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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-331

Filed: 3 March 2020

Mecklenburg County, Nos. 15CRS244732-36, 16CRS14126, 17CRS236924

STATE OF NORTH CAROLINA

v.

WESLEY EVAY WESTBROOK, Defendant.

Appeal by Defendant from judgments entered 6 April 2018 by Judge Tanya T. Wallace in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas O. Lawton, III, for the State.

Guy J. Loranger for Defendant-Appellant.

INMAN, Judge.

This appeal primarily concerns the tension between strategic jury selection in criminal trials and the law allowing prosecutors to excuse a limited number of prospective jurors for just about any reason, on the one hand, and strategic race discrimination by prosecutors in jury selection, prohibited by the United States Constitution, on the other. Given the record in this case, the relatively low bar for

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the State to refute a charge of discrimination, and the highly deferential standard of review on appeal, we find no error.

Wesley Evay Westbrook (“Defendant”) appeals his convictions following jury verdicts finding him guilty of possession of a firearm by a felon, maintaining a dwelling to keep a controlled substance, possession of marijuana with the intent to sell or deliver, possession of cocaine with the intent to sell or deliver, and possession of MDEA. Defendant also appeals his convictions following guilty pleas to obstruction of justice and attaining habitual felon status. Defendant argues: (1) the trial court erred in determining that there was no purposeful discrimination when the State peremptorily challenged three black prospective jurors during *voir dire*; (2) the prosecutor’s remarks at closing argument were improper; (3) the trial court erred by sentencing him as a prior record level IV offender; and (4) he was denied effective assistance of counsel because his counsel failed to argue a pre-trial motion to suppress.

For the following reasons, we hold that Defendant has failed to demonstrate reversible error as to his first two arguments. We vacate Defendant’s sentence and remand for the trial court to properly sentence him at the appropriate record level. We dismiss Defendant’s ineffective assistance of counsel claim without prejudice so he can file a motion for appropriate relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence introduced at trial tends to show the following:

On 11 December 2015, officers with the Charlotte-Mecklenburg Police Department executed a search warrant at Defendant's home. Through surveillance and controlled purchases via a confidential informant, officers believed that Defendant was selling various controlled substances in his home. Defendant, his girlfriend, and his children were present at the time of the search.

As a result of the search, officers discovered the following pertinent items: two mason jars containing marijuana; a marijuana cigarette; a digital scale with green and white residue; plastic baggies; a small folding knife; cocaine and MDEA—also known as “Molly”—concealed in a lemonade container; a loaded handgun and a magazine; roughly \$4,000 in cash; and two cellular smart phones.

After being read his *Miranda* rights, Defendant told officers he was unemployed, only personally consumed the cocaine and MDEA, and that he sold marijuana to support his cocaine habit. Defendant also said that he did not own the handgun.

On 9 May 2016, Defendant was indicted for possession of a firearm by a felon, maintaining a dwelling to keep or sell marijuana and cocaine, possession with the intent to sell or deliver marijuana, possession with the intent to sell or deliver cocaine, possession of MDEA, and attaining habitual felon status.

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Defendant's charges first came on for trial on 26 September 2017. However, four days into the trial, the judge declared a mistrial due to concerns that Defendant contacted and attempted to bribe a prospective juror. One week later, on 9 October 2017, Defendant was indicted for obstruction of justice.

Defendant's second trial began on 2 April 2018. During jury selection, defense counsel argued that the State's attempt to excuse three black prospective jurors from the panel was race-based and requested that they remain for consideration. The trial court, after hearing arguments from both parties, ruled that the State was not acting with purposeful discrimination, denied defense counsel's objection, and excused the three prospective jurors. As jury selection continued, the State peremptorily excused a fourth black juror, Ms. Avery, and defense counsel again objected to the State's excusal as race-based. The trial court sustained the objection, reasoning that the State's explanation for Ms. Avery's excusal equally applied to a white juror whom the State did not excuse.

After a jury was impaneled, the State presented evidence as summarized above. Defendant presented no evidence. On 6 April 2018, the jury found Defendant guilty of possession of a firearm by a felon, maintaining a dwelling to keep a controlled substance, possession with the intent to sell or deliver marijuana, possession with the intent to sell or deliver cocaine, and possession of MDEA. Defendant then pled guilty to obstruction of justice and attaining habitual felon status.

In sentencing Defendant for his convictions following the jury verdict, the trial court determined that Defendant had ten prior conviction points, placing him at prior record level IV. The trial court consolidated those convictions into one judgment and sentenced Defendant in the presumptive range to 105 to 138 months imprisonment, with 194 days of credit for his time in pre-trial custody. The trial court imposed a concurrent sentence in the presumptive range of 6 to 17 months imprisonment for obstruction of justice.

Defendant gave oral notice of appeal.

