Pitfalls at Trial: When to Intervene Absent an Objection

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Introduction

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

Selected Topics on Appellate Review in the Absence of an Objection

I. Court's Authority to Review Issues

There are several broadly based sources of 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. 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.

1. 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.

2. See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 198-201, 657 S.E.2d 361, 365-67 (2008):

> If the court determines that the degree of a party's noncompliance

> with nonjurisdictional requirements warrants dismissal of the appeal under Rule 34(b), it may consider invoking Rule 2. In this situation, the appellate court may only review the merits on "rare occasions" and under "exceptional circumstances," "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest," N.C. R. App. P. 2. (quoting State v. Hart, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citations and internal quotation marks omitted).

3. See State v. Batchelor, 190 N.C. App. 369, 377-78, 660 S.E.2d 158, 164 (2008):

> The record demonstrates that Defendant made a motion to dismiss at the close of the State's evidence. However, Defendant did not renew that motion at the close of all the evidence and therefore waived appellate review of the denial of his motion to dismiss. . . . Nevertheless . . . this is an appropriate case in which to invoke Rule 2 to address the issue of the sufficiency of the evidence. . . . If we do not review the issue of the sufficiency of the evidence in the present case, Defendant 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. (citing State v. Moncree, 188 N.C. App. 221, 231, 655 S.E.2d 464, 470-71 (2008)).

B. General Supervisory Authority.

1. An appellate court's exercise of its general supervisory authority is subject to certain limits. The Supreme Court of North Carolina has held that that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant[.] . . . [T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." Viar v. N.C. Dep't of Transp., 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam) (citing Bradshaw v. Stansberry, 164 N.C. 356, 79 S.E. 302 (1913)). However, in unusual situations, an appellate court may invoke its general supervisory authority to review an issue.

2. See Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs, 363 N.C. 500, 506, 681 S.E.2d 278, 283, rehearing denied 2009 N.C. LEXIS 1525 (N.C. Oct. 8, 2009):

> Although counsel did not object or assign error to the trial court's instructions, "[t]his 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." (quoting State v. Ellis, 361 N.C. 200, 205, 639 S.E.2d 425,

428 (2007)).

C. Writ of Certiorari.

1. See State v Flint, 199 N.C. App. 709, 724, 682 S.E.2d 443, 451 (2009):

> [D]efendant argues that there was an insufficient factual basis for the plea. Preliminarily, we note that defendant has no appeal of right as to this issue. . . . Defendant stated in his brief that "in the event this Court determines that [defendant] does not have an appeal as of right from his guilty plea . . . [defendant] requests that this Court accept this as a petition for certiorari[.]" Accordingly, we treat defendant's appeal as a petition for writ of certiorari on this issue, which we now allow. Therefore, we address the merits of defendant's argument.

D. Plain Error in Criminal Cases (discussed in detail below).

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, temporary stay dissolved, 360 N.C. 72, 624 S.E.2d 365 (2005) (quoting Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 32 (1979)).

B. Examples.

1. Invalid indictment.

a. See State v. Call, 353 N.C. 400, 428-29, 545 S.E.2d 190, 208 (2001):

> [W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court. (citing State v. Braxton, 352 N.C. 158, 173, 531 S.E.2d 428, 436-37 (2000), cert. denied, 531 U.S. 1130, 148 L. Ed. 2d 797, 121 S. Ct. 890 (2001)).

b. See State v. Kelso, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007), disc. review denied, 362 N.C. 367, 663 S.E.2d 432 (2008):

> North Carolina law has long provided that "[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court a[c]quires no jurisdiction [whatsoever], and if it assumes jurisdiction a trial and conviction are a nullity." In other words, an indictment must allege every element of an offense in order to confer subject matter jurisdiction on the court. (quoting State v. Neville, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (internal citation omitted).

