Pitfalls at Trial: When to Intervene Absent an Objection

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Introduction

Ordinarily, our appellate courts will not review an issue that was not properly preserved. North Carolina Rule of Appellate Procedure 10(a)(1) provides:

> 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[.] . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1).

However, certain issues may be raised on appeal, even in the absence of an objection by any party. This manuscript is an introduction to some of the circumstances in which the appellant may obtain review of an alleged error, and the trial court may be reversed, notwithstanding the failure of the appellant to object at trial.

Appellate Review in the Absence of an Objection

I. Court's Authority to Review Issues

There are several broad sources for an appellate court's authority to review issues on appeal despite the lack of an objection at the trial level. As a result, if an error occurs during trial that the appellate court wants to correct, the court can likely find a way to address the issue, rendering any serious error potentially subject to review. The following are the most common avenues used by appellate courts to review issues to which no objection was made at trial.

A. Rule 2 of the North Carolina Rules of Appellate Procedure

Rule 2 of the North Carolina Rules of Appellate Procedure provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2.

It is rare that a defendant successfully invokes Rule 2. Our Supreme Court has explained that "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (citation omitted). "[W]hether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *Id.* at 603, 799 S.E.2d at 603.

However, Rule 2 has occasionally been invoked to review issues not preserved by objection in criminal cases:

- In *State v. Bursell*, the "defendant failed to object to the SBM order on Fourth Amendment constitutional grounds with the requisite specificity, thereby waiving the ability to raise that issue on appeal." 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019).
    - Our Supreme Court affirmed the Court of Appeals' decision to invoke Rule 2 "when considering [the] defendant's young age, the particular factual bases underlying his pleas, and the nature of those offenses, combined with the State's and the trial court's failures to follow well-established precedent in applying for and imposing SBM, and the State's concession of reversible *Grady* error." *Id.* at 201, 827 S.E.2d at 306 (citation omitted).
- *See also State v. Batchelor*, 190 N.C. App. 369, 378, 660 S.E.2d 158, 164 (2008):

    > [T]he State failed to meet its burden of proving that [the d]efendant was the perpetrator of the crime charged, which

> failure warranted the dismissal of the charge of robbery with a dangerous weapon. However, [the d]efendant's trial counsel failed to renew [the d]efendant's motion to dismiss at the close of all the evidence. If we do not review the issue of the sufficiency of the evidence in the present case, [the d]efendant would remain imprisoned for a crime that the State did not prove beyond a reasonable doubt. Such a result would be manifestly unjust and we are therefore compelled to invoke Rule 2 under these exceptional circumstances.

B. General Supervisory Authority

In addition to Rule 2, another rarely invoked but expansive source of appellate jurisdiction over unpreserved issues is our Supreme Court's inherent, general supervisory authority over the lower courts of the State. Our Supreme Court "will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice, and may do so to consider questions which are not properly presented according to its rules." *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007) (cleaned up).

In *Ellis*, our Supreme Court exercised its general supervisory authority despite a statutory limitation on its appellate jurisdiction over the Court of Appeals' decisions on motions for appropriate relief, explaining that "it is beyond question that a statute cannot restrict this Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise 'jurisdiction to review upon appeal any decision of the courts below.' " *Id.* (quoting N.C. Const. art. IV, § 12).

C. 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, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C.R. App. P. 21(a)(1).

Nevertheless, certiorari "is an extraordinary remedial writ. We deploy it sparingly, reserving it to correct errors of law, or to cure a manifest injustice . . . . To that end, a petitioner must show merit or that error was probably committed below."

State v. Woolard, 385 N.C. 560, 568, 894 S.E.2d 717, 724 (2023) (cleaned up). "Ultimately, though, the writ is discretionary." *Id.* (cleaned up).

The Court of Appeals, in its discretion, "routinely allows a petition for a writ of certiorari to review a criminal judgment where the defendant failed to timely appeal." *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018). Although less common, the Court of Appeals may also issue "a writ of certiorari where a litigant failed to timely appeal a civil judgment." *Id.* In *Friend*, the Court allowed a petition for writ of certiorari to review not only a criminal judgment but also a civil judgment for attorney's fees, where the defendant raised a meritorious argument regarding the trial court's failure to provide him with the requisite notice and opportunity to be heard before entering a money judgment imposing fees. *Id.* at 519, 521–22, 809 S.E.2d at 905, 906–07.

Criminal defendants who plead guilty or no contest have a limited statutory right to appeal certain sentencing issues, *see* N.C Gen. Stat. § 15A-1444(a1)–(a2), but may petition for a writ of certiorari to review issues other than those specifically authorized by statute. *Id.* § 15A-1444(e).

D. Plain Error Review (applicable to limited issues and only in criminal appeals; discussed in detail below, at V.)

II. Lack of Subject-Matter Jurisdiction

A. General Rule

"The question of subject matter jurisdiction may properly be raised for the first time on appeal. Furthermore, this Court may raise the question on its own motion even when it was not argued by the parties in their briefs." *State v. Jones*, 172 N.C. App. 161, 163, 615 S.E.2d 896, 897, *disc. review denied*, 360 N.C. 72, 624 S.E.2d 365 (2005) (citation omitted).