II. ANALYSIS

A. Jury Selection

Defendant first argues that the trial court erred in ruling that the State was not purposefully removing prospective jurors because of their race, contending that the State's race-neutral reasons at trial were pretextual. We hold that Defendant has failed to demonstrate clear error.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution “forbid the use of peremptory challenges for a racially discriminatory purpose.” *State v. Barden*, 356 N.C. 316, 342, 572 S.E.2d 108, 126 (2002). Following the United States Supreme Court's opinion in *Batson v. Kentucky*, 476 U.S. 79, 96-98, 90 L. Ed. 2d 69, 87-89 (1986), we employ a three-part test to determine whether a juror has been

excused on the basis of race: (1) the defendant must make a *prima facie* showing that the State exercised a race-based peremptory challenge; (2) if the defendant makes a *prima facie* showing, the burden shifts to the State “to offer a facially valid, race-neutral explanation for the peremptory challenge,” and (3) the trial court then decides if the defendant has established purposeful discrimination. *State v. Taylor*, 362 N.C. 514, 527, 669 S.E.2d 239, 254 (2008).

In reviewing a *Batson* claim:

[T]he trial court must make specific findings of fact at each stage of the *Batson* inquiry that it reaches. This Court must uphold the trial court’s findings unless they are clearly erroneous. Under this standard, the fact finder’s choice between two permissible views of the evidence cannot be considered clearly erroneous. We reverse only when, after reviewing the entire record, we are left with the definite and firm conviction that a mistake has been committed.

State v. Headen, 206 N.C. App. 109, 114-15, 697 S.E.2d 407, 412 (2010) (quotation marks, citations, original alterations, and footnote omitted). “The ‘clear error’ standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry.” *State v. Wright*, 189 N.C. App. 346, 351, 658 S.E.2d 60, 63 (2008) (citation omitted).

Here, before *voir dire* commenced, defense counsel attempted to prevent the prosecutor from asking prospective jurors a question regarding the racial makeup of the parties involved in the case. The prosecutor explained to the trial court that,

because most of the State's witnesses were white police officers and Defendant is black, the State wanted to know, "would that issue in and of itself solely cause [any of the prospective jurors] to be unfair from one side to the other." Defense counsel contended that the State was inappropriately "highlighting race" because it had the propensity to detract the jurors from seeing Defendant "as an individual." The trial court denied defense counsel's objection and allowed the prosecutor to ask the question.

At the beginning of *voir dire*, the State asked the prospective jurors two questions: (1) "Is there anything about the sole fact that the defendant is black or African-American that would cause anyone to be unfair to one side or the other;" and (2) "[i]s there anything about the sole fact that the [majority of the] State's witness list comprises white officers that would cause anyone to be unfair to either side?" Each prospective juror answered "no" to these questions, and the State continued its line of questioning.

The State first peremptorily challenged four prospective jurors: Mr. Woods, a black male; Ms. Billings and Ms. Bonner, black females; and Mr. Janke, a white male. Defense counsel objected and argued that the State was excusing the black jurors because of their race.

At the time of the State's challenge and Defendant's objection, two prospective jurors had been dismissed for cause and ten prospective jurors remained in the jury

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box—six white and four black. Defense counsel noted that Defendant was a black male and that three out of the four of the State’s peremptory challenges were being used against all but one black prospective juror on the panel. The trial court ruled that defense counsel made a *prima facie* showing of race-based discrimination and ordered the State to explain its rationale in seeking to excuse the three black jurors.

The prosecutor explained that the State sought to excuse Mr. Woods because he expressed a belief that non-violent felons should not be prohibited from owning firearms. Defendant was a felon and was charged with possession of a firearm by a felon. The prosecutor told the court that she was concerned Mr. Woods would “overly sympathize” with Defendant.

Regarding Ms. Billings, the prosecutor explained that the State was concerned with her past experience with white police officers. Ms. Billings revealed that when she was 13 years old, white off-duty police officers “almost beat [her cousin] to death,” resulting in hospitalization for almost a year and permanent mental injuries. Ms. Billings recalled that the police officers “said [her cousin] was drunk” and that, though some legal action was taken, “there was nothing done about it because it was a black person versus white police officers.” Ms. Billings stated that she long held resentment toward police officers, but, as she got to know other “good officers,” her general “anger and bitterness” dissipated. The prosecutor noted Ms. Billings “never showed any interest [in the prosecutor’s questions] until she started to speak

about” her cousin’s violent encounter and recounted the incident “very clearly,” causing the prosecutor concern that she “would increase the burden for the State” to prove Defendant guilty.

The State’s rationale for seeking to excuse Ms. Bonner was based less on the substantive content of her answers to questions and more on her tone and demeanor. The State noted that Ms. Bonner responded tersely or non-verbally when answering the prosecutor’s questions so that the State “was unable to get a conversation out of her,” and “didn’t know really where she stood with anything.” The prosecutor explained that she “could have continued to speak to her and try to get something out of it, but I didn’t want it to appear that I was beating up on her.”

