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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-77

Filed: 19 September 2017

Wayne County, No. 10CRS051358, 10CRS051359, 10CRS051360, 10 CRS051361,
10CRS051362

STATE OF NORTH CAROLINA

v.

JAMES C. HOWARD, Defendant.

Appeal by Defendant from judgment entered 15 February 2016 by Judge Paul
L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 9 August
2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy
Kunstling Irene, for the State.*

*Office of the Appellate Defender Glenn Gerding, by Assistant Appellate Defender
John F. Carella and Appellate Defender Glenn Gerding, for defendant-
appellant.*

HUNTER, JR., Robert N., Judge.

James C. Howard (“Defendant”) appeals jury verdicts convicting him of two
counts of first degree murder, two counts of armed robbery, first degree burglary, and
two counts of possession of a firearm by a felon. On appeal, Defendant asserts the
following: (1) the State violated his right to a speedy trial by delaying over five years

before proceeding to trial; (2) the trial court committed plain error by admitting “highly erroneous and unacceptable” DNA expert testimony; and (3) the trial court erred in permitting “hybrid” representation after declaring Defendant competent to represent himself. We dismiss Defendant’s speedy trial claim. We find no error in his remaining assignments of error.

I. Factual and Procedural Background

On 16 March 2010, the Goldsboro Police Department arrested Defendant on warrants for two counts of murder and two counts of possession of a firearm by a felon. On 18 March 2010, the trial court assigned Steven Fisher as Defendant’s trial counsel. On 7 February 2011, a Wayne County Grand Jury indicted Defendant for two counts of first degree murder, two counts of armed robbery, first degree burglary, and two counts of possession of a firearm by a felon. On 4 April 2011, the State announced its decision to seek the death penalty.

On 14 March 2012, Defendant moved for a mental retardation hearing, pursuant to N.C. Gen. Stat. § 15A-2005, *et seq.* In support, Defendant alleged he possessed “a significantly sub-average intellectual functioning that was manifest before the age of 18.” Additionally, when thirteen years old, Defendant possessed an IQ of 62 and “was classified as mildly mentally handicapped.”

Between 9 October 2012 and 13 February 2013, Defendant filed four notices in court, requesting a new appointed counsel. On 25 March 2013, Defendant filed a *pro*

se “Affidavit of fact/Statement of truth”, asking the trial court to “let the jury decide [his] fate” after thirty-six months without “a decision[.]” On 4 December 2013, the trial court ordered Defendant’s case to proceed non-capitally.

On 20 February 2014, Defendant filed a “Legal Notice” and demanded his “[r]ight to a speedy trial be acknowledge[d]” In another “Legal Notice” filed 17 March 2014, Defendant alleged the State detained him for forty-seven to forty-eight months and he had “not seen a court room since April 2012.” On 11 August 2014, Defendant filed another notice, titled: “NOTICE: DISMISSAL FOR DEPRIVATION OF ‘SPEEDY TRIAL’ RIGHTS[.]” The next day, Defendant filed a request for dismissal, asking the trial court to dismiss his pending criminal charges “due to the State’s failure to prosecute”

Defendant filed a “Writ of Legal Notice of Demand for Dismissal of Charge[s]” on 25 February 2015. In his letter, Defendant alleged the trial court had neither denied his other motions, nor granted his right to a speedy trial. Defendant demanded the trial court dismiss his pending criminal charges.

On 16 April 2015, Defendant filed a “Writ of Dismissal of Counsel[.]” In his writ, Defendant reiterated prior requests of dismissal of his counsel and asserted his waiver of right to legal representation. On 15 June 2015, Defendant wrote to the trial court, again asking the trial court to “apply some pressure on the D.A. Office” because he had “been detained in Jail . . . for 60 some odd m[on]ths[.]”

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On 22 June 2015, Defendant wrote the trial court asking for intervention regarding his pending criminal charges. On 28 June 2015, Defendant again wrote to the trial court, asking the court to “please push the D.A. Office[.]” On 14 July 2015, Defendant wrote to the trial court alleging “the Justice System is not performing according to its duty . . .” and stated “[t]his issue need[s] to be resolved and determined expeditiously . . . [.]”

The trial court held pre-trial hearings on 8 and 28 July 2015. In an order entered 13 August 2015, the trial court allowed “the withdrawal of the attorney for the Defendant from this action, and [ordered] the Defendant [to] proceed pro se in this matter[.]” The trial court also ordered Attorney Steven Fisher to be Defendant’s standby counsel and “prepare for trial and maintain a state of preparedness to step in as counsel for the Defendant at any point in time as the Court may order in this action.”

In an order entered 3 December 2015, the trial court determined Defendant was capable to proceed to trial, competent to stand trial, and he made “a voluntary, freely, and intelligently given waiver of counsel.”

On 8 February 2016, the trial court called Defendant’s case for trial. The State’s evidence tended to show the following.

The State called Bobby Reeves. In 2009, Reeves worked at America’s Best Value Inn in Goldsboro as a maintenance man. On 14 December 2009, Ketan Patel,

the owner of the inn, called Reeves to his office. Ketan asked Reeves to unlock Room 108, because the couple staying in that room did not show up for work. Reeves unlocked the door. Both men walked into the room and found Suryakant Patel and Bhabanaven Patel dead. Reeves called 911.

The State next called Clint Hales, a retired officer from the Goldsboro Police Department. On 14 December 2009, Officer Hales received a radio call regarding “two or more bodies” found at the Best Value Inn. Upon arriving, a man¹ opened the hotel room door. Officer Hales walked in and saw:

that the female was laying on the floor, had blood around about her face and her complexion appeared to be kind of darkish gray. The male also had blood around the area where he was slumped over backwards on the chair around the computer. He also appeared to be dead.

Officer Hales exited the room and contacted his supervisor. Hales’s supervisor, Corporal Carl Jackson, arrived. Jackson and Hales entered the room and saw “a pot of some kind of something cooking on the stove[.]” The pot burned and created a lot of smoke throughout the room. Officers turned off the pot, pulled the pot off the burner, and left.

The State called Ronald McDuffie, a corporal with the City of Goldsboro. On 14 December 2009, Corporal McDuffie worked as a crime scene investigator. He arrived at the Best Value Inn around 11:00 a.m. He immediately went into Room

¹ Officer Hales’s testimony does not specify whether Ketan Patel or Reeves opened the door.

