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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 18-1254

Filed: 19 May 2020

Guilford County, No. 16 CRS 92606, 16 CRS 92616, 17 CRS 24032

STATE OF NORTH CAROLINA

v.

TRAVIS LASHAUN WATSON, Defendant

Appeal by Defendant from judgment entered 1 March 2018 by Edwin G. Wilson, Jr., in Superior Court, Guilford County. Heard in the Court of Appeals 6 August 2019.

*Attorney General Joshua H. Stein, by Michael E. Bulleri, for the State.*

*Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for Defendant.*

McGEE, Chief Judge.

I. Factual and Procedural History

Jazmyn Brantley (“Ms. Brantley”), assistant manager of the Family Dollar drugstore on East Cone Boulevard in Greensboro, North Carolina, was working the cash register on 22 December 2016, when, as she later testified, a man entered the store and walked around for about ten minutes. Ms. Brantley testified the man was

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wearing the hood of his jacket drawn over his head, a ball cap, sunglasses, and fake dreadlocks. After walking up to the counter, the man leaned over, pulled a gun on Ms. Brantley, and demanded the money in the safe and the cash register. Ms. Brantley testified the store was well lit and she could see the man's face and, in court, she identified Travis Lashaun Watson ("Defendant") as the man in the store. She also testified the gun she was threatened with was "an old revolver with brown on it." Ms. Brantley testified she did not open the safe, and instead punched a dummy code that "prolong[ed] the safe from opening." At that point, the man said "he'll blow [her] mouth off if [she] was to call the cops." Ms. Brantley testified he was getting impatient and "call[ing] her all type of B words and stuff" because "it was taking too long." When she did not open the safe, the man said "just give him the money out of the register." Meanwhile, Ms. Brantley's boyfriend, who was also in the store, was on the phone calling the police. Ms. Brantley gave the man the money from the cash register and he left the store. She testified the robbery took around seven minutes.

Corporal J.A. Sink ("Corporal Sink") of the Greensboro Police Department responded to the call received on 22 December 2016 at 9:02 a.m. He met Ms. Brantley at the Family Dollar and recorded an interview with her on his body camera. Ms. Brantley said the gun used in the robbery appeared to be "dusty." Although an investigator attempted to take fingerprints at the crime scene, the State and Defendant stipulated there was no match of Defendant's fingerprints.

Two days after the robbery, on 24 December 2016, the Greensboro Police Department responded to a call from Patrick Marshall, Defendant's brother, alleging that Defendant had assaulted him. Mr. Marshall told an Emergency Medical Technician at the scene that Defendant had robbed the Family Dollar and that the wig, clothing, and gun used were in Defendant's apartment.

Detective William Tyndall ("Detective Tyndall") investigated the Family Dollar robbery for the Greensboro Police Department. After confirming what Mr. Marshall said with the EMT, Detective Tyndall had Detective Eric Miller ("Detective Miller") arrange a lineup of photographs of six individuals, including one of Defendant, for Ms. Brantley to attempt to identify the man who robbed the store. When presented with the lineup, Ms. Brantley identified Defendant as the man who robbed the store, saying she "was about 70 percent sure" it was him. Detective Miller testified he recorded Ms. Brantley as saying "[i]t could be him, but he had more facial hair. I recognize his lips." He confirmed that Ms. Brantley had a 70 percent level of confidence that Defendant was the perpetrator during the lineup. Later at trial, Ms. Brantley testified she was "100 percent sure" Defendant was the man who robbed the store.

Detective Tyndall also met with a resident of the apartment complex where Defendant and Mr. Marshall both lived. The search warrant later issued stated "the resident also concurred that the subject in the [surveillance] photographs [taken from

the Family Dollar] looked like [Defendant].” After searching North Carolina Department of Motor Vehicle records, Detective Tyndall learned Defendant owned a 1997 Acura and confirmed Defendant’s residential address.