On surrebuttal, defense counsel argued that the State’s proffered race-neutral reasons were pretextual. Defense counsel noted that Mr. Woods, despite his opinions on felons owning firearms, nonetheless said he would follow the law objectively and did not “express any signs that he would be sympathetic” to Defendant. Defense counsel contended Ms. Billings was “overly specific in her ability to set aside any formed opinions about white cops and black people,” and reasoned that any fear that “she would increase [the State’s] burden of proof” was unfounded. Lastly, defense counsel argued that the prosecutor should have continued questioning Ms. Bonner because it is not “beating upon on somebody if you ask” simple questions and “inquir[e] to gain a better understanding of that person’s manifestations.”

The trial court then orally rendered the following findings of fact:

It appears to the Court, and it has been established, that there were four black jurors remaining on the panel of ten and it did appear to the Court that the remaining jurors were white; that the State exercised four peremptories after questioning all the remaining jurors; three of the four dismissed were black. There was one black man and the remaining two were black women.

The Defendant made a *prima [facie]* showing with the numbers three of ten of the panel being . . . peremptorily dismissed with one white person. The Court found that the Defendant made a *prima facie* showing and requested the legal justification from the State.

The State is required by the law to put forward the neutral justification which . . . “does not need to rise to the level of a challenge for cause” and can—“the explanation need not be persuasive or even plausible.”

The Court has determined that the explanations—as put forth for Mr. Woods, being that he did not believe necessarily or did not believe that convicted felons should be barred from keeping firearms if their convictions in the past have been non-violent[.]

[Ms. Billings], . . . the explanation put forth is that she had, indeed, had a very—had an experience at the age of 13 whereby she understood that a relative was badly beaten by the police and remained in the hospital and she knew—the relative remained in the hospital for over a year recuperating from the beating, had made a significant impact on her. This having been in the ‘70s.

Now, with [Ms. Billings], clearly relating back the circumstances surrounding it and the impact on her and her family, even though she also stated that that was a long time ago, that she now had a brother that was a police officer and she has matured.

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And, finally, [Ms. Bonner]. . . . [A]s the Court found, was very soft spoken. And the State put forward the reasons that she—her answers were very short, she seemed angry, she answered all the questions with yes-or-no answers, made little eye contact.

As did Ms. Billings except for the time that she relayed the situation with her [cousin].

The Court finds that the State has justified its—has put forward a neutral justification for these four peremptories.

At this point in time the defense offers—states that the Court needs to find that the excuses were pretextual in nature. At this point in time, the Defendant offers that Ms. Billings had more or less rehabilitated herself, Mr. Woods had said he could follow the law, and that Ms. Bonner was, I guess, not questioned sufficiently to discern whether or not she was upset about something else, not happy to be here or indeed could not, I assume, make a connection to the State.

(emphasis added). The trial court found that the State was not advancing race-based peremptory challenges and that its race-neutral reasons for excusing the three black jurors were not pretextual in nature. The four challenged jurors were subsequently excused and four new prospective jurors replaced them.

Because the trial court found that defense counsel made a *prima facie* showing of discrimination, we need not discuss the first step of *Batson*. See *State v. Hobbs*, __ N.C. App. __, __, 817 S.E.2d 779, 788 (2018) (“When a trial court finds a defendant has made a *prima facie* showing, the first prong of the analysis is satisfied.” (citing *State v. Wiggins*, 159 N.C. App. 252, 264, 584 S.E.2d 303, 312 (2003))). We address

the remaining two steps: the State's proffered race-neutral reasons for excusing the three jurors and the trial court's determination that they were not pretextual.

1. Race-Neutral Reasons

"To rebut a *prima facie* case of discrimination, the prosecution must 'articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group.' " *State v. McClain*, 169 N.C. App. 657, 668, 610 S.E.2d 783, 791 (2005) (quoting *State v. Cummings*, 346 N.C. 291, 308-09, 488 S.E.2d 550, 560 (1997)). The reasons themselves "need not 'rise to the level justifying a challenge for cause,' and need not be 'persuasive, or even plausible,'" and the State may base its rationale on its past experience and any "legitimate hunches." *State v. Cofield*, 129 N.C. App. 268, 277, 498 S.E.2d 823, 830 (1998) (citations omitted). "At this stage, the issue is the *facial* validity of the prosecutor's explanation, and absent a discriminatory intent, which is inherent in the reason, the explanation given will be deemed race-neutral." *McClain*, 169 N.C. App. at 668, 610 S.E.2d at 791.

Here, the State's explanations for excusing the three jurors consisted of: (1) Mr. Woods' opinions on allowing non-violent felons to own firearms might lead him to be sympathetic to Defendant; (2) Ms. Billings' past experience and views regarding police officers; and (3) Ms. Bonner's perceived disinterest and curtness in addressing the prosecutor's questions.