B. Examples

1. Invalid Indictment

Prior to 2024, North Carolina followed the common-law rule that an indictment had to sufficiently allege all indispensable, essential elements of an offense to give a defendant sufficient notice of the charges against him or her, or else the indictment was facially invalid and deprived the trial court of jurisdiction to enter a conviction on the charge against the defendant. *See, e.g.*, *State v. Rankin*, 371 N.C. 885, 895, 821 S.E.2d 787, 795–96 (2018). In 2024, however, our Supreme Court concluded that the Criminal Procedure Act abrogated this common-law rule, and held that "an indictment raises jurisdictional concerns only when it wholly fails to charge a crime

against the laws or people of this State." *State v. Singleton*, 386 N.C. 183, 184–85, 900 S.E.2d 802, 805 (2024).

The *Singleton* Court identified "two distinct species of indictment deficiencies, jurisdictional and non-jurisdictional." *Id.* at 196, 900 S.E.2d at 812. Jurisdictional deficiencies amount to the "failure to charge a crime" while non-jurisdictional deficiencies represent a "failure to allege with sufficient precision facts and elements of a crime thereby permitting the defendant to prepare a defense and the court to render judgment." *Id.* at 199, 900 S.E.2d at 814.

Consequently, "a mere pleading deficiency in an indictment does not deprive the courts of jurisdiction." *Id.* at 215, 900 S.E.2d at 824. "[W]here non-jurisdictional deficiencies exist in criminal indictments, the better practice is for defendants to raise the issue in the trial courts." *Id.* at 210, 900 S.E.2d at 821. Further, with respect to non-jurisdictional deficiencies, "a defendant seeking relief must demonstrate not only that such an error occurred, but also that such error was prejudicial" in order to quash an indictment. *Id.* By contrast, "an indictment charging the accused with wearing a pink shirt on a Wednesday" raises jurisdictional concerns because it charges "conduct that does not constitute a criminal offense." *Id.* at 205, 900 S.E.2d at 818. "A similar result would be had for charging a defendant with a crime committed in another state." *Id.* at 206, 900 S.E.2d at 818.

Notwithstanding this newly recognized distinction between jurisdictional and non-jurisdictional deficiencies in indictments, for purposes of appellate preservation, the *Singleton* Court maintained that "issues related to alleged indictment defects, jurisdictional or otherwise, remain automatically preserved despite a defendant's failure to object to the indictment at trial." *Id.* at 210, 900 S.E.2d at 821.

2. Misdemeanors

Our General Statutes give the superior court limited jurisdiction over misdemeanors. *See* N.C. Gen. Stat. § 7A-271(a) (2023). When a superior court exceeds this limited authority and impermissibly tries a misdemeanor charge over which it has no subject-matter jurisdiction, the judgment is void. *See State v. Price*, 170 N.C. App. 57, 62, 611 S.E.2d 891, 895 (2005) ("Because the trial court did not have jurisdiction over the misdemeanor charges against [the] defendant we vacate the judgments entered on those charges.").

III. Failure to Follow a Statutory Mandate

A. General Rule

"Generally, when a trial court acts contrary to a statutory mandate, the

defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Jones*, 382 N.C. 267, 274, 876 S.E.2d 407, 412 (2022) (cleaned up). Our Supreme Court has also "recognized that a trial court sometimes has a duty to act *sua sponte* to avoid statutory violations; for example, the trial court must exclude evidence rendered incompetent by statute, even in the absence of an objection by the defendant." *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988).

Our Supreme Court has explained that

> a statute contains a statutory mandate when it is clearly mandatory, and its mandate is directed to the trial court. A statutory mandate is directed to the trial court when it, either (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial or at specific courtroom proceedings that the trial judge has authority to direct.

Jones, 382 N.C. at 274, 876 S.E.2d at 412 (cleaned up).

B. Examples

1. Failure to Exercise Discretion

Where a statute gives the trial court discretion to rule on an issue, the court errs by basing its ruling on the belief that it lacks authority or discretion to grant a request or motion.

For example, N.C. Gen. Stat. § 15A-1233(a) provides:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

"To comply with this statute, a court must exercise its discretion in determining whether or not to permit the jury to examine the evidence. A court does not exercise its discretion when it believes it has no discretion or acts as a matter of

law." *State v. Maness*, 363 N.C. 261, 278, 677 S.E.2d 796, 807 (2009) (cleaned up), *cert. denied*, 559 U.S. 1052, 176 L. Ed. 2d 568 (2010); *see also State v. Ashe*, 314 N.C. 28, 35, 331 S.E.2d 652, 656–57 (1985) (ordering a new trial where the trial court failed to exercise its discretion as evinced by its statement that the jurors' request to review certain testimony could not be granted because there was "no transcript at this point").

2. Orders Entered Out of Term or Session, Without Parties' Consent

In *State v. Trent*, our Supreme Court affirmed the Court of Appeals' ruling that the trial court erred by denying a suppression motion, on the grounds that the order ruling on the suppression motion was entered out of term and out of session:

> This Court has noted that the use of "term" has come to refer to the typical six-month assignment of superior court judges, and "session" to the typical one-week assignments within the term.
>
> Furthermore, this Court has held that an order of the superior court, in a criminal case, must be entered during the term, during the session, in the county and in the judicial district where the hearing was held. Absent consent of the parties, an order entered in violation of these requirements is null and void and without legal effect.

359 N.C. 583, 585, 614 S.E.2d 498, 499 (2005) (cleaned up). Although the State contended that the defendant had not objected, our Supreme Court explained that "the decisions of our appellate courts adequately demonstrate that [a] defendant's failure to object does not affect the nullity of an order entered out of term and out of session." *Id.* at 586, 614 S.E.2d at 500.