Based on the information obtained during his investigation, including Ms. Brantley’s identification of Defendant in the photographic lineup and the identification of Defendant by his neighbor, Detective Tyndall obtained an arrest warrant for Defendant for robbery with a dangerous weapon.

Officer Natalie Altizer (“Officer Altizer”) and other officers of the Greensboro Police Department served the arrest warrant on Defendant at his residence for the Family Dollar robbery and took him into custody on 29 December 2016. Carla Morris (“Ms. Morris”), Defendant’s girlfriend, was also at the residence. Ms. Morris was asked to remain at the residence until Detective Tyndall returned with a search warrant for Defendant’s house and car. Once Detective Tyndall arrived with the search warrants, Detective Tyndall and Officer Altizer searched the apartment. During the search, officers found a .38 caliber revolver in the bag of a vacuum cleaner and Detective Tyndall found .38 caliber bullets in a bag in the trunk of Defendant’s car. Ms. Morris said the gun found in the vacuum bag was hers.

Detective Tyndall and Detective Nick Ingram (“Detective Ingram”) later interviewed Defendant. Detective Ingram read the transcript of the recorded interview to the jury at trial. According to the interview transcript, Detective Tyndall

told Defendant during the interview that he “searched [Defendant’s] residence” and “found the gun that was used in the robbery.” Defendant denied the revolver found at Defendant’s residence was used in the robbery, but admitted to owning it, saying he owned it “[s]ince a . . . young Blood [gang member] started coming over there and giving [him] issues.”

The detectives also asked Defendant where he was during the time of the robbery on 22 December 2016. Defendant said “if we [(i.e. he and Ms. Morris)] didn’t get up and go to the gym, we was in the bed.” Defendant told the detectives they went to the Gold’s Gym. The officers also seized Defendant’s shoes, which resembled those worn by the perpetrator in the surveillance footage. Additional facts will be discussed as needed to resolve the issues presented in our analysis.

Defendant was indicted for robbery with a dangerous weapon, possession of a firearm by a felon, and being a habitual felon. Before trial, Defendant filed a *pro se* motion to dismiss the charges on the grounds that he was improperly transferred from a jail to a state correctional facility. This motion was heard by Judge John O. Craig, III, in Superior Court, Guilford County, on 16 November 2017. The trial court determined it did not have jurisdiction over Defendant’s motion to dismiss. On 22 November 2017, Defendant also filed a motion to suppress all evidence obtained through the search of Defendant’s residence and vehicle, which was later denied by

Judge Edwin G. Wilson, Jr., the trial court judge. Judge Wilson entered a written order denying the motion to suppress on 21 March 2018.

At the conclusion of trial, on 1 March 2018, the jury returned verdicts of guilty for robbery with a dangerous weapon, possession of a firearm by a felon, and being a habitual felon. Defendant received his sentence and gave oral notice of appeal that day.

## II. Analysis

Defendant argues four issues on appeal: (1) the trial court erred in denying Defendant's motion to suppress evidence obtained during the search of his residence; (2) the trial court erred in denying Defendant's *pro se* motion to dismiss; (3) Detective Ingram's testimony about what he learned from the Gold's Gym manager was inadmissible hearsay; and (4) the trial court erred or plainly erred by permitting the State to introduce copies of personal correspondence written by Defendant while he was in jail. We consider these issues in turn.

### 1. Defendant's Motion to Suppress

Defendant first argues the trial court erred in denying his motion to suppress the search of his residence. Defendant specifically argues the search warrant was deficient because it was based in part on "triple hearsay" and that the supporting "affidavit failed to present sufficient credible evidence to the magistrate, and therefore the motion to suppress should have been allowed." Defendant further

argues the protective sweep conducted by officers during and immediately following Defendant's arrest was not reasonable under the circumstances.