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We hold that the State's stated reasons for peremptorily challenging jurors Mr. Woods and Ms. Billings supported the trial court's finding that the challenges were, on their face, race-neutral, as they both related to Defendant's case and were not based on discriminatory intent. Defendant was charged with possession of a firearm by a felon pursuant to a search of his residence by multiple police officers, including a S.W.A.T. team.

We likewise hold that, based on the relatively low standard established by our caselaw, the State's explanation for challenging Ms. Bonner supported the trial court's finding that it was race-neutral. The State's concerns about a prospective juror's demeanor and responses to its questions have previously been upheld as a race-neutral basis for a peremptory challenge. *See State v. Smith*, 328 N.C. 99, 126, 400 S.E.2d 712, 727 (1991) (“[A] prospective juror’s nervousness or uncertainty in response to counsel’s questions may be a proper basis for a peremptory challenge, absent defendant’s showing that the reason given by the State is pretextual.”); *see also State v. McQueen*, 249 N.C. App. 543, 550, 790 S.E.2d 897, 903 (2016) (making “excessive eye contact or failure to make appropriate eye contact” can constitute a race-neutral explanation). We acknowledge, however, the risk that a prosecutor, though acting in good faith, may be unable to distinguish between racial bias and reasonable concerns about a potential juror's demeanor. *See Batson*, 476 U.S. at 106, 90 L. Ed. 2d at 94 (Marshall, J., concurring) (“A prosecutor’s own conscious or

unconscious racism may lead him easily to . . . a characterization that would not have come to his mind if a white juror had acted identically.”). Other jurisdictions have reviewed challenges based on demeanor with greater scrutiny. *See Hardy v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) (“Demeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination.”).

We next address whether the State’s race-neutral reasons were nonetheless a pretext for excusing the jurors based on their race.

2. Purposeful Discrimination

In *Batson*’s third step, “the trial court must make the ultimate determination of whether [the] defendant has established purposeful discrimination.” *State v. White*, 349 N.C. 535, 548, 508 S.E.2d 253, 262 (1998) (citation omitted). At this stage, the defendant “has a right of surrebuttal to show that the [State’s] explanations are pretextual.” *State v. Peterson*, 344 N.C. 172, 176, 472 S.E.2d 730, 732 (1996) (citation omitted).

In determining whether the defendant has shown purposeful discrimination, “the trial court should consider the totality of the circumstances.” *Cofield*, 129 N.C. App. at 279, 498 S.E.2d at 831. Factors that this Court has considered include, but are not limited to:

- (1) [T]he characteristic in question of the defendant, the victim and any key witnesses;
- (2) questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of discrimination based

upon the characteristic in question; (3) the frequent exercise of peremptory challenges to prospective jurors with the characteristic in question that tends to establish a pattern, or the use of a disproportionate number of peremptory challenges against venire members with the characteristic in question; (4) whether the State exercised all of its peremptory challenges; and, (5) the ultimate makeup of the jury in light of the characteristic in question.

State v. Carter, 212 N.C. App. 516, 526-27, 711 S.E.2d 515, 524 (2011) (citation omitted).

“The ability of the trial judge to observe firsthand the reactions, hesitations, emotions, candor, and honesty of the lawyers and veniremen during *voir dire* questioning is crucial to the ultimate determination whether the [State] has discriminated.” *Smith*, 328 N.C. at 127, 400 S.E.2d at 727-28 (emphasis added). For this reason, the “the trial court’s determination is given great deference because it is based primarily on evaluations of credibility.” *State v. Fair*, 354 N.C. 131, 140, 557 S.E.2d 500, 509 (2001) (citation omitted). “Because the trial court [is] in the best position to assess the prosecutor’s credibility, we will not overturn its determination absent clear error.” *State v. Williams*, 339 N.C. 1, 17, 452 S.E.2d 245, 255 (1994).

After careful review of the record, briefs, and counsel’s oral arguments, we are not persuaded that the trial court committed clear error in allowing the State to excuse the three prospective jurors.

Defendant argues that, although Mr. Woods expressed a view that non-violent felons should be able to own firearms, prospective jurors were not told whether

Defendant's prior felony was violent or not, so that the State's concern about Mr. Woods sympathizing with Defendant was speculative. Defendant also notes that Mr. Woods' affirmation that he would "absolutely" follow the trial court's instruction thus cut against the State's rationale for excusing him. We are not persuaded that the trial court clearly erred in finding that the State's reasoning for excusing Mr. Woods was not pretextual. The trial judge is in the best position to gauge the sincerity of a prosecutor's explanation for a peremptory challenge. *See Hernandez v. New York*, 500 U.S. 352, 365, 114 L. Ed. 2d 395, 409 (1991) ("[T]he best evidence often will be the demeanor of the attorney who exercises the challenge.").