3. Arraignment

In *State v. Edgerton*, the defendant was indicted for habitual larceny and attaining the status of a habitual felon. 266 N.C. App. 521, 523, 832 S.E.2d 249, 252 (2019), *disc. review denied*, 375 N.C. 496, 847 S.E.2d 886 (2020). After the State's evidence, the defendant's counsel informed the court that the defendant "would stipulate to the sufficient prior larcenies to arrive at the level of habitual larceny." *Id.* After the jury returned a guilty verdict on the habitual-larceny charge, the defendant became agitated and was removed from the courtroom. *Id.* The habitual-felon phase of the trial began in the defendant's absence. The defendant argued on appeal, *inter alia*, that the trial court erred by failing to arraign him on the habitual-felon charge. *Id.* at 531, 832 S.E.2d at 256. The Court of Appeals recognized that "[b]ecause the arraignment proceeding in question is mandated by [N.C. Gen. Stat. § 15A-928], the

trial court's error is preserved for appeal if it prejudiced [the d]efendant." *Id.* at 531, 832 S.E.2d at 257. The *Edgerton* Court concluded that the defendant was not so prejudiced. *Id.* at 532, 832 S.E.2d at 257.

4. Failure to Conduct Statutorily Required Inquiry

A statutory mandate is directed to the trial court when it either "(1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial or at specific courtroom proceedings that the trial judge has authority to direct." *State v. Chandler*, 376 N.C. 361, 366, 851 S.E.2d 874, 878 (2020) (citation omitted).

a. Plea Transcript: N.C. Gen. Stat. § 15A-1022

Where a defendant "argues the trial court cannot sentence him as an habitual felon without a jury's determination of his habitual felon status or his express waiver of jury determination and admission of habitual felon status," the Court of Appeals has reviewed the issue despite the defendant's failure to object at trial. *State v. Artis*, 174 N.C. App. 668, 676, 622 S.E.2d 204, 210 (2005), *disc. review denied,* 360 N.C. 365, 630 S.E.2d 188 (2006); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (discussed below).

b. Acceptance of Plea: N.C. Gen. Stat. § 15A-1023

Section 15A-1023 states, in pertinent part, that the trial court "must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea." N.C. Gen. Stat. § 15A-1023(c). Our Supreme Court has held that "any error that the trial court committed under [N.C. Gen. Stat. § 15A-1023] which prejudiced [the] defendant is an issue that is automatically preserved for appellate review." *Chandler*, 376 N.C. at 366, 851 S.E.2d at 878 (concluding that the trial court erred by not accepting a guilty plea because the defendant refused to admit that he was factually guilty).

c. Representation by Counsel: N.C. Gen. Stat. § 15A-1242

"For failure of the trial judge to make the inquiry mandated by N.C.G.S. § 15A-1242 before permitting the defendant to proceed to trial without counsel, the defendant is entitled to a new trial." *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986) (concluding that the trial court erred by allowing the defendant to represent himself without determining that his waiver of counsel was knowing and voluntary).

d. Competence to Stand Trial: N.C. Gen. Stat. § 15A-1002

"Where a defendant demonstrates or where matters before the trial court

indicate that there is a significant possibility that a defendant is incompetent to proceed with trial, the trial court must appoint an expert or experts to inquire into the defendant's mental health in accord with N.C.G.S. § 15A-1002(b)(1)." *State v. Grooms*, 353 N.C. 50, 78, 540 S.E.2d 713, 730 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

e. Waiver of Jury Trial: N.C. Gen. Stat. § 15A-1201(d)

Even absent an objection from the defendant, our appellate courts may review whether the trial court improperly "commenced a bench trial without first personally addressing [the d]efendant to determine whether he fully understood and appreciated the consequences of that decision, in violation of N.C. Gen. Stat. § 15A-1201(d)(1)." *State v. Hamer*, 272 N.C. App. 116, 124, 845 S.E.2d 846, 852 (2020), *aff'd*, 377 N.C. 502, 858 S.E.2d 777 (2021).

5. Entry of Unauthorized Sentence

In *Davis,* the defendant was convicted of second-degree murder, felony serious injury by vehicle, and assault with a deadly weapon inflicting serious injury. 364 N.C. 297, 300, 698 S.E.2d 65, 67 (2010). On appeal, the defendant argued that N.C. Gen. Stat. § 20-141.4(b) did not authorize his sentences for felony death by vehicle and felony serious injury by vehicle, because the second-degree murder and assault with a deadly weapon inflicting serious injury judgments provide greater punishment for the same conduct. *Id.* The Court of Appeals denied review based on his failure to object at trial, but our Supreme Court agreed with the defendant that the issue was preserved despite his failure to object and reversed. *Id.* at 302, 698 S.E.2d at 68.

This issue also commonly arises when multiple assault charges arise from the same conduct. *See, e.g.*, *State v. McPhaul*, 256 N.C. App. 303, 318, 808 S.E.2d 294, 306 (2017) ("According to the plain language in N.C. Gen. Stat. § 14-32.4(a), the trial court was not authorized to enter judgment and sentence [the] defendant for assault inflicting serious bodily injury, because [assault with a deadly weapon with intent to kill inflicting serious injury] imposes greater punishment for the same conduct."); *see also State v. Harding*, 258 N.C. App. 306, 316, 813 S.E.2d 254, 262 (finding similar statutory mandate in prefatory clause of N.C. Gen. Stat. § 14-33(c)), *disc. review denied*, 371 N.C. 450, 817 S.E.2d 205 (2018).