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108. He “saw the lady laying there, one eye partially opened, the other closed -- excuse me, blood in her face. The gentleman was slumped over in the chair against the wall. Looked over at him, he had blood in his face, blood covered him also. They were both deceased.”

Corporal McDuffie then met with two State Bureau of Investigation (“SBI”) agents, Pat Matthews and Barbara Lewis. Corporal McDuffie took photos of the “outside area[.]” He also took more photos of inside the room. In these photos, the male victim had no jewelry on his left hand. Additionally, his pants pockets were unzipped. The female victim also did not have any jewelry on her hands.

Agent Lewis told Corporal McDuffie “to take some DNA swabs on the outside of the door 108 and on the inside.” He swabbed the inside and outside of the door handle. Some days after,² Corporal McDuffie returned to Room 108 and found a bullet “that was lodged in the kitchen area, with the sink, under the floorboard.”

The State next called Jeremy Sutton, a sergeant with the Goldsboro Police Department. On 14 December 2009, Sgt. Sutton worked as a crime scene investigator and investigated the Best Value Inn around 3 p.m. He entered Room 108 and “quickly noticed that there was two deceased bodies in there, one being a male, one being a female. And right away you could just smell the strong odor of like a burnt substance,

² The record is unclear as to exactly when Corporal McDuffie returned to Room 108.

curry or something, that was -- it was just overwhelming.” Sgt. Sutton took photos of the inside and outside of the Best Value Inn.

Later that evening, a funeral home arrived to take the victims’ bodies to the morgue. While documenting evidence in Room 108, Sgt. Sutton found two wallets. Both wallets contained identification, but neither wallet had any money. Investigators also found a roll of tape in a field behind the Best Value Inn.

The State next called Justin Godwin. On 14 December 2009, Godwin worked as an agent with the SBI. Agent Godwin searched Room 108, and found several pieces of evidence, namely a bullet projectile. However, he did not find any money in the hotel room.

The State called retired SBI Agent Pat Matthews. On 14 December 2009, Agent Matthews performed a “crime scene search” of Room 108 at the Best Value Inn. When asked “[w]hat else did you take away from being there?”, Agent Matthews answered:

That both Mr. Patel and Ms. Patel appeared to have suffered gunshot wounds to the head, in addition to there being other projectiles or bullets in the residence. One appeared to be under the sink and had gone that way, and it was located on the 15th. Then the projectile that was of course found in the clothes that we talked about. And then there were some fragments of bullets where maybe the bullet broke apart or it shaved off a piece of metal. One piece was located on the bed and there was another partial projectile located on the floor.

The next day, 15 December 2009, Agent Matthews observed the autopsies of Suryakant and Bhabanaven. During the autopsies, doctors:

collected known fingerprints for Mr. and Ms. Patel, they collected known blood samples for Mr. and Ms. Patel, in case we needed it to relate back to anything, a metal fragment from Ms. Patel, from her head, known head hair from Ms. Patel, three metal fragments from Mr. Patel. The bullet broke apart inside his skull, and so there were three separate metal fragments taken from him. A known head hair standard for Mr. Patel and of course, the clothing for Mr. Patel and Ms. Patel.

The State next called Dwayne Dean, a captain with the Goldsboro Police Department. On 14 December 2009, Captain Dean's sergeant called him regarding the crime at the Best Value Inn. Upon arriving at the hotel, Captain Dean spoke with Reeves and Ketan Patel, the owner-manager, in an effort to get information on the victims. Captain Dean learned the two victims lived in the hotel room. Based on this information, Captain Dean obtained a search warrant for the room.

Captain Dean returned to the police department. Dean's sergeant called him and informed him "the victim's [(Suryakant's)] cell phone had been pinging near Orange Street, which is off of North William Street." Captain Dean called the cell phone, but no one answered. Captain Dean continued calling the cell phone. Around 8:20 p.m., he heard ringing coming from a dumpster near Alpha Arms Apartments. Inside the dumpster, he found the phone inside a plastic bag. Alpha Arms Apartments is "about a mile" across a field from the Best Value Inn. The field

separating Alpha Arms Apartments and the hotel is also where investigators found the roll of tape.

On or about 15 January 2010, Captain Dean and other investigators served arrest warrants on Defendant and his girlfriend, Eluxious Gurganus.³ These arrest warrants involved a different criminal investigation. Investigators found the two in Room 203 of the Irish Inn Motel, in Goldsboro. After arresting Defendant, investigators searched the motel room. Investigators found a silver revolver on the floor behind the headboard.

Investigators also seized a backpack found in the motel room. Inside the backpack, investigators found a black ski mask, a pair of mechanic gloves, and a Porter Cable reciprocating saw and battery. In a zippered pouch attached to the backpack, they found a purple Crown Royal bag, a headlamp in a black bag, an Irwin reciprocating saw blade, “a retractable razor blade type knife[,]” a small flashlight, and two white zip ties. Investigators also found “nine tall bullets and 22 shorter bullets” in the purple Crown Royal bag.

Captain Dean sent the phone to the SBI laboratory and received results on 9 February 2010. Thereafter, Captain Dean “learned” Defendant’s brother’s name, Retho. Captain Dean “ran” Retho’s name through the “local reference management system[,]” From his search, Dean discovered Retho lived in Alpha Arms Apartment.

³ Gurganus also went by “Angel”. Additionally, in Captain Dean’s testimony, Gurganus’s first name is spelled as “Alexis.”

Additionally, “Retho’s DNA was found on the plastic bag that the phone was contained in”

The State next called Rajal Patel. Rajal and her husband, Ketan Patel, own the Best Value Inn. Gurganus rented a room at the Best Value Inn on the following dates in 2009: 11 November, 14 November, 19 November, 21 November, 23 November, 25 November, 26 November, 28 November, 1-2 December, 4-6 December, and 8-11 December.

The State next called Nora Johnson, a former employee of the Best Value Inn.⁴ Johnson knew the victims. Suryakant always wore a watch and a ring. Bhabanaven wore “a lot of jewelry[,]” specifically earrings and bracelets.