Defendant also notes that, after Mr. Woods was excused, another prospective juror, Mr. Smith, hesitated as to whether non-violent felons should own firearms, but the State did not move to excuse him. Mr. Smith was questioned after the trial court's *Batson* determination regarding Mr. Woods, the record does not indicate Mr. Smith's race, and his hesitant response was not as concrete as Mr. Woods' statement. Our courts have held that similar characteristics among prospective jurors do not, in and of themselves, require a finding that race-neutral reasons were pretextual. *See, e.g., State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152-53 (1990); *State v. Locklear*, 349 N.C. 118, 140-41, 505 S.E.2d 277, 289-90 (1998). As such, the trial court did not clearly err in allowing the State to excuse Mr. Woods.

Regarding Ms. Billings, Defendant disputes the State's explanation that she

“never showed any interest” in answering the prosecutor’s questions before discussing her cousin’s assault by police officers. Defendant notes that Ms. Billings also talked extensively about her career as an administrative assistant. Defendant also notes that Ms. Billings said that her past bias against white police officers would not affect her impartiality as a juror. But this is precisely the scenario *Batson* and its progeny contemplated when reviewing these claims. On review, we only have the written record before us, but it is the trial court who has the superior vantage point in gauging the State’s credibility and determining whether the explanation for the challenges should be believed. *See, e.g., State v. Sessoms*, 119 N.C. App. 1, 6, 458 S.E.2d 200, 203 (1995). Defendant fails to demonstrate that the trial judge, who observed the entirety of the jury selection process, clearly erred in ruling that the State’s reason for excusing Ms. Billings was race-neutral and not pretextual.

We also are unpersuaded that the trial court clearly erred in determining that the State’s peremptory challenge to Ms. Bonner was race-neutral and not pretextual. Defendant argues that the State relied only on Ms. Bonner’s demeanor but nonetheless concedes that the North Carolina Supreme Court has held that a prospective juror’s behavior during *voir dire* is a sufficient ground for peremptory excusal. *Smith*, 328 N.C. at 126, 400 S.E.2d at 727.

The record supports the State’s rationale to the trial court. Although Defendant and the State in their briefs focus on Ms. Bonner’s responses to yes-or-no

questions, Ms. Bonner's responses to 16 additional questions from the prosecutor, many of them open-ended, were abrupt, one-word, or non-verbal answers.

Defendant's appellate counsel contended, for the first time in oral argument, that the State's attempt to excuse the fourth black prospective juror, Ms. Avery, and the trial court's sustaining Defendant's objection as to that juror, should factor into our analysis of whether the trial court clearly erred in ruling that the State did not pretextually excuse Mr. Woods, Ms. Billings, and Ms. Bonner because of their race. The United States and North Carolina Supreme Court have endorsed consideration of aggregate factors beyond those related to the individual juror whom the State seeks to excuse. *See Flowers v. Mississippi*, __ U.S. __, __, 204 L. Ed. 2d 638, 657 (2019) (holding that the history of the prosecutor's peremptory strikes in the same defendant's previous trials "strongly support[ed] the conclusion that his use of peremptory strikes in [the] sixth trial was motivated in substantial part by discriminatory intent"); *Porter*, 326 N.C. at 501, 391 S.E.2d at 152-53 ("Rarely will a single factor control the decision-making process.... [The *Batson* approach] address[es] the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State."). The State argues that the trial court's ruling on the fourth juror demonstrates that the trial judge was engaged and thoughtful in considering Defendant's objections.

We will not engage in this analysis because Defendant's counsel did not ask

the trial court to do so and did not raise this issue in his principal brief. During defense counsel's first *Batson* objection to the State's peremptory removal of Mr. Woods, Ms. Billings, and Ms. Bonner from the jury panel, the trial court asked counsel their views on whether it could revisit its ruling later on if there were other *Batson* objections. Defense counsel responded that he would "renew [his] objection." But other than the singular challenge to the State's removal of Ms. Avery, defense counsel did not raise any further *Batson* objections before the jury was impaneled or during the trial. Nor did Defendant make this argument in his principal brief. Defendant has thus abandoned this issue for appellate review. *See State v. Gardner*, 315 N.C. 444, 447, 340 S.E.2d 701, 704 (1986) ("Failure to make timely objection or exception at trial waives the right to assert error on appeal." (citations omitted)); N.C. R. App. P. 28(b)(6) (2020) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Likewise, to the extent Defendant's appellate counsel in oral argument urges us to review whether a trial court has a duty to *sua sponte* reconsider its initial *Batson* determination, that is not for us to decide in this case because it was not argued in Defendant's principal brief. In any event, nothing prevented the trial court from declaring a mistrial or granting another remedy it deemed appropriate if it later concluded that the State's peremptories against the four black jurors were "motivated in substantial part by discriminatory intent." *Snyder v. Louisiana*, 552 U.S. 472, 485,

170 L. Ed. 2d 175, 186 (2008).

Defendant further argues that the State's discriminatory intent permeated the jury selection because the prosecutor "made race an issue at the outset" of *voir dire* when she asked the prospective jurors whether Defendant's race or the fact that a majority of the State's witnesses were white police officers would affect their objectivity as jurors. The prosecutor's questions could, on the other hand, support the opposite conclusion—that the State was seeking to discover and exclude jurors who were racially biased, rather than to purposefully discriminate against black jurors. *See Smith*, 328 N.C. at 126-27, 400 S.E.2d at 727 ("[The State's rationale] permit[ted] a conclusion that [it] was primarily concerned with removing jurors who might not be able to give [the] defendant and the State a fair trial."). The record supports this inference. The prosecutor explained to the trial court that the questions were "relevant to determine whether [the] jury can be fair and impartial."