2. Misdemeanors.

a. Jurisdiction is limited by statute. N.C. Gen. Stat. § 7A-271(a) provides that:

> The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor:
>
> > (1) Which is a lesser included offense of a felony on which an indictment has been returned, or a felony information as to which an indictment has been properly waived; or
> >
> > (2) When the charge is initiated by presentment; or
> >
> > (3) Which may be properly consolidated for trial with a felony under G.S. 15A-926; or
> >
> > (4) To which a plea of guilty or nolo contendere is tendered in lieu of a felony charge; or
> >
> > (5) When a misdemeanor conviction is appealed to the superior court for trial *de novo*, to accept a guilty plea to a lesser included or related charge.

b. See State v. Price, 170 N.C. App. 57, 60, 611 S.E.2d 891, 894 (2005):

> [T]he trial court lacked jurisdiction to try the misdemeanor charges against [defendant] as they had not been tried in district court and subsequently appealed to superior court, nor had they been included in an indictment.

III. Failure to Follow Statutory Mandates

A. General Rule.

1. See State v. Hucks, 323 N.C. 574, 579-80, 374 S.E.2d 240, 244 (1988):

> When a trial court acts contrary to a statutory mandate, the error ordinarily is not waived by the defendant's failure to object at trial. We also have 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. In so holding, we have viewed such mandatory statutes as legislative enactments of public policy which require the trial court to act, even without a request to do so, much like the public policy favoring fair and error-free capital trials which is served by N.C.G.S. § 7A-450(b1). (citing State v. Ashe, 314 N.C. 28, 331 S.E. 2d 652 (1985), and State v. McCall, 289 N.C. 570, 223 S.E. 2d 334 (1976)).

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.

a. 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.

b. See State v. Ashe, 314 N.C. 28, 36-37, 331 S.E.2d 652, 657-58 (1985) (trial court failed to exercise its discretion in merely stating that the request to review certain testimony could not be granted because there was "no transcript at this point").

2. Order in criminal case entered out of term or session, without consent of parties.

a. See State v. Trent, 359 N.C. 583, 585, 614 S.E.2d 498, 499 (2005), which affirmed the Court of Appeal's 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 "[t]he 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." Capital Outdoor Adver., Inc. v. City of Raleigh, 337 N.C. 150, 154, 446 S.E.2d 289 nn.1 & 2, 337 N.C. 150, 446 S.E.2d 289, 291 nn.1 & 2 (1994). 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. . . . [T]he decisions of our appellate courts adequately demonstrate that defendant's failure to object does not affect the nullity of an order entered out of term and out of session. (quoting State v. Boone, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984)).

3. Failure to conduct statutorily required inquiry.

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

(1) See 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) (where "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," court reviews issue despite defendant's failure to object, citing N.C. Gen. Stat. § 15A-1446(d)(18)).

b. Self-representation: N.C. Gen. Stat. § 15A-1242.

(1) See State v. Dunlap, 318 N.C. 384, 348 S.E.2d 801 (1986) (new trial required where court allowed defendant to represent himself without determining that his waiver of counsel was knowing and voluntary).

c. Competence to stand trial: N.C. Gen. Stat. § 15A-1002(a).

(1) See State v. Grooms, 353 N.C. 50, 78, 540 S.E.2d 713, 730 (2000):

> 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).

4. Entry of unauthorized sentence.

> a. See State v. Davis, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010). In Davis, the defendant was convicted of second-degree murder, felony serious injury by vehicle, and assault with a deadly weapon inflicting serious injury (ADWISI). On appeal, Defendant argued that N.C. Gen. Stat. § 20-141.4(b) (2009) did not authorize his sentences for felony death by vehicle and felony serious injury by vehicle, because the second-degree murder and ADWISI judgments provide greater punishment for the same conduct. The Court of Appeals denied review based on his failure to object at trial. The Supreme Court of North Carolina reversed:
>
> It is well established that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial."

5. Expression of Opinion.

> a. N.C. Gen. Stat. § § 15A-1222 and 1232.
>
> b. See State v. Duke, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005):
>
> 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. (citing State v. Young, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989)).