Unauthorized probationary terms may also be reviewed. *See State v. Lu*, 268 N.C. App. 431, 433–34, 836 S.E.2d 664, 666 (2019).

6. Expression of Opinion

"Whenever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions." *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006).

7. Jury Selection in Criminal Cases

Where "the defendant contend[ed] that the trial court erred in preventing his counsel from asking jurors questions, solely because the trial court had previously asked the same or similar questions," in alleged violation of N.C. Gen. Stat. § 15A-1214(c), our Supreme Court held that the error was reviewable notwithstanding the defendant's failure to object. *State v. Jones*, 336 N.C. 490, 496–97, 445 S.E.2d 23, 26 (1994).

8. Lifetime Registration of Sex Offenders

"Despite [the d]efendant's failure to object below," the issue of whether an offense is an "aggravated offense" for the purposes of sex-offender registration pursuant to N.C. Gen. Stat. § 14-208.23 "is preserved for appeal." *State v. Johnson*, 253 N.C. App. 337, 344, 801 S.E.2d 123, 128 (2017).

9. Jail Fees

"The trial court acted contrary to the statutory mandate in calculating the jail fees and prejudiced [the] defendant by ordering him to pay twice the amount of jail fees authorized by statute. Accordingly, the issue of jail fees is also preserved under the rule articulated in *Ashe*." *State v. Fennell*, 241 N.C. App. 108, 112, 772 S.E.2d 868, 871 (2015); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (discussed below).

IV. Errors Preserved by N.C. Gen. Stat. § 15A-1446(d)

N.C. Gen. Stat. § 15A-1446(d) enumerates a number of issues that "may be the subject of appellate review even though no objection, exception or motion has been made in the trial division." However, our Supreme Court "views subsection 15A-1446(d) with skepticism because our Constitution provides that '[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division.' " *Singleton*, 386 N.C. at 207, 900 S.E.2d at 819 (quoting N.C. Const. art. IV, § 13(2)).

Although several subsections have been declared unconstitutional, as detailed below, most have nonetheless been cited approvingly as enabling appellate review.

The following provisions of N.C. Gen. Stat. § 15A-1446(d) have been cited by our appellate courts when reviewing alleged errors to which the defendant did not object:

N.C. Gen. Stat. § 15A-1446(d)(1): "Lack of jurisdiction of the trial court over the offense of which the defendant was convicted."

"[T]he failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981).

N.C. Gen. Stat. § 15A-1446(d)(3): "The criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law."

To date, this subsection has been cited only once, in a case in which the State sought review of a trial court's quashing of a common-law public-nuisance charge. The Court of Appeals held "that this subsection applies only to appeals by defendants who have been convicted of acts which do not constitute a crime. Quite simply, if the State believed that an act 'did not constitute a violation of the criminal law,' the State should have dismissed the case." *State v. Truzy*, 44 N.C. App. 53, 55, 260 S.E.2d 113, 115 (1979) (emphasis omitted), *disc. review denied*, 299 N.C. 546, 265 S.E.2d 406 (1980).

N.C. Gen. Stat. § 15A-1446(d)(4): "The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5)."

In *Jerrett*, the defendant "did not challenge at trial the sufficiency of the indictment to allege first-degree kidnapping." 309 N.C. at 259 n.4, 307 S.E.2d at 349 n.4. This, however, did not preclude appellate review. Our Supreme Court cited § 15A-1446(d)(4), as well as *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688 (1967), in which the Court "held that if the offense is not sufficiently charged in the indictment, this Court, *ex mero motu*, will arrest the judgment." *Id.* (cleaned up).

Our Supreme Court in *Singleton* differentiated this ground for automatic preservation from the jurisdiction-based ground of § 15A-1446(d)(1), noting that while not every deficiency in an indictment raises a jurisdictional concern, when it comes to automatic preservation of this issue, "there appears to be no conflict between our [Appellate] Rules and subsection 15A-1446(d)(4)." 386 N.C. at 208, 900 S.E.2d at 819.

N.C. Gen. Stat. § 15A-1446(d)(5): "The evidence was insufficient as a matter of law." (at least with respect to sentencing-related errors)

This provision is inconsistent with Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure, which provides that a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial. N.C.R. App. P. 10(a)(3). Accordingly, our Supreme Court has held: "To the extent that N.C.G.S. § 15A-1446(d)(5) is inconsistent with N.C.R. App. P. 10([a])(3), the statute must fail." *State v. Richardson*, 341 N.C. 658, 677, 462 S.E.2d 492, 504 (1995) (citation omitted).

However, our appellate courts have nonetheless invoked subsection (d)(5) to review sufficiency-of-the-evidence issues arising from sentencing hearings. *See State v. Morgan*, 164 N.C. App. 298, 304, 595 S.E.2d 804, 809 (2004):

> The State argues that [the d]efendant did not properly preserve this error for appellate review because she failed to object to the prosecution's calculation of her prior record level at the sentencing hearing. However, the assignment of error in this case is not evidentiary; rather, it challenges whether the prosecution met its burden of proof at the sentencing hearing. Error based on insufficient evidence as a matter of law does not require an objection at the sentencing hearing to be preserved for appellate review.

N.C. Gen. Stat. § 15A-1446(d)(9): "Subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified."