Defendant fails to show a veneer of pretext shielding any discriminatory intent by the prosecutor in her juror *voir dire*, other than that three out of the four argued peremptory challenges involved jurors of the same race as Defendant. While Defendant notes this disparity in the State's peremptory challenges, *Batson* and its progeny have long emphasized the importance of discriminatory treatment rather than disparate impact. *See Headen*, 206 N.C. App. at 118, 697 S.E.2d at 414 ("It is not enough that the effect of the challenge was to eliminate all or some

African-American jurors.” (citation omitted)); *Batson*, 476 U.S. at 93, 90 L. Ed. 2d at 85. Engaging in a numerical analysis is helpful, but it is not necessarily dispositive of purposeful discrimination. *Barden*, 356 N.C. at 344, 572 S.E.2d at 127-28. The State’s consistent questions to the jurors throughout the jury selection process do not reflect any incongruous questioning of black jurors. Notwithstanding the prosecutor’s initial questions regarding the racial makeup of the parties, none of those questions, expressly or implicitly, invoked race. Nor can we effectively consider the ultimate makeup of the empaneled jury, as the race of five of the twelve jurors and the alternate juror are unknown.¹

In light of our analysis above and the “tremendous deference accorded” to the trial court, *State v. White*, 131 N.C. App. 734, 740, 509 S.E.2d 462, 467 (1998), we hold that the trial court did not clearly err in denying defense counsel’s *Batson* objection.

B. Improper Closing Remarks

Defendant also argues that portions of the prosecutor’s closing argument were improper and deprived him of a fair trial. We disagree.

1. Statements Objected to at Trial

“The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by

¹ The remaining seven consisted of four black jurors and three white jurors.

failing to sustain the objection.” *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted). We must first determine whether the remarks were improper and, if so, whether “the trial court failed to make a reasoned decision.” *Id.*

Defendant first argues that, over his trial counsel’s objection, the State improperly remarked that Defendant used the plastic baggies found in his home to package cocaine for sale. Defendant asserts that this statement was outside of the record because no evidence was presented showing any substances were found in baggies.

Prosecutors are given wide latitude in the scope of their argument, and may argue any inference that reasonably can be drawn from the evidence presented. So long as the argument is consistent with the record and does not travel into the fields of conjecture or personal opinion, the argument is not improper.

State v. Wardrett, __ N.C. App. __, __, 821 S.E.2d 188, 194 (2018) (quotation marks, alterations, and citations omitted). Prosecutors may even craft scenarios involving the alleged crime committed if “the record contains sufficient evidence from which the scenario is reasonably inferable.” *State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 139 (2007) (quotation marks and citation omitted).

Here, the prosecutor presented to jurors “Drug dealing 101” and depicted Defendant, at his residence, storing and allocating drugs in bags for sale. This depiction was reasonably inferable. The search of Defendant’s home yielded hundreds of grams of marijuana, eight grams of cocaine, baggies, a small folding

knife, a digital scale, roughly \$4,000 in cash, and a lemonade container with a hidden compartment storing controlled substances. Officers testified that, based on their experience, the considerable amount of drugs and drug paraphernalia led them to believe Defendant was selling controlled substances. Officers also testified that, in their experience, the cocaine and marijuana were packaged in small baggies to be sold in small increments, with the weight of each bag determined by the digital scale. Defendant himself told officers that he sold marijuana and personally consumed cocaine and MDEA. On this evidence, it was not improper for the prosecutor to argue to the jury that Defendant used the baggies to store drugs.

Defendant next challenges the prosecutor's argument, in italicized part, made over the objection of Defendant's trial counsel:

How do you know that marijuana was in here? *I bet you knew marijuana was in that bag before you came into the courtroom because you could smell it down the hall. So you knew that crap was in your house, you could smell it. Your small kids could smell it. . . .*

Right? Come on. Come on. Common sense.

[Defendant] maintained that dwelling to sell drugs.

(emphasis added).

Defendant contends that these statements went beyond the evidence because no odor about the marijuana was described by any witness. The State presented overwhelming evidence that Defendant used his residence to maintain controlled

substances and that he possessed marijuana with the intent to sell or deliver. The prosecutor's references to marijuana's apparent odor were not "of such a magnitude that their inclusion prejudiced" Defendant. *Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

Defendant also asserts that the following argument to the jury, in italicized part, and made over the objection of defense counsel at trial, was improper:

[Defendant's] house was being used to maintain and to sell drugs and he did it intentionally. And all the legal circumstances lead right up to [Defendant]. [Defendant] is a drug dealer.