6. Violation of N.C. Gen. Stat. § 15A-1214, governing procedures for selection of the jury in criminal cases.

> a. See State v. Jones, 336 N.C. 490, 496-97, 498, 445 S.E.2d 23, 26, 27 (1994):
>
> [T]he defendant contends 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. The defendant contends that this violated N.C.G.S. § 15A-1214(c) and entitles him to a new trial. . . . Even though the defendant did not object, this assignment of error is reviewable. When a trial court acts

> contrary to a statutory mandate, the right to appeal the court's action is preserved, notwithstanding the failure of the appealing party to object at trial.

IV. Errors Preserved by Statute in Criminal Cases.

N.C. Gen. Stat. § 15A-1446(d) lists eighteen errors that "may be the subject of appellate review even though no objection, exception or motion has been made in the trial division."

A. 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:

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

a. *See* State v. Sturdivant, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981):

> It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. N.C. Const. Art. I, § 22. Thus, defendant's motion, attacking the sufficiency of an indictment, falls squarely within the proviso of G.S. 15A-1415(b)(2), *supra*, and as such may be made for the first time in the appellate division. G.S. 15A-1418. Moreover, the 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. G.S. 15A-1441, -1442(2)(b), -1446(d)(1) and (4). Consequently, we shall proceed to address defendant's motion upon its merits.

2. 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."

a. See State v. Truzy, 44 N.C. App. 53, 55, 260 S.E.2d 113, 115 (1979):

> The State requests that this Court consider, pursuant to N.C. Gen. Stat. § 15A-1446(d)(3), whether the trial court erred in quashing the common law public nuisance charge. This section provides for appellate review, without objection at trial, of errors based upon a "criminal pleading [which] charged acts, which at the time they were committed, did not constitute a violation of criminal law." We hold 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.

3. 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)."

a. See State v. Jerrett, 309 N.C. 239, 259, 307 S.E.2d 339, 349 (1983):

> [D]efendant did not challenge at trial the sufficiency of the indictment to allege first-degree kidnapping. This, however, does not preclude review by this Court. Under G.S. 15A-1446(d)(4), a party may assert as error in this Court that the pleading failed to state essential elements of an alleged violation even though no objection, exception or motion was made at trial. Further, in State v. Partlow, 272 N.C. 60, 157 S.E. 2d 688 (1967), we held that "if the offense is not sufficiently charged in the indictment, this Court, ex mero motu, will arrest the judgment."

4. 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."

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

> 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.

5. 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. See State v. Graham, 186 N.C. App. 182, 189-90, 650 S.E.2d 639, 645 (2007), appeal dismissed and review denied, 362 N.C. 477, 666 S.E.2d 765 (2008):

> [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." Because we believe, for the reasons that follow, that defendants objection was improperly overruled, we will review the entire line of questioning. (quoting State v. Brooks, 72 N.C. App. 254, 258, 324 S.E.2d 854, 857, disc. review denied, 313 N.C. 331, 327

S.E.2d 901 (1985)).

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

a. See State v. Josey, 328 N.C. 697, 703, 403 S.E.2d 479, 482 (1991):

> When Ernest Marvin Josey was testifying the presiding judge questioned him as to a conversation between him and his wife shortly before the robbery. Ernest Josey testified that the idea for the robbery originated with his wife and that she told him to get out of the automobile and take Ms. Baldwin's purse. Although the defendant did not object to these questions her exceptions to questions asked by the court are automatically preserved. N.C.G.S. § 15A-1446(d)(11) (1988).

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

a. See State v. Szucs, 207 N.C. App 694, 701 S.E.2d 362, 367 (2010):

> N.C. Gen. Stat. § 15A-1022(a)(6) prohibits a superior court from accepting a plea of guilty without first informing the defendant of the maximum possible and mandatory minimum sentences. . . . N.C. Gen. Stat. § 15A-1446(d)(16) permits appellate review for errors occurring in the entry of the plea "even though no objection, exception or motion has been made in the trial division."