Gurganus was a “regular” at the hotel, and Defendant stayed with Gurganus there “a lot.” Johnson remembered Defendant well because of an “altercation” the two had. On Friday, 11 December 2009, Johnson had memorable contact with Defendant:

It was that Friday. He was mad. He wanted a refund because they were changed from different rooms, and he wanted the other room close to the office and he wanted -- he demanded a refund and I said I can’t refund him the money because it’s not him that checked in and if he wanted a refund Ms. Gurganus had to come in to the office and get it herself, because she did use a credit card.

⁴ The State also called former employees of the Best Value Inn, Rebecca Thompson and Tawonda Jones. Their testimonies are not dispositive on appeal.

Fifteen minutes later, Gurganus came to the office and apologized for Defendant's actions. Instead of receiving a refund, and the two ended up staying another night.

On 12 December 2009, Johnson saw Suryakant and Defendant smoke cigarettes together "in the back." The next afternoon, on Sunday, 13 December 2009, Johnson saw Suryakant and Defendant together in a breezeway by the back door of the hotel.

The State called Shakia Greats, another former employee of the Best Value Inn. Greats knew Gurganus because Gurganus stayed at the hotel. On Sunday, 13 December 2009, Greats saw Suryakant and another person under a breezeway at the back of the hotel. At trial, Greats could not remember who the other person under the breezeway was. The State refreshed Greats's memory by showing her a statement she signed on 14 December 2009. In the statement, Greats described the other man as "a tall black male wearing a hat, a hoodie and a jacket."

The State showed Greats a statement from 22 June 2010, in which she said:

Nora Johnson called me at work. She told me they found the guy that killed Papa and Mama [(Suryakant and Bhabanaven)]. She told me to check online and that would give me a picture of the guy that did it. I checked online and pulled up the picture. I realized that he was the same gentleman from that night. He was talking to Papa by the staircase behind the office I'd seen him one time before and he came with his girlfriend and I spoke to her. She talked about him. Her name was Eluxious. That's what was on the ID.

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The State next called Brandy Gillespsie. Gillespsie has children with Retho, Defendant's brother. In 2009 and 2010, Gillespsie and Retho lived together in Alpha Court.⁵ A dumpster sat behind their apartment. Around⁶ 14 December 2009, sometime during the evening, Defendant knocked on Gillespsie's apartment door. Gillespsie looked through the "peephole" and saw Defendant outside. Gillespsie "got" Retho, and he went outside for a "[f]ew minutes, no more than 10."

The State called Retho Howard, Defendant's brother. Retho recalled meeting Captain Dean, when Dean interviewed him during his imprisonment. At trial, Retho could not "really recall" what he told Captain Dean about the cell phone. After the State refreshed his memory, Retho remembered telling the following story to Captain Dean.

Gillespsie told him about Defendant being outside the apartment.⁷ Retho joined Defendant outside, and the two talked for five to ten minutes. Defendant gave him a cell phone, and Retho threw the phone in the dumpster. The next day,⁸ Defendant told Retho he killed two people. However, Retho "thought it was a joke." Retho also told Captain Dean about Defendant's guns. Specifically, Retho described

⁵ Witnesses referred to Alpha Arms Apartments as Alpha Court.

⁶ Gillespsie could not recall whether Defendant knocked on her door on Sunday. She only knew it was close in time to when she read the newspaper.

⁷ Retho's testimony does not indicate the day when Gillespsie told him about Defendant being outside.

⁸ Retho later testified Defendant told him about the murders two or three days after giving him the cell phone.

a chrome gun, with “a big rubber handle.” Retho saw Defendant with this gun in November 2009.

The State next called Erin Ermish.⁹ Ermish works at the State Crime Laboratory as the training coordinator for body fluid identification and DNA analysis. Without objection, the State tendered Ermish as an expert in the field of DNA analysis.

Ermish received the following for evaluation:

a cell phone found in a dumpster, a flashlight found under the female victim, a bloodstain from B. Patel, a bloodstain from S. Patel, an iron found on the floor beside the female victim, a cookie tin found on the floor, a cookie tin lid found on the floor, a roll of duct tape -- or a roll of tape found in a field behind the hotel, swabbing from the inside door handle, swabbing from the outside door handle -- one Smith & Wesson .38 caliber handgun, serial number C910824, cheek swabbings from James Howard, [c]heek swabbings from E. Gurganus, and a bubble swabbing (Ph) from Retho Howard, Jr.

⁹ Before calling Ermish, the State called Karen Morrow, a forensic scientist and manager at the State Crime Laboratory. The State tendered, without objection, Morrow as an expert in the field of latent print examination and interpretation. Morrow evaluated a cell phone, flashlight, inked impressions of Suryakant and Bhabanaven, an iron, a cookie tin and its lid, a roll of tape, and prints found on the door handle. She concluded “[t]here was no identifiable -- no identifiable latent prints” on the evidence. Morrow next evaluated a revolver and six rounds of ammunition. On both the gun and ammunition, Morrow did not find any identifiable latent prints. Thus, she could determine someone touched the items, but there was not enough information to make an identification or comparison.

Ermish obtained a “partial”¹⁰ DNA profile on all the items. For the gun, the DNA profiles for Suryakant and Bhabanaven were excluded as contributors to the DNA mixture. The DNA profiles of Defendant, Gurganus, and Retho could not be excluded as “contributors to the mixture.” Regarding the inside door handle, the profile was:

consistent with a mixture and the partially predominant profile matched the DNA profile of S. Patel, and the DNA profile obtained from B. Patel was excluded as a contributor to the mixture. The DNA profile obtained from James Howard [(Defendant)] cannot be excluded as a contributor to the mixture. The DNA profile obtained from E. Gurganus was excluded as a contributor to the mixture and no conclusion could be rendered as to the contribution of Retho Howard Jr. to the mixture.

The fact Defendant cannot be excluded is “one of the stronger statements” she could “make about the presence of DNA being associated with him[.]” Without objection, the State admitted Ermish’s reports into evidence.

The State called Dr. Deborah Radisch, the Chief Medical Examiner for the State of North Carolina. The State tendered Dr. Radisch as an expert in the field of forensic pathology. Dr. Radisch performed an autopsy on Bhabanaven. Bhabanaven died from a single gunshot wound in the middle of her forehead.

Dr. Sam Simmons, a former colleague of Dr. Radisch, performed an autopsy on Suryakant. Dr. Radisch reviewed Dr. Simmons’s records and formed her own opinion.

