to interpret the mental state requirement of N.C. Gen. Stat. § 14-269.2(b), we hold that the rule of lenity applies. Accordingly, we must resolve this issue in favor of lenity for Defendant, and we hold that the State bears the burden of proving a defendant's mental state not only for the "possess or carry" element of the statute, but also for the presence on educational property element.

4. Plain Error

Finally, we must determine whether, in this case, the trial court's failure to instruct the jury on the mental state requirement for the "on educational property" element amounted to plain error. For the following reasons, we hold that it did.

In 2012, our Supreme Court clarified how plain error review applies to unpreserved error in criminal cases where the trial court omits an element of the crime in its jury instructions. *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d

326, 334 (2012). In *Lawrence*, the Supreme Court analyzed the evolution of both federal and State plain error review and developed a framework for future application of the plain error rule in North Carolina. *See id.* The dissenting opinion in this case concludes that the trial court's instructions did not rise to the level of plain error under *Lawrence*. We disagree.

In *Lawrence*, the defendant was indicted for two counts each of attempted robbery with a dangerous weapon, attempted kidnapping, attempted breaking and entering, and conspiracy to commit robbery with a dangerous weapon. *See id.* at 510, 723 S.E.2d at 329. The defendant was tried and convicted of all charges. *See id.* On appeal, the defendant argued that the trial court erroneously omitted from the jury instructions the element of robbery with a dangerous weapon that "the weapon must have been used to endanger or threaten the life of the victim." *Id.* at 510–11, 723 S.E.2d at 329. The State conceded the trial court's instruction failed to set forth all of the elements of robbery with a dangerous weapon. *See id.* The Court of Appeals held the trial court's erroneous omission of an element of the crime amounted to plain error. *See State v. Lawrence*, 210 N.C. App. 73, 92, 706 S.E.2d 822, 836 (2011). The Supreme Court reversed. *See Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335.

The Supreme Court set forth the following framework for plain error review:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire

> record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

Id. at 518, 723 S.E.2d at 334 (internal citations and quotation marks omitted). The Supreme Court held that although the trial court's instruction to the jury was erroneous, *see id*., it did not amount to plain error because the jury was presented with "overwhelming and uncontroverted" evidence of the defendant's guilt on the element of the crime which the trial court omitted from its instruction. *See id*. at 519, 723 S.E.2d at 335. The Court noted that "[t]he record contains testimony by multiple witnesses describing the efforts of the group, which included defendant, to kidnap, threaten, and rob [the victim] Ms. Curtis." *Id*. at 519, 723 S.E.2d at 334. The Court held that the defendant could not show the prejudicial effect necessary to establish fundamental error; thus, the error did not amount to plain error. *See id*. at 519, 723 S.E.2d at 335.

This case is similar to *Lawrence* in that the trial court erroneously failed to instruct the jury on an element of the crime—the *mens rea* requirement. Here, the trial court instructed the jury that "the State must prove two things beyond a reasonable doubt: First, that the defendant knowingly possessed a Ruger pistol. And second, that the defendant was on educational property at the time she possessed the pistol." For the reasons stated above, these jury instructions improperly relieved the

State of its burden to prove that Defendant was *knowingly* on educational property at the time she possessed the gun. However, this case differs from *Lawrence* in that the evidence of Defendant's knowledge of her presence on educational property was neither "overwhelming" nor "uncontroverted."

Here, the trial court's error in its jury instructions amounted to fundamental error because the jury was presented with sufficient evidence that Defendant lacked knowledge of her presence on educational property. The evidence presented at trial showed that Defendant knew that she was not allowed to bring her gun onto "campus," and does not bring the gun into her dorm room. Further, on the day in question, Defendant chose not to drive into the gated, residential area of campus with the gun in her glove compartment, even though her stated purpose for being in the parking lot was to do her laundry in her dorm room. Rather, Defendant chose to park her car in an area open to the public, requiring no special permit to enter. This evidence suggests that Defendant *knew* that the gated, residential area of campus was "educational property," but that the public parking lot—which was mostly empty at the time—was not.