> Under N.C.G.S. § 15A-1446(d)(9), the subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is incompetent may be asserted as error on appeal notwithstanding the lack of an objection to or motion to strike the testimony at trial.

State v. Gordon, 316 N.C. 497, 501, 342 S.E.2d 509, 511 (1986).

N.C. Gen. Stat. § 15A-1446(d)(10): "Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving

that line of questioning."

"[A] sole improperly overruled objection to a single line of questioning at one instance in the trial is sufficient to preserve the entire line of questioning for appellate review, if the same evidence is not admitted on a number of occasions throughout the trial." *State v. Graham*, 186 N.C. App. 182, 189, 650 S.E.2d 639, 645 (2007) (cleaned up), *appeal dismissed and disc. review denied*, 362 N.C. 477, 666 S.E.2d 765 (2008). "Because we believe . . . that [the] defendant's objection was improperly overruled, we will review the entire line of questioning." *Id.* at 190, 650 S.E.2d at 645.

"[The d]efendant did object to the State's initial question regarding the substance of [his] communications with counsel. Accordingly, any further questions regarding the substance of those communications is preserved as a matter of law if the objection was erroneously overruled." *State v. Graham*, 283 N.C. App. 271, 278, 872 S.E.2d 573, 579, *disc. review denied*, 383 N.C. 683, 880 S.E.2d 701 (2022); *see also State v. Corbett*, 376 N.C. 799, 826–27, 855 S.E.2d 228, 248–49 (2021).

N.C. Gen. Stat. § 15A-1446(d)(11): "Questions propounded to a witness by the court or a juror."

This subsection has also been cited only once, in a case in which, during the testimony of the defendant's husband, "the presiding judge questioned him as to a conversation between him and his wife shortly before the robbery. [The husband] testified that the idea for the robbery originated with his wife and that she told him to get out of the automobile and take [the victim]'s purse." *State v. Josey*, 328 N.C. 697, 703, 403 S.E.2d 479, 482 (1991). Our Supreme Court held: "Although the defendant did not object to these questions her exceptions to questions asked by the court are automatically preserved." *Id.*

N.C. Gen. Stat. § 15A-1446(d)(16): "Error occurred in the entry of the plea."

This subsection has been cited as supporting review of:

- Whether "the trial court committed reversible error by accepting [the] defendant's oral guilty plea to being an habitual felon." *State v. Szucs*, 207 N.C. App 694, 701, 701 S.E.2d 362, 367 (2010).
- Whether a defendant could be sentenced "as an habitual felon without a jury's determination of his habitual felon status or his express waiver of jury determination and admission of habitual felon status." *Artis*, 174 N.C. App. at 676, 622 S.E.2d at 210.
- Whether "a stipulation by defense counsel that [the defendant] has been convicted of the prior misdemeanors alleged in an indictment charging

habitual misdemeanor assault is not sufficient to establish the prior conviction element of that charge without submission of that element for determination by the jury." *Id.* at 677–78, 622 S.E.2d at 210–11.

N.C. Gen. Stat. § 15A-1446(d)(18): "The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law."

Our Supreme Court has confirmed that this subsection is constitutional: "This provision does not conflict with any specific provision in our appellate rules and operates as a 'rule or law' under Rule 10(a)(1), which permits review of this issue." *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010). This subsection has been cited as supporting review of, *inter alia*:

- Whether "the trial court recommended an amount of restitution that was not supported by competent evidence." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004).
- Whether the State "prove[d] that [the] defendant's out-of-state convictions were for offenses substantially similar to any North Carolina offenses." *State v. Henderson*, 201 N.C. App. 381, 383, 689 S.E.2d 462, 464 (2009) (cleaned up).
- "[T]he calculation of a prior record level . . . ." *State v. Boyd*, 207 N.C. App 632, 641, 701 S.E.2d 255, 261 (2010).
- Whether one trial judge "overruled" another's safekeeping order by sentencing the defendant, and whether the trial court abused its discretion in sentencing the defendant. *State v. Meadows*, 371 N.C. 742, 748, 821 S.E.2d 402, 406–07 (2018).

N.C. Gen. Stat. § 15A-1446(d)(19): "A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required."

"Given the procedural posture of this case, and the timing of the United States Supreme Court's decision in *Indiana v. Edwards*, . . . N.C. Gen. Stat. § 15A-1446(d)(19) . . . specifically allows review of this issue presented in this appeal." *State v. Wray*, 206 N.C. App. 354, 356, 698 S.E.2d 137, 139 (2010), *review dismissed as moot*, 365 N.C. 88, 706 S.E.2d 476 (2011).

The following provisions of N.C. Gen. Stat. § 15A-1446(d) have not been cited as the basis for an appellate court's review of an issue otherwise subject to default.

N.C. Gen. Stat. § 15A-1446(d)(2): "Lack of jurisdiction of the trial court over the person of the defendant."

N.C. Gen. Stat. § 15A-1446(d)(8): "The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina."

N.C. Gen. Stat. § 15A-1446(d)(12): "Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion."

N.C. Gen. Stat. § 15A-1446(d)(14): "The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved."

N.C. Gen. Stat. § 15A-1446(d)(15): "The defendant was not present at any proceeding at which his presence was required."