¹⁰ For her DNA testing, Ermish copies sixteen areas of the DNA. Then, she separates the DNA “out by -- based on the size of the piece of DNA that [she has.]” She generates a DNA profile, “which is basically a series of numbers at each one of those 16 locations.” A partial profile occurs when she gets DNA results at anything less than the sixteen locations.

Dr. Radisch opined Suryakant died from gunshot wounds to his head.

The State next called Neil Morin. Morin worked as the forensic science supervisor of the firearms unit at the State Crime Laboratory. The State tendered Morin as a forensic firearms identification expert. Morin evaluated four small lead fragments, a firearm, and six cartridges. Morin concluded three bullets were fired from the handgun. Additionally, the fourth bullet “had the same class characteristics, meaning the rifling was the same” as the bullets fired from the handgun. Morin indicated the fourth bullet came from Bhabanaven.¹¹

The State rested. Defendant moved to dismiss the charges. The trial court denied Defendant’s motions.

Defendant called Ray Jackson, a licensed private investigator. Jackson worked as a special agent with the SBI for eighteen years. At the request of Defendant’s former counsel, Steven Fisher, Jackson became involved in Defendant’s case. On 5 January 2012, as part of his investigation, Jackson spoke with Retho and “asked him if he could help his brother[.]” Retho told Jackson the statement he gave investigators was not true. Retho “felt threatened, and he told them something so he would not be charged.” Retho signed an affidavit confirming his conversation with Jackson.

Defendant testified on his own behalf and narrated his testimony. Defendant “was a regular guest” at the Best Value Inn when the murders occurred. However,

¹¹ The State also called Trevor Albaugh, a police officer with the City of Goldsboro. Albaugh established the chain of custody for the items taken into evidence.

he did not kill Suryakant and Bhabanaven and thought “they were nice people[.]” On 7 or 8 January 2010,¹² Retho asked Defendant to keep a gun in Defendant’s room at the Irish Inn. Defendant instructed Retho to place the gun behind the bed. However, Defendant touched the gun on prior occasions and carried it for protection.

On cross-examination, Defendant denied being under the influence of cocaine on 13 and 14 December 2009. When asked why Defendant and Eluxious stopped staying at the Best Value Inn after the murders, Defendant explained they “didn’t stay there no more because there was too much going on there anyway.”

Defendant next called Dr. Maher Nouredine. Dr. Nouredine owns Forensigen, LLC, a forensic, genetics, and serology consulting company. Defendant tendered Dr. Nouredine as an expert.¹³ Dr. Nouredine reviewed the State Crime Lab reports. In rendering her opinion, she:

relied on the case file that was provided by the lab in discovery, as well as the standard operating procedures for DNA and serology interpretation at the time, in addition to the iterations of changes in their interpretation from the time this analysis was done, all the way to pretty much the present day, or the end of 2015.

Regarding the DNA swab from the inside door handle, Dr. Nouredine agreed with the State Crime Laboratory that Suryakant was the “partially predominant

¹² On cross examination, Defendant alleged Retho brought him the gun between 10 and 15 January 2010.

¹³ The record is unclear as to the exact field in which Defendant tendered Dr. Nouredine as an expert.

profile[.]” Additionally, Dr. Nouredine agreed Defendant “cannot be excluded as a possible contributor.” However, Dr. Nouredine opined the lab “should have calculated the statistic for the male victim.”

For the gun, Dr. Nouredine opined the DNA mixture was “indicative of at least three people and again, the quality of that mixture is low, with data missing throughout.” Moreover:

[t]he lab’s calculation of different statistics for that mixture is scientifically invalid and they cannot do that in the present SOPs. My review, that mixture, again, would be inconclusive and it would be inconclusive under current laboratory SOPs.

In addition to that, that mixture revealed a DNA contribution from at least two unknown individuals that we don’t know who they are. There’s additional DNA that we don’t know where it’s coming from.

The State called Taiwan Miller, a court officer at the Wayne County Jail, as a rebuttal witness. From 4 to 22 January 2010, Retho stayed in the Wayne County Jail. At no point during that stay did Retho leave the jail.

On 15 February 2016, the jury returned its verdicts and found Defendant guilty of two counts of first degree murder,¹⁴ two counts of armed robbery, first degree burglary, and two counts of possession of a firearm by a convicted felon. On the same day, the trial court sentenced Defendant to the following: two terms of life

¹⁴ The jury returned special verdict forms, finding Defendant guilty of first degree murder under both: (1) the basis of malice, premeditation and deliberation; and (2) the first degree felony murder rule.

imprisonment, without parole, for the murder convictions; two terms of 96 to 125 months imprisonment for the robbery with a dangerous weapon convictions; 96 to 125 months imprisonment for the first degree burglary conviction; and two terms of 15 to 18 months for the possession of a firearm by a felon convictions. The trial court ordered all of terms of imprisonment to run consecutively. Defendant gave notice of appeal in open court.

II. Standard of Review

We review Defendant's speedy trial claim *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted) ("The standard of review for alleged violations of constitutional rights is *de novo*.").

We review the State's DNA expert testimony for abuse of discretion. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted). However, because Defendant did not object to the State's DNA expert testimony, we review for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Plain error occurs when the error is "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) (quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "Under the plain error rule, defendant

must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

We also review the trial court’s determination of Defendant’s competency to stand trial and decision to appoint standby counsel for abuse of discretion. *State v. Coley*, 193 N.C. App. 458, 461, 668 S.E.2d 46, 49 (2008) (citing *State v. Pratt*, 152 N.C. App. 694, 697, 568 S.E.2d 276, 278 (2002)) (“The determination of whether a defendant is competent to stand trial rests within the trial court’s discretion and the burden of persuasion falls upon the defendant.”); N.C. Gen. Stat. § 15A-1243 (2016).

III. Analysis

We review Defendant’s contentions in three parts: (A) his right to a speedy trial; (B) the State’s DNA expert witness’s testimony; and (C) the role of standby counsel at trial.

A. Right to a Speedy Trial

Defendant argues the State violated his constitutional right to a speedy trial by waiting five years to try him after his arrest. We dismiss, without deciding, this issue on appeal.