8. 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."

a. See State v. Mumford, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010):

> The State urges us to find that N.C.G.S. § 15A-1446(d)(18) is unconstitutional because the statute conflicts with this Court's supreme authority to make rules for the Appellate Division under Article IV, Section 13(2) of the North Carolina Constitution. The State cites several instances in which we have found various other subdivisions of subsection 15A-1446(d) to be unconstitutional. . . . However, in each of these cases the provisions of subsection 15A-1446(d) conflicted with specific provisions of our appellate rules rather than the general rule stated in Rule of Appellate Procedure 10(a). Rule 10(a) provides generally that an issue may not be reviewed on appeal if it was not properly preserved at the trial

level or unless the alleged error has been "deemed preserved" "by rule or law." N.C. R. App. P. 10(a)(1). Here subdivision(d)(18) states that an argument that "[t]he 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" may be reviewed on appeal even without a specific objection before the trial court. 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. (citing State v. Spaugh, 321 N.C. 550, 552-53, 364 S.E.2d 368, 370 (1988) (noting that § (d)(5) is unconstitutional because of conflict with then Rule 10(b)(3), State v. Bennett, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983) (holding § (d)(13) unconstitutional because of conflict with then Rule 10(b)(2)), and State v. Elam, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981) (holding § (d)(6) unconstitutional because of conflict with Rules 10 and 14(b)(2)).

b. See State v. Shelton, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004):

While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18). (citing State v. Reynolds, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003)).

c. See State v. Henderson, 201 N.C. App 381, 689 S.E.2d 462, 466 (2009):

This Court has also explained that a defendant's stipulation to an out-of-state felony conviction is sufficient to support treating the felony conviction as a Class I felony, but the stipulation alone is not sufficient to support a higher classification for sentencing purposes. (citing State v. Bohler, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806 (2009), disc. review denied, 691 S.E.2d 414, 2010 N.C. LEXIS 54 (N.C. Jan. 28, 2010)).

d. See State v. Boyd, 207 N.C. App 632, 701 S.E.2d 255, 261 (2010):

This Court reviews the calculation of a prior record level *de novo*. This Court may review a "sentence imposed [that] was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." N.C. Gen. Stat. § 15A-1446(d)(18) (2009). This review is appropriate "even though no objection, exception, or motion has been made in the trial division." N.C. Gen. Stat. §

15A-1446(d). (citing State v. Fraley, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)).

9. 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.

a. See State v. Wray, 206 N.C. App 354, 698 S.E.2d 137, 139 (2010), review dismissed as moot, 2011 N.C. LEXIS 179 (N.C. Mar. 10, 2011):

> Where significant changes in the law occur during the pendency of a trial, Rule 10 (b)(1) of the N. C. Rules of Appellate Procedure permits review of issues that "by rule or law [are] deemed preserved." N.C. R. App. P. 10(b)(1). Section 15A-1446(d)(19) allows for appellate review of a trial court's order where "[a] significant change in law, either substantive or procedural, applies to the proceeding leading to the defendant's conviction or sentence and retroactive application of the changed legal standard is required."

B. 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.

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

2. 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."

3. 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."

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

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

V. Plain Error in Criminal Cases

A. Introduction.

1. Plain error is defined as "'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting United States v. McCaskill, 676 F.2d 995,

1002 (4th Cir.) (citation omitted), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)).

2. Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure provides that in "criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." Accordingly, plain error review is waived by a defendant's failure to "specifically and distinctly" assert plain error. See, e.g., State v. Wright, __ N.C. App __, 709 S.E.2d 471 (2011).

3. "[P]lain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence." State v. Golphin, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000), cert. denied, 532 U.S. 931, 149 L. Ed. 2d 305, 121 S. Ct. 1379 (2001).

4. There are three recent North Carolina Supreme Court cases that have clarified or restricted the nature of plain error review.

a. See State v. Lawrence, 365 N. C. 506, 723 S. E. 2d 326 (2012). In Lawrence, the trial court omitted an element of the offense of conspiracy to commit robbery with a dangerous weapon from the jury instructions. The defendant was convicted of both conspiracy and attempted robbery with a dangerous weapon. The Court of Appeals held that the omission of an element from the conspiracy charge was plain error. The Supreme Court reversed and wrote an opinion designed to clarify the nature of plain error review.