A criminal defendant's constitutional right to be present at all stages of trial may not be waived in a capital case (see below). However, the Court of Appeals has held that, in noncapital cases, "the failure to object at trial to the alleged denial of a defendant's constitutional right to be present at all stages of the trial constitutes waiver of the right to argue the denial on appeal." *State v. Jefferson*, 288 N.C. App. 257, 261, 886 S.E.2d 180, 183 (2023) (cleaned up).

The *Jefferson* Court did not resolve the apparent tension between this precedent and § 15A-1446(d)(15). *Id.* In a subsequent unpublished opinion, the Court of Appeals declined to invoke Rule 2 to review a waived right-to-be-present issue in another noncapital case. *State v. McCants*, 292 N.C. App. 372, 897 S.E.2d 44, 2024 WL 446411, at *3–*4 (2024) (unpublished).

N.C. Gen. Stat. § 15A-1446(d)(17): "The form of the verdict was erroneous."

V. Plain Error Review (limited to certain unpreserved issues; only available in criminal cases)

A. Introduction

In 2012, our Supreme Court explained North Carolina's plain-error doctrine in *State v. Lawrence*:

> 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 affects the fairness, integrity or public reputation of judicial proceedings.

365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (cleaned up).

"[P]lain error review in North Carolina is normally limited to instructional and evidentiary error." *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333; *see also State v. Miles*, 221 N.C. App. 211, 216, 727 S.E.2d 375, 378 (2012) (recognizing that issue of "whether it was plain error for the trial court to require the defendant to wear prison garb in front of the jury . . . was not appropriate for plain error review because the alleged error was not instructional or evidentiary.").

In 2024, our Supreme Court further clarified the frequently misunderstood—and thus, oft-misapplied—"probable-impact prong" of the plain-error standard of review:

> The question is not whether the challenged evidence made it more likely that the jury would reach the *same* result. Instead, the analysis is whether, without that evidence, the jury probably would have reached a *different* result. This is a crucial distinction because something can become more likely to occur yet still be far from *probably* going to occur.

State v. Reber, 386 N.C. 153, 160, 900 S.E.2d 781, 788 (2024).

Not long after *Reber*, the Supreme Court also reiterated that "plain error review is unavailable for issues that fall within the realm of the trial court's discretion, such as Rule 403 determinations." *State v. Gillard*, ___ N.C. ___, ___, 909 S.E.2d 226, 251 (2024) (cleaned up).

This standard of review is difficult to satisfy, but our appellate courts have found plain error on rare occasions. The following cases are examples:

B. Erroneously Admitted Evidence

- *State v. Brunson*, 204 N.C. App. 357, 359, 693 S.E.2d 390, 391 (2010) (concluding that the trial court committed plain error by admitting expert testimony on identification of opiates where expert did not perform any scientific analysis, but relied solely on visual inspection).
- *State v. Harwood*, 221 N.C. App. 451, 463, 727 S.E.2d 891, 901 (2012) (concluding that the trial court committed plain error by admitting the defendant's inculpatory statements and items seized from a search of his residence, because they were the direct result of an illegal search and seizure and "absent the admission of the evidence obtained as a result of the unlawful investigative detention, the record would probably not have contained sufficient evidence to establish [the d]efendant's guilt").
- *State v. Ryan*, 223 N.C. App. 325, 338, 734 S.E.2d 598, 607 (2012) (reversing the trial court on the grounds that the admission of "[the doctor]'s improper expert opinion testimony vouching for the credibility of the child constituted plain error" given that, "[e]xcept for [the doctor]'s testimony, the evidence presented at trial amounted to conflicting accounts" and "[b]ecause [the doctor] was an expert in treating sexually abused children, her opinion likely held significant weight with the jury"), *disc. review denied,* 366 N.C. 433, 736 S.E.2d 189 (2013).
- *State v. Hinton*, 226 N.C. App. 108, 112, 738 S.E.2d 241, 246 (2013) (ordering a new trial on the grounds that the admission of "testimony from [a law enforcement officer] regarding gang activity in Elizabeth City" constituted plain error given that "the testimony was irrelevant and highly inflammatory when no evidence was presented to the jury that the offense in question was gang related").
- *State v. Farook*, 381 N.C. 170, 178, 871 S.E.2d 737, 746 (2022) ("The trial court plainly erred when it admitted privileged testimony from [the defendant's prior counsel] as evidence against [the defendant] at the hearing on [the] defendant's motion to dismiss" on speedy-trial grounds.).

C. Jury Instructions

1. Failure to instruct on all elements of the offense

- *State v. Bogle*, 324 N.C. 190, 196, 376 S.E.2d 745, 748 (1989) ("[A]ll substantive and material features of the crime with which a defendant is charged must be addressed in the trial court's instructions to the jury. . . . Because the 'willful blindness' jury instructions given here failed to adequately address the material element of knowledge, there was error. We hold that the willful blindness instruction is inconsistent with North

Carolina law, and thus the trial court erred in giving such an instruction to the jury.").

- *State v. Coleman*, 227 N.C. App. 354, 356, 742 S.E.2d 346, 348 (reversing the trial court on the grounds that the trial court failed to instruct the jury in accordance with footnote 4 of N.C.P.I.—Crim. 160.17 and Crim. 260.30, which provides that "if the defendant contends that he did not know the true identity of what he possessed" then the trial judge must add to the beginning of the jury charge for trafficking in heroin by possession and by transportation that "the defendant knew that what he possessed was [heroin]"), *disc. review denied,* 367 N.C. 271, 752 S.E.2d 466 (2013).