The Sixth Amendment of the United States Constitution states, in relevant part, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial[.]” U.S. Const. amend. VI. “This provision is made applicable to the

states by the Fourteenth Amendment.” *State v. Washington*, 192 N.C. App. 277, 282, 665 S.E.2d 799, 803 (2008) (citation omitted). “Likewise, Article I, Section 18 of the North Carolina Constitution provides that ‘[a]ll courts shall be open[]to every person ... without favor, denial, or delay.’” *State v. Washington*, 192 N.C. App. 277, 282, 665 S.E.2d 799, 803 (2008) (quoting N.C. Const. art. 1, § 18).

At the outset, we must address our appellate jurisdiction. The State argues Defendant “did not preserve his speedy trial argument for appellate review[.]” (all caps in original) The State’s argument is two-fold: (1) Defendant filed *pro se* motions in an effort to assert his right to a speedy trial, which is not allowed under case law; and (2) Defendant failed to obtain a ruling from the trial court on this issue. We address the State’s arguments in turn.

First, in *State v. Grooms*, 353 N.C. 50, 540 S.E.2d 713 (2000), our Supreme Court held “[h]aving elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel.” *Id.* at 61-62, 540 S.E.2d at 721 (citations omitted). Additionally, in *State v. Williams*, our State Supreme Court held the trial court did not err in dismissing defendant’s *pro se* speedy trial motions when defendant was represented by counsel. 363 N.C. 689, 700-01, 686 S.E.2d 493, 500-01 (2009). Our Court clarified the *Williams*’s and *Grooms*’s holdings and stated, “[n]owhere in *Williams* or *Grooms* does our Supreme Court state that a

trial court cannot consider a motion filed by a defendant personally when the defendant is represented by counsel, only that it is not error for the trial court to refuse to do so.” *State v. Howell*, 211 N.C. App. 613, 615, 711 S.E.2d 445, 447 (2011). However, in *Howell*—and unlike in the present case—defense counsel “argued the speedy trial issue at the hearing, and both the State and the trial court consented to addressing this issue.” *Id.* at 615, 711 S.E.2d at 447-48.

Second, even assuming *arguendo* the pro se speedy trial motions filed by Defendant could have been considered by the trial court, the trial court never ruled on Defendant’s motions asserting his right to a speedy trial. Thus, the motions are not properly before us on appeal. Accordingly, we hold Defendant did not preserve this argument for appellate review, and we dismiss this assignment of error. N.C. R. App. P. 10(a)(1) (2016) (“It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.”).

B. DNA Expert Testimony

Defendant next contends the trial court committed plain error by allowing the State’s DNA expert to testify using methods of analysis, which the State Crime Laboratory and scientific community rejected. We disagree.

The pre-2011 amendment version of Rule 702 of the North Carolina Rules of Evidence governs expert testimony and states, in pertinent part, “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the

evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.” N.C. R. Evid. 702 (2011).¹⁵

The seminal case in pre-*Daubert* Rule 702 analysis is *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004), *superseded by statute*, Act of June 17, 2011, ch. 283, sec. 1, 3, 2011 N.C. Sess. Laws 1048, 1049 (codified at N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(3)), *as stated in State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016), which states:

It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C.G.S. § 8C-1, Rule 104(a) (2003). When making such determinations, trial courts are not bound by the rules of evidence. *Id.* In this capacity, trial courts are afforded “wide latitude of discretion when making a determination about the admissibility of expert testimony.” *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Given such latitude, it follows that a trial court’s ruling on the qualifications of an expert or the admissibility of an expert’s opinion will not be reversed on appeal absent a showing of abuse of discretion. *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463, *cert. denied*, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988); *Bullard*, 312 N.C. at 144, 322 S.E.2d at 378; *State v. Moore*, 245 N.C. 158, 164, 95 S.E.2d 548, 552 (1956) (“[T]his Court has uniformly

¹⁵ The North Carolina General Assembly amended Rule 702 in 2011 and “adopt[ed] the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases.” *State v. McGrady*, 368 N.C. 880, 884, 787 S.E.2d 1, 5 (2016). The new Rule 702 applies to all actions arising on or after 1 October 2011. Act of 17 June 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Law 1048, 1049. For criminal cases, the action arises “on the date that the bill of indictment was filed.” *State v. Gamez*, 228 N.C. App. 329, 333, 745 S.E.2d 876, 879 (2013). In this case, a Wayne County Grand Jury indicted Defendant on 7 February 2011. Thus, the earlier version of Rule 702 applies.

held that the competency of a witness to testify as an expert is a question primarily addressed to the court, and his discretion is ordinarily conclusive, that is, unless there be no evidence to support the finding, or unless the judge abuse[s] his discretion.”).

The most recent North Carolina case from this Court to comprehensively address the admissibility of expert testimony under Rule 702 is *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), which set forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? *Id.* at 527-29, 461 S.E.2d at 639-40. (2) Is the witness testifying at trial qualified as an expert in that area of testimony? *Id.* at 529, 461 S.E.2d at 640. (3) Is the expert's testimony relevant? *Id.* at 529, 461 S.E.2d at 641.

Id. at 458, 597 S.E.2d at 686.

Defendant points to the three-step inquiry from *Howerton* and argues “[i]n this case, the State’s expert’s testimony failed the first step: ‘Is the expert’s proffered method of proof sufficiently reliable as an area for expert testimony?’” Defendant argues in his main brief, and more explicitly in his reply brief, our Court must apply plain error.

However,

[b]ecause our Supreme Court has held that discretionary decisions of the trial court are not subject to plain error review, *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000) (stating that the North Carolina Supreme Court ‘has not applied the plain error rules to issues which fall within the realm of the trial court’s discretion’), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001), we need not address [Defendant]’s argument on this issue.

State v. Norton, 213 N.C. App. 75, 81, 712 S.E.2d 387, 391 (2011).

Nevertheless, as our Court did in *Norton*, “in the interest of ensuring that [Defendant] had a fair trial, we address the merits of [his] argument.” *Id.* at 81, 712 S.E.2d at 391.

Thus, we now turn to whether the DNA testing done by Ermish was sufficiently reliable under Rule 702(a). “In the first step of the *Goode* analysis, the trial court must determine whether the expert’s method of proof is sufficiently reliable as an area for expert testimony.” *Howerton*, 358 N.C. at 459, 597 S.E.2d at 686 (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-40 (1995)). “[T]he requirement of reliability is nothing new to the law of scientific and technical evidence in North Carolina” *Id.* at 459, 597 S.E.2d at 686 (citations omitted).