According to the trial court's erroneous jury instructions, these facts would be irrelevant to the jury's analysis of Defendant's guilt because they pertain only to Defendant's knowledge of her presence on educational property. Proper consideration of such facts probably would have impacted the jury's finding of guilt

in this case. This evidence establishes the prejudicial effect, and thus the fundamental error, that was lacking in *Lawrence*.

Lastly, "because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation marks omitted). Here, the trial court's erroneous instructions to the jury seriously affected the fairness of Defendant's trial. Defendant admitted to the element of possession in her opening statement. Thus, the *only* element of the crime which the jury could consider in determining guilt or innocence was the "on educational property" element. It was crucial in this case that the trial court properly instruct the jury on the only element of the crime at issue. Nevertheless, based on the trial court's instructions, the jury was only permitted to consider whether the State proved that Defendant was, in fact, on educational property—not whether she *knew* she was on educational property.

We therefore find that the trial court committed plain error by failing to require the jury to consider whether the State met its burden of proving that Defendant was knowingly on educational property when she possessed the Ruger pistol. Our reading of N.C. Gen. Stat. § 14-269.2(b) requires the State to prove that a defendant both knowingly possessed or carried a prohibited weapon *and* knowingly entered educational property with that weapon. This interpretation of the statute

safeguards the rights of lawful gun owners in our State while also protecting vulnerable citizens present on educational property.

B. Ineffective Assistance of Counsel

Defendant's second assignment of error on appeal is that her trial counsel was ineffective by failing to argue an allegedly fatal variance in the indictment. Defendant asserts that the indictment against her was flawed because it stated that she possessed weapons at "High Point University, located at 833 Montlieu Avenue" but the evidence presented at trial showed that she possessed the weapons two miles away from that address, at "1911 North Centennial Street." We are not persuaded.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985). Furthermore, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248. Finally, a reviewing court "should avoid the temptation to second-guess the actions of trial counsel[;] . . . judicial review of counsel's performance must be highly deferential." *State v. Gainey*, 355 N.C. 73, 113, 558 S.E.2d 463, 488 (2002).

An 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 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 Supreme Court has held that "it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial[.]" *State v. Sturdivant*, 302 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). Furthermore, we have consistently held that, as long as the indictment contains all of the essential elements of the crime, mere surplusage in the indictment language does not render a variance in the indictment fatal. *See State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) (upholding the indictment language as surplusage where the indictment alleged that the defendant discharged a "shotgun" and the evidence at trial showed he discharged a "handgun"); *State v. Bollinger*, 192 N.C. App. 241, 243, 665 S.E.2d 136, 138 (2008) (upholding the indictment language as surplusage where the indictment alleged that the defendant unlawfully carried "metallic knuckles" and the evidence at trial showed he carried a knife).

Here, the indictment stated:

> The jurors for the State upon their oath present that on or about the date of offense and in the county named above the defendant named above unlawfully, willfully and

> feloniously did knowingly possess a pistol, Ruger 380 semi-automatic pistol, on educational property, High Point University located at 833 Montlieu Avenue, High Point, North Carolina.

The indictment charged all of the essential elements of the crime: that Defendant knowingly possessed a Ruger pistol on educational property—High Point University. We agree with the State that the physical address for High Point University listed in the indictment is surplusage because the indictment already described the "educational property" element as "High Point University." Because the indictment properly contained all of the essential elements of the crime, Defendant has failed to establish any fatal variance in her indictment. Therefore, her assertion that her attorney's representation fell below an objective standard of reasonableness for failure to argue this purported fatal variance must fail.

V. Conclusion

For the foregoing reasons, we find that the trial court committed plain error while instructing the jury in this case. As such, we reverse Defendant's conviction, and remand for a new trial consistent with this opinion.

REVERSED and REMANDED.

Judge STROUD concurs.

Judge BRYANT concurs in part, dissents in part.

BRYANT, Judge, concurring in part and dissenting in part.