2. Instructions allowing for conviction without requiring the State to prove every element of the offense with respect to each defendant

- *State v. Berry*, 356 N.C. 490, 524, 573 S.E.2d 132, 153 (2002) ("[T]he instruction given during the sentencing proceeding allowed the jury to find the course of conduct aggravating circumstance solely on the basis that [the] defendant had committed another murder, effectively negating the cautionary instructions given during the guilt-innocence phase. Because the sentencing instruction allowed the jury to disregard both the potentially attenuating effects of the passage of time on an alleged course of conduct and the differences between the two murders, while relieving the burden on the State of proving the required link between the two murders, we are satisfied that the instruction constituted plain error.").
- *State v. Jones*, 357 N.C. 409, 418, 584 S.E.2d 751, 757 (2003) (concluding that the trial court committed plain error by instructing the jury on the aggravating circumstance of pecuniary gain because the trial court's instruction "set forth an irrebuttable presumption that the aggravator existed based on the jury's determination that [the defendant] was guilty of felony murder").
- *State v. Nobles*, 350 N.C. 483, 516, 515 S.E.2d 885, 905 (1999) (The trial court's instruction "effectively took from the jury's consideration whether the weapon used in this case is normally hazardous to the lives of more than one person. We conclude that this error relieved the State of its burden to prove this element of the aggravating circumstance in violation of due process principles; further, the trial court's instructions constituted plain error.").
- *State v. Adams*, 212 N.C. App. 413, 418, 711 S.E.2d 770, 773 (2011) ("The jury instructions . . . impermissibly grouped [the] defendants together in presenting the charges, the issues, and [the] defendants to the jury. Given that conflicting evidence was presented as to the order in which weapons were drawn and what role generally each defendant played in the incident, this confusion likely had an effect on the jury's verdict.").

- *State v. Williams*, 226 N.C. App. 393, 396, 401, 741 S.E.2d 9, 13, 16 (2013) (The trial court plainly erred by instructing the jury on a newly enacted stalking statute "when the bulk of the conduct constituting the offense was alleged to have taken place while the old stalking statute . . . was still in effect and the evidence failed to show that [the] defendant continued to harass the victim after the new statute came into effect" because "the trial court must specifically instruct the jury that they must decide whether the State has proven that the defendant committed a criminal act after the date of enactment beyond a reasonable doubt and render a special verdict as to that issue.").

3. Failure to instruct on mitigating factors

- *State v. Jones*, 346 N.C. 704, 717, 487 S.E.2d 714, 722 (1997) ("In the present case [the] defendant's criminal history was presented to the jury, but the jury was not allowed to consider whether this history was significant under the statutory (f)(1) mitigating circumstance" because the trial court plainly erred by failing to instruct the jury on that mitigating factor.).
- *State v. Flippen*, 344 N.C. 689, 702, 477 S.E.2d 158, 166 (1996) (Where the defendant and the State stipulated to the existence of a statutory mitigating factor, the trial court erred by not giving the *mandatory* peremptory instruction that the factor existed and must be given some weight.).

4. Failure to charge on defenses and lesser-included offenses supported by the evidence

- *State v. Collins*, 334 N.C. 54, 62–63, 431 S.E.2d 188, 193 (1993) (The trial court plainly erred by failing to instruct the jury on attempted first-degree murder as a lesser-included offense where the defense expert testified that the victim would have died of unrelated causes.).
- *State v. Davis*, 177 N.C. App. 98, 103, 627 S.E.2d 474, 478 (2006) (The trial court plainly erred by failing to instruct the jury on all elements of self-defense, where the affirmative defense was supported by evidence.).
- *State v. Clark*, 201 N.C. App. 319, 324, 689 S.E.2d 553, 558 (2009) (The trial court "did not conclude that the truck was, as a matter of law, a deadly weapon, but rather left that question to be decided by the jury"; therefore, "the trial court should have instructed the jury on the lesser included offense of assault on a government official" in the event the jury determined the truck was a deadly weapon, with the failure to do so constituting plain error.).

- *State v. Hamilton*, ___ N.C. App. ___, ___, 895 S.E.2d 611, 619 (2023) ("[B]ecause a rational jury could have viewed the evidence to support common-law robbery and not robbery with a dangerous weapon, the trial court erred by not instructing the jury on common-law robbery . . . . Therefore, the trial court plainly erred in failing to instruct the jury on the lesser included offense." (cleaned up)), *remanded*, 386 N.C. 325, 901 S.E.2d 787 (2024).
    - NOTE: Our Supreme Court allowed the State's petition for discretionary review in *Hamilton* and remanded to the Court of Appeals for reconsideration in light of the plain-error standard of review rearticulated in *Reber*, 386 N.C. at 160, 900 S.E.2d at 788. The matter remains pending at the Court of Appeals and is docketed as No. 22-847-2.

5. Variance between indictment and jury instructions

- *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986) (The trial court plainly erred by failing to instruct the jury on a kidnapping theory not charged in the indictment.).