In Lawrence, the Supreme Court noted that the plain error rule "provides that a criminal defendant is entitled to a new trial if the defendant demonstrates that the jury probably would have returned a different verdict had the error not occurred." 365 N. C. at 507. The Supreme Court observed that the plain error rule had been formulated in different ways by the Court of Appeals and opined that "these incomplete and inconsistent formulations lead us to conclude that clarification of the plain error standard is needed." 365 N. C. at 508. The Supreme Court also noted that "this Court has not issued a doctrinal statement regarding the plain error standard in almost thirty years." 365 N. C. at 511.

In Lawrence, the Supreme Court reviewed federal case law concerning plain error review. The Supreme Court noted that "originally, the doctrine permitted federal courts to take notice of errors for which no objection or exception had been made when the errors were obvious, or if they otherwise seriously affected the fairness, integrity or public reputation of judicial proceedings." 365 N. C. at 515. The Lawrence Court noted that "the United States Supreme Court previously held that the rule is primarily concerned with ensuring the 'fundamental fairness of the trial' and 'preventing a miscarriage of justice.'" Id. According to the Lawrence opinion, the federal courts have refined plain error review by creating a four factor test which provides that (1) there must be an error—that is a deviation from

a legal rule…unless the rule has been waived; (2) the error must be plain, which is synonymous with clear or obvious; (3) the error must affect a substantial right which means that it must be prejudicial and affect the outcome of the trial; and (4) the rule is permissive which means that appellate court should not always reverse unless it is satisfied that the error seriously affected the fairness, integrity or public reputation of the proceedings. 365 N. C. at 515-516.

The North Carolina plain error rule applies only when the 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. 365 N. C. at 516. The Lawrence decision maintained the limit on the rule's application to instructional and evidentiary issues. Id. According to Lawrence, "the plain error rule…is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error was such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." 365 N. C. at 571 (Internal quotation marks omitted for clarity.).

The Supreme Court affirmed that for error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 365 N. C. at 518. For an error to be fundamental, "the 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. Also, under the plain error standard, the Supreme Court reaffirmed that "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." Id. In Lawrence, since the jury implicitly found the omitted element of the conspiracy charge beyond a reasonable doubt when it convicted the defendant on the attempted robbery with a dangerous weapon charge, the Supreme Court concluded that the error did not probably affect the outcome of the trial.

Interestingly, the Supreme Court in Lawrence also commented that "as part of the adversarial process, the parties 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.'" 365 N. C. at 512.

b. See State v. Towe, 366 N. C. 56, 732 S. E. 2d 564 (2012). In Towe, the defendant alleged that the trial court committed plain error by admitting conclusory expert testimony that the alleged victim had been sexually abused when there was no physical evidence to support that conclusion. In Towe, the

expert testified that the literature concerning child sexual abuse indicated that 70 to 75 percent of children who have reported sexual abuse have no abnormal physical findings. Then the expert testified that the alleged victim fell within the category of children who have been sexually abused and yet had not physical findings. This testimony violated the North Carolina rule that "an expert may not testify that sexual abuse has occurred without physical evidence supporting the opinion." 366 N. C. at 60. The Supreme Court concluded in Towe that the Court of Appeals mischaracterized the plain error prejudice standard in Towe when it "concluded that it was 'highly plausible' that the jury could have reached a different result without the expert testimony." The Supreme Court then applied the standard set out in Lawrence and concluded that a fundamental error occurred at the trial, that the error had a probable impact on the jury's finding that the defendant was guilty and that the error was one that seriously affected the fairness, integrity and public reputation of the judicial proceedings. 366 N. C. at 62-63

c. See State v. Carter, 366 N. C. 496, 739 S. E.2d 548 (2013). In Carter, the defendant alleged that the trial court committed plain error by failing to instruct the jury on lesser included offenses of attempted first degree sexual offense. In Carter, the Court of Appeals held that the failure to instruct on the attempt offenses was plain error because the "jury could rationally have found defendant guilty of attempted first degree sexual offense." 366 N. C. at 499. The Supreme Court determined that the "Court of Appeals' consideration of what the jury could rationally have found was improper." Id at 500. After reviewing the facts, the Supreme Court concluded that the "defendant has not shown that the jury probably would have returned a different verdict if the trial court had provided the attempt instruction." Id.