I concur in the portion of the majority opinion overruling defendant's challenge based on her claim of ineffective assistance of counsel. However, as to the main portion of the majority opinion, because I do not believe the trial court's instruction to the jury amounted to the level of plain error, I respectfully dissent.

The majority reverses the verdict of the jury and the judgment of the trial court, and remands the matter for a new trial on the premise that the trial court committed plain error in failing to instruct the jury on an element in a statutory offense that is not clearly set forth in the statute and was not presented to the trial court for its consideration. "This case presents the question of how the . . . plain error standard of review should be applied to error that is not preserved for appellate review." *State v. Lawrence*, 365 N.C. 506, 511, 723 S.E.2d 326, 330 (2012).

Under our adversarial system, parties are to present their evidence and arguments at trial, and "have an obligation to raise objections to errors at the trial level. Any other approach would place an undue if not impossible burden on the trial judge. . . . If parties do not timely object, they waive the right to raise the alleged error on appeal." *Id.* at 512, 723 S.E.2d at 330 (citations and quotations omitted). In a criminal case, error that is not preserved at trial, is reviewed on appeal only for plain error. *Id.* (citing N.C. R. App. P. 10(a)(4) (2012)).

"[Our North Carolina Supreme Court] and the United States Supreme Court have emphasized that plain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error[.]" *Id.* at 517, 723 S.E.2d at 333 (citing *State v. Odom*, 307 N.C. 655, 660—61, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203, 212 (1977), and *United States v. Ostendorff*, 371 F.2d 729 (4th Cir.) (1967))). "[T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error." *Id.* at 516, 723 S.E.2d at 333 (citation omitted).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

Id. at 518, 723 S.E.2d at 334 (citation omitted).

The question here regards whether the trial court committed plain error when instructing the jury on the felony charge of possessing a weapon on campus or other educational property in violation of N.C.G.S. § 14-269.2(b). The burden is on defendant to show that the instructional error had a probable impact on the jury verdict.

Pursuant to General Statutes, section 14-269.2(b), "[i]t shall be a Class I felony for any person *knowingly* to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school." N.C.G.S. § 14-269.2(b) (emphasis added).

The majority opinion carefully considers whether "knowingly" modifies only "possess or carry" or whether it extends to the phrase "on educational property." Using principles of statutory construction addressing the common law presumption against criminal liability without a showing of *mens rea*, the General Assembly's intent in enacting and amending section 14-269.2(b), and the rule of lenity, as well as case law precedent from the United States Supreme Court and the Fourth Circuit Court of Appeals, the majority holds that "the 'knowingly' mental state in N.C. Gen. Stat. § 14-269.2(b) must modify both clauses – 'possess or carry' and 'on educational property.' " I do not necessarily take issue with the analysis of the statute. However, even accepting that a conviction pursuant to this statute requires that a defendant is knowingly on educational property and knowingly in possession of a firearm, the critical inquiry here is whether in failing to instruct the jury they had to find defendant was knowingly on educational property to find defendant guilty of possessing a weapon on campus or other educational property in violation of N.C.G.S. § 14-269.2(b) the trial court's error amounted to plain error. I submit that it does not.

We are required to apply the plain error rule cautiously. The prejudicial prong of plain error review requires that, even upon a showing of error, defendant can prevail only if she can establish that "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and quotations omitted); *see also State v. Smith*, 152 N.C. App 29, 37—38, 566 S.E.2d 793, 799 (2002). Such is not the case on this record. The trial court's failure to instruct the jury that in order to find defendant guilty it must find defendant was knowingly on educational property was not an error that had a probable impact on the jury verdict.

The majority opinion states that defendant "adamantly denied that she was on educational property." The record reflects that outside of the jury's presence, prior to and during a *Harbison* inquiry, defendant confirmed to the trial court that she knowingly and willingly allowed her counsel to make an admission before the jury that she was in possession of a firearm and three knives. And, in a statement before the court made outside the presence of the jury, and in opening statements made before the jury, defendant denied she was on educational property at the time she possessed the weapons. Other than during the *Harbison* inquiry and assertion during opening statements, and likely closing arguments, there is no indication in the record that defendant put forth any direct evidence before the jury that she was not on educational property. I do not consider this an adamant denial. It is clear however,

that given defendant's general admission to possession of the weapons, her only defense at trial was that she was not on educational property.