And his attorney told you he had eight children. And that's wonderful and it's a blessing, *but you don't get to support your kids by ruining the families in this community with the crap that you're peddling in the street.*

(emphasis added). Defendant argues that because there was no evidence that Defendant supported his children by selling drugs, the above remark traveled outside of the record and was meant to appeal to the jury's "passion and prejudice."

We are not persuaded that these statements prejudiced Defendant. Defendant told officers that he did not have a job and sold marijuana to fund his cocaine habit. It was not unreasonable for the prosecutor to infer that he sold marijuana in his community; using these proceeds to support one's children may be perceived as less condemnable than using such funds to buy cocaine. We also are not persuaded that Defendant was prejudiced by the prosecutor's comment that he was "ruining the families in this community with the crap that you're peddling." While undoubtedly

an assertion beyond the record evidence, we are not persuaded that Defendant has demonstrated that jurors would have reached a different verdict in the absence of the argument.

2. Other Jury Argument

Defendant on appeal challenges other portions of the prosecutor's jury argument made without any objection by defense counsel at trial.

The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine 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 and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Jones, 355 N.C. at 133, 558 S.E.2d at 107 (citation omitted). We therefore employ “a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial.” *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). In doing so, we consider the arguments “in context and in light of the overall factual circumstances to which they refer.” *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citation omitted).

Defendant argues that the prosecutor made a grossly improper argument to refute the argument by defense counsel that Defendant made no voluntary statements to officers. Defendant contends the following italicized comments were so grossly improper that the trial court should have intervened, even absent objection by defense counsel:

[Defense counsel] will tell you [Defendant] didn't say it because it wasn't memorialized. . . .

And if he didn't say it, why did he ask to do substantial assistance? Substantial assistance you've been charged and you're working off the charge. Well, he wouldn't sign any paperwork so that went bye-bye.

So even if the officers did present him with a signed Miranda warning he wouldn't have signed it. He's been in this game too long. The fact that it wasn't signed doesn't mean it didn't exist or it didn't happen. You are the sole judges of that.

And that's what he's banking on. . . . Did you think Detective Banks was lying? . . .

(emphasis added).

While it may have been improper for the prosecutor to discuss whether Defendant would have signed a form declaring he waived his *Miranda* rights, it was not so grossly improper that it "contaminated the trial such that [it] rendered the proceedings fundamentally unfair." *State v. Mann*, 355 N.C. 294, 308, 560 S.E.2d 776, 785 (2002). The prosecutor emphasized that officers testified Defendant waived his *Miranda* rights and that it was the jury's duty to weigh their credibility.

Defendant also contends the following italicized portion of the prosecutor's argument expressed her personal belief, was outside the evidence, and was grossly improper:

Look at this picture. Look how close everything is set up. It looks just like it. *They lived there and they sold drugs to support their family out of that house. . . .*

Do these kids look terrified? . . . Does this mom look like something happened to her kid? . . . Does she look upset as she's sitting there? No. This is just part of the game. This is part of living at [Defendant's residence]. Not phased at all.

(emphasis added).

Like the prosecutor's argument that Defendant was ruining families by peddling drugs and supporting his children with the proceeds, which we explained above was not prejudicial, even assuming the argument accusing Defendant's girlfriend was outside the record and improper, "it is not enough that the prosecutors' remarks were undesirable or universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986) (quotation marks and citations omitted).

Defendant also argues that the trial court should have intervened *ex mero motu* to stop the following argument by the prosecutor:

How do we know [Defendant] lived there? . . . *This letter to [Defendant] from one of his friends from Caledonia Correctional Institution, sent it to him—mailed December 3rd, 2015. He lived there.*

(emphasis added).

The letter addressed to Defendant was discussed in witness testimony and admitted, without objection, as proof that Defendant lived at his residence—as it displayed his name and the relevant address—for the purpose of establishing the elements of his maintaining a dwelling charge. The information that the envelope was sent to Defendant by a friend of his in prison was hearsay—an out-of-court statement used to prove the truth of the matter. But other evidence, including officers’ surveillance of Defendant, showed that Defendant lived at the residence. Also, in light of overwhelming evidence that Defendant, already a convicted felon, was selling drugs from his home, argument about the letter’s source was not so prejudicial as to require the trial court to intervene. *See State v. Thompson*, 118 N.C. App. 33, 42, 454 S.E.2d 271, 276 (1995) (“Overwhelming evidence of guilt may render constitutional error harmless.” (citation omitted)).