B. Admission of Evidence.

1. See State v. Blackwell, 207 N.C. App 255, 699 S.E.2d 474, 477 (2010) (erroneous introduction of laboratory reports "resulted in prejudice so grave that it meets the heightened standards of plain error").

2. See State v. Brunson, 204 N.C. App 357, 693 S.E.2d 390 (2010) (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).

C. Jury Instructions.

1. Right to unanimous verdict.

a. See State v. Wilson, 363 N.C. 478, 483, 681 S.E.2d 325, 329 (2009) (ex parte conversation with foreman in absence of entire jury violates Defendant's right to unanimous 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.

b. See State v. Johnson, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007) (right to unanimous verdict violated by instruction allowing jury to convict on either of two theories, one of which was not supported by evidence):

> Pursuant to the North Carolina Constitution, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24. N.C. Gen. Stat. § 15A-1237(b) (2005) also provides that a jury verdict "must be unanimous, and must be returned by the jury in open court." 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." (quoting Ashe at 39, 331 S.E.2d at 659).

c. See State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987) (right to unanimous verdict violated by instructions that leave it unclear which predicate felony was basis of felony murder conviction).

2. Failure to instruct on all elements of offense.

> See State v. Bogle, 324 N.C. 190, 195-96, 376 S.E.2d 745, 748 (1989) ("trial judge is required by N.C.G.S. § 15A-1231 and N.C.G.S. § 15A-1232 to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime.").

3. Instructions allowing conviction without requiring State to prove every element of offense.

> a. See State v. White, 300 N.C. 494, 499, 268 S.E.2d 481, 485 (1980) (principles of due process require the State to prove beyond a reasonable doubt every essential element of the charged crime) (citing Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975)).
>
> b. See 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 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.

c. See State v. Jones, 357 N.C. 409, 584 S.E.2d 751 (2003) (Plain error for court to give instruction on pecuniary gain aggravating circumstance that "set forth an irrebuttable presumption that the aggravator existed based on the jury's determination that Mr. Jones was guilty of felony murder").

d. See State v. Nobles, 350 N.C. 483, 515-16, 515 S.E.2d 885, 904-05 (1999):

> During the capital sentencing proceeding, the trial court instructed the jury regarding the (e)(10) aggravating circumstance as follows: The second aggravating circumstance which you may consider is did the defendant knowingly create a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person? . . . . [I]in the case sub judice the trial court's instruction that "a Lorcin 380 caliber semi-automatic pistol is a weapon which would normally be hazardous to the lives of more than one person" 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. Accordingly, defendant is entitled to a new capital sentencing proceeding.

4. Failure to instruct on mitigating factors.

a. Statutory requirement in capital trials.

(1) See State v. Skipper, 337 N.C. 1, 44, 446 S.E.2d 252, 276 (1994), cert. denied, 513 U.S. 1134, 130 L. Ed. 2d 895, 115 S. Ct. 953 (1995):

> [The] trial court has no discretion as to whether to submit statutory mitigating circumstances when evidence is presented in a capital case which may support a statutory circumstance.

(2) See State v. Jones, 346 N.C. 704, 715, 487 S.E.2d 714, 721 (1997) (although the defendant argued against submission of the mitigating circumstance at issue, he was awarded a new sentencing hearing based on the trial court's failure to submit the factor to the jury):

> During the sentencing proceeding jury charge conference, defendant argued against the submission of the (f)(1) mitigating circumstance. Defendant now asserts that the trial court should have submitted the (f)(1) mitigating circumstance because the evidence would permit a rational juror to find that defendant did not have a significant history of prior criminal acts. Defendant's opposition at trial to the submission of the (f)(1) mitigating circumstance does not concern us here.

b. State and Defendant stipulate to existence of mitigating factor.