In its case-in-chief, the State presented four witnesses: a security officer with High Point University; a security supervisor of officers in the Security Department at High Point University; and two law enforcement officers with the High Point Police Department. The security officer testified he encountered defendant in the parking lot of the Administration Building—High Point University property. At the time, there were two entrances to the parking lot; one required passing an automatic security arm and the other was an open entrance that did not require passing through security. The security officer testified that "the whole building [was] surrounded by security" and that fences stood on both sides of the open entrance to the parking lot.

> Q. Now just from your recollection – you're pretty familiar with the campus for this section where you encountered [defendant] . . . .
>
> . . .
>
> Were there any signs stating that this is campus property, no public allowed, anything of that nature?
>
> A. There are signs posted that [it] is High Point University property.

A supervisor of High Point University security officers also testified that there was a "signature fence" around the Administration Building, and he believed there was signage indicating High Point University at or near the entrance to the Administration Building parking lot defendant used.

> *Q. Okay. But at the -- on December 25, 2012, was there the High Point University fence around that area?*
>
> *A. Yes.*

(Emphasis added). Additionally,

> *Q. All right. Was [defendant's] car located on campus?*
>
> *A. Yes. It was in our parking lot of the Administration Building.*

(Emphasis added)

In response, defendant put forth no direct evidence that she was not on High Point University property. Furthermore, defendant presented no evidence that when she parked in the Administration Building parking lot to access her nearby on-campus apartment, she *did not know* she was on High Point University property.

The record evidence clearly shows that defendant was on High Point University Property when she entered the Administration Building parking lot encompassed by fencing with signage indicating the property belonging to High Point University, and that she was on notice she was on educational property. This evidence tends to show that not only was notice posted, but that defendant *knew* she was on High Point University property. Specifically, defendant was a senior at High Point University. On Christmas night she was going to her on-campus apartment to do laundry. So, she drove her car to the Administration Building parking lot, driving

through one of two entrances surrounded by a fence and marked as High Point University property.

Evidence of defendant's knowledge that she was on High Point University property is further supported by defendant's statement to law enforcement. In defendant's statement to High Point Police Department officers, she stated that she had taken a concealed weapons class and knew she wasn't supposed to have a gun on campus. She said she didn't have anywhere else to keep the handgun, so she kept it locked in the glove compartment of her car. "I know I'm not supposed to have it on campus, but I don't take it in my room, or anything."

Defendant's written statement to law enforcement officers was admitted into evidence without objection. However, at some point later, after recognizing that the statement was prejudicial, and not at all helpful to her defense, defendant sought to make a late objection and rescind her earlier lack of objection to the admission of her statement. The trial court noted that the objection was untimely and that it was a late objection. The court also noted that defendant's statement was a confession, and that no motion to suppress had been filed. Defendant's objection to her statement was overruled by the trial court as being late and therefore waived.

Our plain error standard of review requires that defendant bear the heavy burden of establishing plain error. *Lawrence*, 365 at 518, 723 S.E.2d at 334. In order to meet her burden on plain error review, defendant had to show there was sufficient evidence before the jury to enable them to find that she did not know she was on

educational property. No such evidence was presented in this trial. On the contrary, there was substantial and sufficient evidence for a jury to find not just that defendant was on educational property but that defendant *knew* she was on educational property. Therefore, defendant has failed to establish that but for the trial court's alleged error in its jury instructions, the jury probably would not have found her guilty of felony possession of a weapon on campus or other educational property, in violation of N.C.G.S. § 14-269.2(b). Thus, defendant has failed to establish fundamental error and, therefore, plain error. *See id.*

Because defendant cannot establish plain error, defendant is not entitled to a new trial. Accordingly, I would overrule defendant's argument, acknowledge the verdict of the jury, and affirm the judgment of the trial court.