Defendant finally argues that the prosecutor improperly asserted her personal beliefs when she stated as fact that he was “guilty” and a “drug dealer.” Prosecutors are prohibited from proclaiming their personal beliefs as to a defendant’s guilt in closing arguments. N.C. Gen. Stat. § 15A-1230(a) (2017). But the prosecutor’s violation of this prohibition does not render the argument grossly improper if it also relates to “the strength of the evidence to the theories under which [the] defendant [is] being prosecuted and which [will] be presented shortly to the jury on the verdict sheets.” *State v. Waring*, 364 N.C. 443, 500, 701 S.E.2d 615, 651 (2010). Although

the prosecutor did assert a personal belief, she consistently discussed the requirements to convict Defendant for his charged crimes and the evidence that the State presented. As such, these improper comments were not so grossly improper as to require intervention by the trial court.

C. Miscalculation at Sentencing

Defendant also argues that the trial court erred in calculating that he had ten prior conviction points and sentencing him at prior record level IV. The State concedes, and we agree, that the trial court should have found that he had eight prior conviction points and sentenced him at prior record level III.

We review *de novo* the determination of a defendant's prior record level for sentencing purposes. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). Although defense counsel did not object to this sentencing error, this issue is preserved by law for appellate review. *State v. Green*, __ N.C. App. __, __, 831 S.E.2d 611, 614 n.2 (2019) (citations omitted).

In sentencing a defendant, the trial court must first determine the offender's prior record level "by calculating the sum of the points assigned to each of the offender's prior convictions." N.C. Gen. Stat. § 15A-1340.14(a) (2017). Although the State bears the burden of proving that the offender committed the prior conviction by a preponderance of the evidence, *id.* § 15A-1340.14(f), prior convictions can be proven by, among other independent methods, stipulation of the parties. *Id.* §

15A-1340.14(f)(1). Here, while Defendant stipulated to the trial court's prior record level worksheet, we have held that a defendant cannot stipulate to an incorrect prior record level because it is a conclusion of law that we review *de novo*. *State v. Harris*, 255 N.C. App. 653, 662-63 n.3, 805 S.E.2d 729, 736 n.3 (2017) (citations omitted).

Because Defendant was sentenced above the presumptive range for a Class C, prior record level III offender, N.C. Gen. Stat. § 15A-1340.17(c), he was prejudiced by the trial court's error. *See State v. Ballard*, 244 N.C. App. 476, 477, 781 S.E.2d 75, 77 (2015) (“[A]n erroneous record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct record level.” (citation omitted)). We thus vacate the trial court's sentencing judgment and remand for resentencing.²

D. Ineffective Assistance of Counsel

In Defendant's first trial, his counsel filed a pretrial motion to suppress along with a supporting affidavit contending that Defendant did not freely, voluntarily, and knowingly waive his *Miranda* rights. However, counsel did not argue the motion before the trial court declared a mistrial. At Defendant's second trial, defense counsel only motioned to disclose the identity of the State's confidential informants and did not argue any suppression motion. Defendant now argues that he was denied effective counsel because his attorney failed to motion to suppress officer testimony

² Defendant does not argue that the judgment for his obstruction of justice conviction be resentenced.

that he waived his *Miranda* rights following the search of his residence. Because the record lacks the necessary material for us to conduct appellate review, we dismiss Defendant's claim without prejudice.

"Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal." *State v. Allen*, __ N.C. App. __, __, 821 S.E.2d 860, 861 (2018). Although we have previously addressed IAC claims on direct appeal, *Fair*, 354 N.C. at 166-67, 557 S.E.2d at 525, we have expressed reluctance in the past to review such claims that are "based on evidence admitted at trial after counsel's failure to obtain a suppression hearing." *State v. Rivera*, __ N.C. App. __, __, 826 S.E.2d 511, 521 (2019). Direct review of these claims "is not appropriate unless it is clear that an MAR proceeding would not result in additional evidence that could influence our decision on appellate review." *Id.* at __, 826 S.E.2d at 522.

Here, because there was insufficient evidence presented at trial surrounding the reading of Defendant's *Miranda* rights and his subsequent waiver of them, we cannot adequately review this issue. *See State v. Long*, 354 N.C. 534, 540, 557 S.E.2d 89, 93 (2001) (reasoning that the "evidentiary issues may need to be developed before" the defendant could "adequately raise" his IAC claim). We therefore dismiss Defendant's IAC claim without prejudice to enable him to file a motion for appropriate relief. *See, e.g.*, N.C. Gen. Stat. § 15A-1415(b)(3) (2017).

III. CONCLUSION

In sum, we hold that Defendant has failed to demonstrate reversible error as to his challenges that the prosecutor was improperly excusing jurors for their race and that she made improper statements during closing argument. We vacate the trial court's sentencing judgments and remand for resentencing at the correct prior record level. Furthermore, we dismiss without prejudice Defendant's IAC claim so he can file a motion for appropriate relief.

NO ERROR IN PART; VACATED AND REMANDED IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges ARROWOOD and BROOK concur.

Report per Rule 30(e).