“This Court and our Supreme Court have recognized that, with the proper foundation, DNA profile testing is generally admissible as an established technique considered to be reliable within the scientific community.” *McLean v. Mechanic*, 116 N.C. App. 271, 277, 447 S.E.2d 459, 463 (1994) (citations omitted). “[W]hen specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied.” *Howerton*, 358 N.C. at 459, 597 S.E.2d at 687 (citations omitted).

Moreover:

[w]ithin this general framework, reliability is thus a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony. This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence. In this regard, we emphasize the fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury. *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940) ("The competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury. This principle is so well settled we do not think it necessary to cite authorities.").

Therefore, once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility. *See, e.g., Barnes*, 333 N.C. at 680, 430 S.E.2d at 231 (holding that a forensic serologist's failure to conduct or provide for additional, independent testing of blood samples went to the weight of the evidence, not its admissibility); *McLean v. McLean*, 323 N.C. 543, 556, 374 S.E.2d 376, 384 (1988) (concluding that deficiencies in the expert's methodology were relevant in considering the expert's credibility and the weight to be given his testimony, but that they did not render his opinion inadmissible). Here, we agree with the United States Supreme Court that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596, 125 L. Ed. 2d at 484; *accord Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 244, 311 S.E.2d 559, 571 (1984) ("It is the function of cross-examination to expose any weaknesses in [expert]

testimony . . .”).

Id. at 460-61, 597 S.E.2d at 687-88 (alterations in original).

Recently, our Court addressed when an expert witness deviates from guidelines or protocol in *State v. Hunt*, ___ N.C. App. ___, 790 S.E.2d 874 (2016), *disc. rev. denied*, ___ N.C. ___, 795 S.E.2d 206 (2016).¹⁶ In *Hunt*, the Court adopted the reasoning in an unpublished decision and held deviations from “established methodology” went to the weight of the expert’s testimony, and not to admissibility of the testimony. *Id.* at ___, 790 S.E.2d at 880 (adopting the Court’s reasoning in *State v. Hudson*, No. COA11-444, 2012 WL 379936, (unpublished) (N.C. Ct. App. Feb. 7, 2012)). Additionally, the *Hunt* Court cited to several cases addressing laboratory protocols:

In addition, several circuit courts have held that, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the introduction of laboratory protocols goes to the weight and not the admissibility of evidence. *See e.g. United States v. Shea*, 211 F.3d 658, 668 (1st Cir. 2000) (holding that flaws in an application of an otherwise reliable methodology go to weight and credibility, not admissibility); *United States v. Chischilly*, 30 F.3d 1144, 1154 (9th Cir. 1994) (“The impact of imperfectly conducted laboratory procedures might therefore be approached more properly as an issue going not to the admissibility, but to the weight of the DNA profiling evidence.”); *United States v. Bonds*, 12 F.3d 540, 563 (6th Cir. 1993) (“[C]riticisms about the specific

¹⁶ We acknowledge *Hunt* applies Rule 702 under the *Daubert* standard. However, our consideration of *Hunt* does not prejudice Defendant. The pre-*Daubert* standard “is decidedly less mechanistic and rigorous than the ‘exacting standards of reliability’ demanded by [Daubert].” *Howerton*, 358 N.C. at 464, 597 S.E.2d at 690 (citation omitted).

application of the procedure used or questions about the accuracy of the test results do not render the scientific theory and methodology invalid or destroy their general acceptance. These questions go to the weight of the evidence, not the admissibility.”).

Id. at ___, 790 S.E.2d at 880.

As stated *supra*, Ermish evaluated the following: Suryakant’s cell phone; a flashlight; bloodstains from Suryakant and Bhabanaven; an iron; a cookie tin and its lid; a roll of tape; swabbing from the inside and outside of the hotel room door handle; a handgun; and swabbings from Defendant, Gurganus, and Retho. Ermish obtained a “partial” DNA profile on all the items. Regarding the gun, the DNA profiles for Suryakant and Bhabanaven were excluded as contributors to the DNA mixture. The DNA profiles of Defendant, Gurganus, and Retho could not be excluded as “contributors to the mixture.” Regarding the inside door handle, the profile was:

consistent with a mixture and the partially predominant profile matched the DNA profile of S. Patel, and the DNA profile obtained from B. Patel was excluded as a contributor to the mixture. The DNA profile obtained from James Howard [(Defendant)] cannot be excluded as a contributor to the mixture. The DNA profile obtained from E. Gurganus was excluded as a contributor to the mixture and no conclusion could be rendered as to the contribution of Retho Howard Jr. to the mixture.

On cross-examination, the following exchange occurred:

Q. And in your conclusion work, that the DNA profile obtained from the items be consistent with a mixture of multiple contributors; correct?

A. Yes.

Q. But you did not specify the number of contributors; correct?

A. That's correct.

Q. Under your current protocols in 2016, do you specify the minimum numbers of contributors in the mixtures; correct?

A. We do under our current protocols. However, in 2010 we did not.

Q. Okay. In fact, when you were testing this sample in December 2009 your lab was operating under a set of standard operating procedures for DNA evidence interpretation, these protocols have since been changed quite a bit; correct?

A. Yes. They have.

Q. Can you look at the e-gram from item number four? People could have contributed -- I mean, tell the jury how many people could have contributed to that sample.

A. Based on our current policies and procedures I'm not allowed to make a[n] interpretation or -- on evidence that's obtained or DNA profiles that obtained without that interpretation going through reviewers, so I cannot do that right now.

....

[Q]. Is it true that under your current protocols your lab no longer -- no longer -- experts [sic] DNA mixture with this complexity?

A. It would depend on the type of sample that was obtained. In 2009 when these samples were run, we were

using different technologies and different amplification kits. The chemistry that we used has since changed and so the data from 2009 cannot necessarily be compared to the data I would obtain today.

Q. In other words, you have this -- you have this complex mixture before you now, your interpretation would be completely different than what you -- opinion back in 2010?

A. As I said, I cannot -- I cannot apply the procedures that we currently use to the data I obtained in 2009 because of the changes that have been made. So I cannot say whether or not this profile would be able to be interpreted today or not.

Q. In fact, the only interpretation that you would offer for complex mixture as such is that it is too complex to draw a conclusion from?