VI. Other

A. Failure to correct grossly improper argument *ex mero motu*

- *State v. Rogers*, 355 N.C. 420, 464–65, 562 S.E.2d 859, 886 (2002) ("In the case at bar, the prosecutor went beyond ascribing the basest of motives to [the] defendant's expert. As detailed above, he also indulged in *ad hominem* attacks, disparaged the witness'[s] area of expertise, and distorted the expert's testimony. We have observed that maligning the expert's profession rather than arguing the law, the evidence, and its inferences is not the proper function of closing argument. . . . In light of the cumulative effect of the improprieties in the prosecutor's cross-examination of [the] defendant's expert and the prosecutor's closing argument, we are unable to conclude that [the] defendant was not unfairly prejudiced. Accordingly, we hold that [the] defendant is entitled to a new capital sentencing proceeding." (cleaned up)).
- *State v. Jones*, 355 N.C. 117, 134, 558 S.E.2d 97, 108 (2002) ("[T]he prosecutor's repeated degradations of [the] defendant: (1) shifted the focus from the jury's opinion of [the] defendant's character and acts to the prosecutor's opinion, offered as fact in the form of conclusory name-calling, of [the] defendant's character and acts; and (2) were purposely intended to deflect the jury away from its proper role as a fact-finder by appealing to its

members' passions and/or prejudices. As a consequence, we deem the disparaging remarks grossly improper and prejudicial.").

- *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) ("[W]e hold that the prosecutor impermissibly commented on [the] defendant's silence in violation of his rights under the state and federal Constitutions. . . . Hence, the trial court's failure to intervene *ex mero motu* amounted to an abuse of discretion. Because we cannot conclude that this omission had no impact on the jury's sentencing recommendation, we set aside the sentence of death and remand for a new capital sentencing proceeding.").
- *State v. Hembree*, 368 N.C. 2, 20, 770 S.E.2d 77, 89 (2015) (The trial court erred by failing to intervene *ex mero motu* where "[t]he State argued to the jury, not only that [the] defendant had confessed truly and recanted falsely, but that he had lied on the stand in cooperation with defense counsel" where "there was no evidence showing that he had done so at the behest of his attorneys.").

B. Right to Trial by a Jury of 12 and Right to a Unanimous Jury Verdict

> [I]t is well established that for the trial court to provide explanatory instructions to less than the entire jury violates the defendant's constitutional right to a unanimous jury verdict. . . . While the failure to raise a constitutional issue at trial generally waives that issue for appeal . . . where the error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel.

State v. Wilson, 363 N.C. 478, 483–84, 681 S.E.2d 325, 329–30 (2009) (citation omitted) (The trial court's *ex parte* conversation with foreman in absence of entire jury violated a defendant's right to unanimous verdict.).

A defendant's right to a unanimous verdict is violated by an instruction allowing the jury to convict the defendant on either of two theories, one of which was not supported by evidence:

> Generally, a defendant's failure to object to an alleged error of the trial court precludes the defendant from raising the error on appeal. Where, however, the error violates a defendant's right to a trial by a jury of twelve, a defendant's failure to object is not fatal to his right to raise the question on appeal.

State v. Johnson, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007) (cleaned up).

Most recently, the Court of Appeals considered whether "the trial court's substitution of an alternate juror after jury deliberations had begun constitutes reversible error." *State v. Chambers*, 292 N.C. App. 459, 460, 898 S.E.2d 86, 87, *disc. review allowed*, 386 N.C. 341, 901 S.E.2d 774 (2024). The *Chambers* Court noted that the defendant failed to object to the juror substitution at trial but determined that "this error is not waivable." *Id.* at 461, 898 S.E.2d at 88. The Court then concluded that the juror substitution violated the defendant's constitutional right to a jury of 12, notwithstanding a recently enacted amendment to N.C. Gen. Stat. § 15A-1215(a) allowing for the substitution of an alternate juror after deliberations had begun: "[W]here a statute conflicts with our state constitution, we must follow our state constitution." *Id.* at 462, 898 S.E.2d at 88.

- NOTE: Our Supreme Court allowed the *Chambers* defendant's petition for discretionary review and heard oral arguments on 11 February 2025. The appeal remains pending at our Supreme Court and is docketed as No. 56PA24.

C. Right to be Present (in Capital Trials)

> [T]he trial court's action in excusing prospective jurors as a result of its private unrecorded bench conferences with them violated the defendant's state constitutional right to be present at every stage of the trial. The confrontation clause of the Constitution of North Carolina guarantees the right of this defendant to be present at *every* stage of the trial.

State v. Smith, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990).

Notably, the right to be present may be waived by noncapital defendant. "Unlike the right to a unanimous jury verdict under Article I, Section 24, the right to be present at every stage of the trial under Article I, Section 23 may be waived by noncapital defendants." *Wilson*, 363 N.C. at 485, 681 S.E.2d at 330. Accordingly, our Supreme Court has held that a defendant "waived appellate review of the trial court's unrecorded conversations by failing to object at trial." *Id.*; *see also State v. Tate*, 294 N.C. 189, 197–98, 239 S.E.2d 821, 827 (1978).

D. Failure to Deliver Requested and Agreed-Upon Jury Instructions

"When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection." *State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018).

> A request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

Id. (cleaned up).

E. Change in Law

See State v. Chapman, 359 N.C. 328, 381, 611 S.E.2d 794, 831–32 (2005) (cleaned up):

> On 1 March 2005, the United States Supreme Court issued its opinion, *Roper v. Simmons*, [543 U.S. 551, 161 L. Ed. 2d 1 (2005)] . . . [and] held that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the states from imposing a death sentence on offenders who were younger than eighteen years of age when they committed their crime. . . . Because [the] defendant was not yet eighteen years old at the time he murdered [the victim], we vacate [the] defendant's death sentence pursuant to the United States Supreme Court's recent decision in *Roper v. Simmons*.