We note the State argues Defendant has waived this argument. The State contends Defendant "did not renew [his pretrial] motion [to suppress] at trial by objecting to the admission of the challenged evidence." The State argues, citing caselaw from this Court and our Supreme Court, that "[b]ecause Defendant failed to renew his motion to suppress at trial, this issue is not preserved on appeal."

After reviewing the record and transcript of the trial proceedings, we hold Defendant has waived appellate review of the trial court's denial of his motion to suppress. Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure provides that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2017). Our Supreme Court "has consistently interpreted [the Rule] to provide that a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (emphasis in original) (citations omitted).

As this Court noted in the analogous case of *State v. Hargett*, 241 N.C. App. 121, 772 S.E.2d 115 (2015), in *Oglesby* itself, the Supreme Court addressed the

question of whether “a defendant should be barred from raising this issue [error in the denial of a motion to suppress evidence] on appeal since he did not renew his objection at trial and has not argued, alternatively, that the trial court committed plain error by allowing the [challenged evidence] entered into evidence.” *Hargett*, 241 N.C. App. at 124-25, 772 S.E.2d at 119 (alterations in original) (quoting *Oglesby*, 361 N.C. at 553-54, 648 S.E.2d at 821 (internal citations omitted)).

In the present case, Defendant filed a pretrial motion to suppress evidence gathered from the search of his residence, “including, but not limited to, a firearm, photograph(s) of Defendant or others, and the statements of Defendant and others gained through the use of information discovered during the illegal search . . . .” However, Defendant only made this motion before trial. When the State introduced the evidence challenged in Defendant’s pretrial motion to suppress at trial, including the gun and photographs taken at the residence, Defendant did not object. Indeed, the trial court reminded Defendant’s counsel during trial that “any of the rulings I made yesterday [at the *in limine* hearing] that you disagree with, I know you may need to make them [(i.e. the objections)]—you know, make them again during the trial.” Despite the longstanding caselaw that “a trial court’s evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial[.]” Defendant failed to object to the evidence during trial. *Oglesby*, 361 N.C. at 554, 648 S.E.2d at 821 (emphasis in



original) (citations omitted). Therefore, Defendant's appeal of the trial court's denial of his motion to suppress evidence arising from the search is not preserved.

Moreover, Defendant has failed to argue on appeal that the trial court plainly erred in denying his motion to suppress. North Carolina Rule of Appellate Procedure 10(a)(4) entitles an appellant to review for plain error if "the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2017). However, if the appellant does not "specifically and distinctly" contend the judicial action to be plain error in the brief, the argument is not properly before this Court. *See State v. Golphin*, 352 N.C. 364, 410, 533 S.E.2d 168, 198-99 (2000), *cert. denied*, 532 U.S. 931, 149 L.Ed.2d 305 (2001). Therefore, appellate review of the trial court's denial of Defendant's motion to suppress for plain error is also waived.

## 2. Defendant's Pro Se Motion to Dismiss

Defendant next argues the trial court erred in denying his *pro se* motion to dismiss. Defendant cited N.C. Gen. Stat. § 15-A 1368.6(b) (2017) in the motion, arguing he was denied the opportunity for a preliminary hearing and improperly imprisoned, and "move[d] the [trial c]ourt to [d]ismiss all and any N.C. criminal charges that are pending, relating of the current imprisonment and detention." At a hearing in Superior Court in Guilford County, Defendant's appointed counsel, Thomas Kobrin ("Mr. Kobrin"), raised the issue of Defendant's motion to dismiss and

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asked the trial court to permit Defendant to argue the motion himself. The District Attorney argued the Defendant's transfer from the Guilford County jail to a state prison, which Defendant complained of in his motion to dismiss, was the result of "the Department of Public Safety activat[ing] the nine months that they had suspended at the end of his [previous] sentence . . . ."