A. Yes. And under today's procedures, very complex mixtures -- mixtures of four, five or six people in general I would not be able to draw a conclusion.

Q. The science of interpretation of forensic DNA evidence has changed quite a bit since 2009 and 2010, hasn't it?

A. Yes. It has changed quite a bit since 2009 and 2010.

Q. Isn't it true that shortly after this analyst (Ph) was done in this case in December 2009 and January of 2010, the scientific network group for DNA analysts met and issued a set of guideline[s] to forensic DNA labs for mixture interpretation, in particular?

A. Yes. I believe there was a report or guidelines released in 2009 or 2010.

Q. Are you familiar with the SWGDAM 2010 guideline[s] for mixtures' interpretation?

A. Yes.

Q. Isn't it true that the State lab -- the state crime lab did not adopt such guidelines until late in 2012, early 2013?

A. I cannot recall exactly when we adopted those guidelines but those were guidelines and not rules that had to be followed. They were just suggestions.

Q. You did not go back and reinterpret the evidence in this case based on updated protocols; correct?

A. No, I did not.

Defendant does not argue against the admissibility of DNA evidence generally. *See McLean*, 116 N.C. App. at 277, 447 S.E.2d at 462-63 (“This Court and our Supreme Court have recognized that, with the proper foundation, DNA profile testing is generally admissible as an established technique considered to be reliable within the scientific community.”). Instead, he argues Ermish’s methods only followed the 2010 guidelines. However, the State Crime Laboratory adopted the 2010 SWGDAM guidelines in 2013. Thus, Defendant argues because Ermish did not perform her analysis under the guidelines active in 2016, her methods were unreliable and inadmissible.

However, in accordance with our precedent, we hold Ermish’s deviations from current protocols “went to the weight of [her] testimony and not the admissibility of the testimony.” *Hunt*, ___ N.C. App. at ___, 790 S.E.2d at 880. The change in protocols, and Ermish’s nonadherence to the new protocols, does not touch the “basic

methodological adequacy of an area of expert testimony.” *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687. Indeed, this issue “is a matter traditionally reserved for the jury.” *Id.* at 460-61, 597 S.E.2d at 687-88 (citing *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940)).

Notably, Defendant thoroughly cross-examined Ermish on the updated protocols and her testing. *See id.* at 461, 597 S.E.2d at 688 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596, 125 L. Ed. 2d 469, 484 (1993)) (agreeing with the United States Supreme Court that “[v]igorous cross-examination presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence”) (alteration in original). Moreover, Defendant called his own expert witness, Dr. Nouredine, to rebut the DNA evidence presented by Ermish. Accordingly, the trial court neither abused its discretion nor committed plain error in permitting Ermish’s testimony regarding DNA evidence. We overrule this assignment of error.

C. Standby Counsel

Finally, Defendant argues the trial court erred in declared him competent to stand trial, while also assigning standby counsel “[p]artial [r]esponsibility” for the case.¹⁷

¹⁷ Defendant’s arguments on appeal are solely regarding the role of standby counsel during trial. We note Defendant alludes to an argument that the trial court erred in finding him competent to proceed *pro se* and points to an alleged “ambiguity regarding whether [Defendant] made a knowing

As stated by our State Supreme Court in *State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473 (1992):

A defendant has only two choices—“to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel.” *State v. Parton*, 303 N.C. 55, 61, 277 S.E.2d 410, 415 (1981), *disavowed on other grounds by State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985); *accord State v. Williams*, 319 N.C. 73, 75, 352 S.E.2d 428, 430 (1987); *State v. Porter*, 303 N.C. 680, 688, 281 S.E.2d 377, 383 (1981); *State v. House*, 295 N.C. 189, 204, 244 S.E.2d 654, 662 (1978); *cf. Treff*, 924 F.2d at 979 n. 6 (“a defendant has no right to hybrid representation and a request to proceed in such a manner is not deemed an election to proceed *pro se*”); *State v. Robinson*, 290 N.C. 56, 64–67, 224 S.E.2d 174, 178–80 (1976) (trial court’s adoption of a “middle course” of legal representation prejudiced defendant). . . . A trial court faced with a *pro se* defendant may appoint standby counsel pursuant to N.C.G.S. § 15A–1243. The duties of standby counsel are limited by statute to assisting the defendant when called upon and to bringing “to the judge’s attention matters favorable to the defendant upon which the judge should rule upon his own motion.” N.C.G.S. § 15A–1243 (1988).

Id. at 677, 417 S.E.2d at 477-78. N.C. Gen. Stat. § 15A-1243 (2016) governs standby counsel for a *pro se* defendant and states:

When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may determine that standby counsel should be appointed to assist the defendant when called upon and to bring to the judge’s attention matters favorable to the defendant upon which the judge should rule upon his own motion.

waiver of his right to counsel.” However, he presents no arguments in support of these contentions. Accordingly, we need not address these issues. N.C. R. App. P. 28(a) (2016).

Id.

Our Court addressed the issue of the role of standby counsel in *State v. Thomas*, 134 N.C. App. 560, 518 S.E.2d 222 (1999). The Court relied on *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122 (1984) and held defendant failed to show reversible error from standby counsel's role at trial. *Thomas*, 134 N.C. App. at 565-66, 518 S.E.2d at 226-27. In *McKaskle*, the United States Supreme Court stated "a defendant's right to conduct his own defense requires that he 'be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.'" *Id.* at 565, 518 S.E.2d at 227 (quoting *McKaskle*, 465 U.S. at 174, 79 L. Ed. 2d at 131). Moreover:

[p]articipation by counsel with a *pro se* defendant's express approval is, of course, constitutionally unobjectionable. A defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense. Such participation also diminishes any general claim that counsel unreasonably interfered with the defendant's right to appear in the status of one defending himself.

McKaskle, 465 U.S. at 182, 79 L. Ed. 2d at 136.

The defendant in *Thomas* examined jurors, exercised challenges, made an opening statement, cross-examined witnesses, made objections and arguments on legal issues, and made a closing argument. *Thomas*, 134 N.C. App. at 566, 518 S.E.2d at 227. Standby counsel participated when the jury was absent from the courtroom

or at bench conferences. *Id.* at 566, 518 S.E.2d at 227. “Of primary importance,” the Court highlighted standby counsel’s participation was done at defendant’s express request. *Id.* at 566, 518 S.E.2d at 227.