(1) See State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (1996) (where Defendant and State stipulated to existence of statutory mitigating factor, trial court erred by not giving peremptory instruction that factor existed and must be given some weight).

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

a. See State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993) (plain error for trial court not to instruct on attempted first degree murder as lesser included offense where expert testified that victim would have died of unrelated causes).

b. See State v. Davis, 177 N.C. App. 98, 627 S.E.2d 474 (2006) (plain error for trial court not to instruct on all elements of self-defense, as defense was supported by evidence).

6. Failure to give instruction after agreeing to do so.

a. See State v. Keel, 333 N.C. 52, 56-57, 423 S.E.2d 458, 461 (1992) (where the trial court agreed to give a specific instruction requested by the State, and defense counsel had no objection, the issue is preserved for appeal under Rule 10(b)(2) of the Rules of Appellate Procedure):

> Because the State requested this instruction, and the trial court agreed to give it, the defendant's counsel had no reason to make his own request for this instruction. The State's request, approved by the defendant and agreed to by the trial court, satisfied the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal.

7. Variance between indictment and jury instructions.

a. See State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986) (plain error to instruct on kidnaping theory not charged in indictment).

VI. Other

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

1. See 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 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 defendant's expert and the prosecutor's closing argument, we are unable to conclude that defendant was not unfairly prejudiced. Accordingly, we hold that defendant is entitled to a new capital sentencing proceeding. (quoting State v. Smith, 352 N.C. 531, 561, 532 S.E.2d 773, 792 (2000)).

2. See State v. Jones, 355 N.C. 117, 126, 131, 558 S.E.2d 97, 103, 106 (2002):

> [W]e take this opportunity to revisit in some detail: (1) the limits of proper closing argument, (2) the professional and ethical responsibility of attorneys making such arguments, (3) the duty of our trial judges to be diligent in overseeing closing arguments, and (4) the possible ramifications for failing to keep such arguments in line with existing law. . . . The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is . . . whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord[.] . . . [W]e hold that the prosecutor's repeated degradations of defendant: (1) shifted the focus from the jury's opinion of defendant's character and acts to the prosecutor's opinion, offered as fact in the form of conclusory name-calling, of 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. (citing

State v. Trull, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), cert. denied, 528 U.S. 835, 145 L. Ed. 2d 80, 120 S. Ct. 95 (1999)).

3. See State v. Ward, 354 N.C. 231, 264-65, 555 S.E.2d 251, 272-73 (2001):

> [D]uring sentencing arguments prosecutor improperly commented on defendant's invocation of his constitutional right to remain silent. Defendant did not object to the prosecutor's remarks. Nonetheless, he argues that the trial court's failure to intervene ex mero motu to control the prosecutor's argument rendered the proceedings fundamentally unfair. . . . [W]e hold that the prosecutor impermissibly commented on 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.

B. Right to be present in capital trial.

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

> [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. (citing State v. Huff, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989), and N.C. Const. Art. I, § 23).

2. Note: the right to be present may be waived by noncapital defendant. See State v. Wilson, 363 N.C. 478, 485, 681 S.E.2d 325, 330 (2009):

> 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. Accordingly, we held in [State v.] Tate, [294 N.C. 189, 197, 239 S.E.2d 821, 827 (1978),] that the defendant waived appellate review of the trial court's unrecorded conversations by failing to object at trial. (citing State v. Boyd, 332 N.C. 101, 105, 418 S.E.2d 471, 473 (1992)).

C. Change in Law.

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

On 1 March 2005, the United States Supreme Court issued its opinion, Roper v. Simmons, 543 U.S. 551, 161 L. Ed. 2d 1, 125 S. Ct. 1183 (2005), . . . holding 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 defendant was not yet eighteen years old at the time he murdered Ms. Nesbitt, we vacate defendant's death sentence pursuant to the United States Supreme Court's recent decision in Roper v. Simmons.