In the case *sub judice*, at a hearing on 28 July 2015, the trial court discussed Fisher’s role as standby counsel:

[Fisher]: And then my question was do you want -- does the Court want me to continue to prepare the DNA and ballistic experts for trial?

THE COURT: Okay.

Do you want to -- if you’ll stand up, please, Mr. Howard.

Do you want to be heard on those issues?

[Defendant]: I would, I would ask for some help on that anyway, your Honor.

THE COURT: Okay. Well, let me take a step back just for a moment, if I can do that. Will you allow me to do that?

Now, I’m not -- let me tell what I’m not going to do, and then I’ll tell you what I’ll consider doing. Fair enough?

I’m not going to replace Mr. Fisher with another lawyer. I’m not going to do that.

[Defendant]: I understand that.

THE COURT: Okay.

[Defendant]: Mm-hmm.

THE COURT: But let me back up and tell you what I’ll consider doing. Now, we’re all human beings in this courtroom. We make some very good decisions sometimes; sometimes we don’t. And I’m not saying you’ve made good ones or bad ones, I’ll speak for myself; sometimes I make

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good ones and bad ones. The first thing I want to ask you is did you understand what Mr. Fisher just said?

[Defendant]: Yes, sir, I did.

THE COURT: All right. We'll cover that first; thank you very much.

And what he's saying, as I understand it, is there are experts, at least two, with pending information, and I think what you're saying is you want him to -- you want his help getting that to the right place.

[Defendant]: No, he asked me do -- was I going to let him continue to do that and I said yes.

THE COURT: Okay.

[Defendant]: I'm going to ask for his help on that because --

THE COURT: Okay.

[Defendant]: -- there [are] some things in that DNA that I need to be clarified, because I --

THE COURT: Mm-hmm.

[Defendant]: -- don't understand it, so definitely, yes, sir.

THE COURT: Okay. I think I understand both of you then. Now let me go a step further, because this is a -- if you'll tell me yes or no, sir to this.

[Defendant]: Okay.

THE COURT: With all that's been said, is it still your position, as we stand here now, that you want to represent yourself, or has your mind changed and do you still want Mr. Fisher to represent you?

[Defendant]: I'm going to represent myself.

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THE COURT: Okay. So that hasn't changed.

[Defendant]: No, it hasn't.

THE COURT: But as standby counsel, and as your -- as I've just allowed him to withdraw, former counsel, you would like for him to handle those discovery matters.

[Defendant]: If he [is] going to be standby then, I will -- no. No, sir, your Honor.

THE COURT: Okay. No, sir what?

[Defendant]: My understanding is that he was going to be standby counsel.

THE COURT: Okay. I just told him he was going to be standby counsel.

[Defendant]: Okay. So you asked me do I want him to be standby counsel?

THE COURT: No, I didn't ask that. I asked did you want him to -- these expert issues. You just said --

[Defendant]: And I said yes.

THE COURT: Okay. So I'm going to allow that. Okay. I'm making sure I'm clear.

[Defendant]: Okay.

THE COURT: I'm allowing that, so Mr. Fisher, I will order and allow you as standby counsel to make sure that the expert testimony, witness information is properly sent, properly exchanged, copies are properly presented to the Defendant so he can prepare properly for trial.

Does that address your issue?

MR. FISHER: It does, your Honor.

THE COURT: If you'll prepare an order to that effect.

MR. FISHER: And, given that the underlying DNA material and scientific issues surrounding the DNA are relatively complex, my assumption is, if I'm going to be prepared to stand up -- be standby counsel -- in other words, if there's a DNA, State DNA expert that he's cross-examining and he decides at that point he wants me to step in, that I should continue to prepare those areas as if I were proceeding to trial myself.

THE COURT: Yes, sir, because if at any point -- I'm making this clear to Mr. Howard -- if at any point during the trial or at any procedure during the trial Mr. Howard felt he needed your services as an attorney and asked the Court to reappoint you, if I'm the trial judge, I will allow that. And you would certainly need to be in a position to be prepared to continue forward with that.

MR. FISHER: And, and --

THE COURT: He may not do that, but if he did I'd want you to be prepared.

On 13 August 2015, the trial court entered an order allowing Defendant's counsel's withdrawal. Additionally, the trial court ordered:

3. That pursuant to N.C.G.S. 15A-1243, and in the discretion of the Court, attorney Steven M. Fisher is hereby appointed as stand-by counsel for the Defendant. Attorney Steven Fisher is to prepare all documents necessary for the Defendant's Ballistics and DNA experts, and work to prepare these experts for trial. Attorney Steven Fisher is also to make himself reasonably available to the Defendant for review of all audio and video discovery contained on DVDs and CDs in this action which the Defendant desires to review.

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4. Attorney Steven Fisher, as standby counsel, is to prepare for trial and maintain a state of preparedness to step in as counsel for Defendant at any point in time as the Court may order in this action.

In an order entered 3 December 2015, the trial court found and concluded Defendant was competent to stand trial and to conduct the trial proceedings without the assistance of counsel.

We conclude this case is similar to *Thomas*. Here, Defendant approved, and often requested, actions taken by his standby counsel, Fisher. Our review shows seven occurrences at trial where Fisher participated at trial. Once, Fisher relocated to see exhibits displayed to the jury. Another time, Fisher brought a matter to the trial court's attention, as permitted by his role as standby counsel. All other instances, when he presented arguments on behalf of Defendant or conferred with Defendant, were outside the presence of the jury. While the trial court permitted some discussion or interaction between Fisher and Defendant regarding the DNA and ballistics experts, Defendant presented no argument to this Court regarding any alleged errors in that respect. It is not our duty to supplement a party's brief. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005).

Additionally, Defendant examined jurors, exercised challenges, made his opening statements, cross-examined witnesses, made objections and legal arguments, and made his closing argument. *Thomas*, 134 N.C. App. at 566, 518 S.E.2d at 227.

Thus, we must hold the error, if any, in Fisher's role as standby counsel is not reversible error. Accordingly, we overrule this assignment of error.

IV. Conclusion

For the reasons stated above, we dismiss Defendant's speedy trial claim and find no error in his remaining issues on appeal.

DISMISSED IN PART; NO ERROR IN PART.

Judge DAVIS concurs.

Judge MURPHY concurs in result only.

Report per Rule 30(e).