Defendant spoke at the hearing and said that under N.C.G.S. § 15A-1368.6(b), he was entitled to a preliminary hearing on any post-release supervision violation "within seven working days of arrest[.]" while Defendant was held in jail for four months before being transferred to a correctional facility without such a hearing. At the hearing on the motion, Defendant also cited the United States Supreme Court decision *Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed.2d 484 (1972), in support of his position. Defendant also acknowledged that he signed a "form TC18C" that waived his right to a preliminary hearing within seven days, effectively placing it on hold. While "conced[ing] that [Defendant] may have a legitimate argument to make[.]" the trial court concluded "the argument . . . would have to be made before the Department of Public Safety and the Parole Commission" because "th[e] post-release supervision violation is something that is outside the jurisdiction of the superior court."

On appeal, Defendant asserts the trial court "basically did not rule on the issue" and "that the trial court erred in finding it did not have jurisdiction to rule on

[Defendant's] motion, in failing to address his motion to dismiss the charges, and in failing to dismiss the charges.”

The State responds that “Defendant divested the trial court of the power to conduct a revocation hearing by waiving his right to a preliminary hearing.” N.C. Gen. Stat. § 15A-1368.6 (2017) governs “[a]rrest and hearing on post-release supervision violation.” N.C.G.S. § 15A-1368.6(b) provides as follows:

Unless the [final revocation] hearing . . . is first held or a continuance is requested by the supervisee, a preliminary hearing on supervision violation shall be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a supervisee to determine whether there is probable cause to believe that the supervisee violated a condition of post-release supervision.

Furthermore, N.C. Gen. Stat. § 15A-1368.6(c) provides that “[t]he preliminary hearing on post-release supervision violation shall be conducted by a judicial official, or by a hearing officer designated by the [Post-Release Supervision and Parole] Commission.”

In the present case, Defendant claimed he signed a form “to place a Post Release Supervision Preliminary Hearing on Hold” in his motion to dismiss. At the hearing, however, Defendant stated that through the form he “waive[d]” his hearing and also that he “postponed” it. As the form is not in the record, we cannot determine whether Defendant waived a preliminary hearing, as the State argues, or merely placed it on hold. While the Superior Court might have had jurisdiction to hold a preliminary hearing as a “judicial official” under the statute, neither Defendant’s

motion to dismiss nor his argument in the hearing on the motion indicates that he requested the Superior Court to hold such a hearing as a remedy. Rather, Defendant “move[d] the [trial c]ourt to [d]ismiss all and any N.C. criminal charges that are pending, relating of the current imprisonment and detention.”

The State further argues—and we agree—that “Defendant does not cite to, and the State is not aware of, any case law that provides for the dismissal of unrelated charges when a defendant’s due process rights are violated during post-release proceedings.” Whether the trial court had jurisdiction to hold a preliminary hearing or not, dismissal of the charges at issue here is not an appropriate remedy, and the trial court’s oral finding it lacked jurisdiction was, in effect, a ruling denying Defendant’s motion to dismiss. Therefore, we hold the trial court did not err in denying Defendant’s motion to dismiss for lack of jurisdiction and, alternatively, assuming *arguendo* it did err, we hold any error was harmless.

### 3. Defendant’s Objection to Alleged Hearsay Statements

Defendant next argues the trial court erred by overruling his objection to inadmissible hearsay testimony by Detective Ingram about what the detective learned from the manager of Gold’s Gym. We disagree. This Court reviews the trial court’s determination as to whether a statement is hearsay *de novo* on appeal. *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (2011) (citation omitted).

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Detective Ingram testified on direct examination about his interview with Defendant, reading the transcript of the interview into evidence, including multiple instances where Defendant said he was at Gold's Gym when the robbery occurred. When asked on direct examination whether he contacted Gold's Gym about Defendant, Detective Ingram testified he did. On the final question of cross-examination, Defendant's counsel asked Detective Ingram "did you ever pull the security videos from Gold's Gym[.]" to which he replied, "I did not." In response, the State conducted a redirect examination of Detective Ingram, which proceeded as follows:

Q: Why didn't you pull the videos from Gold's Gym?

A: I made telephone contact with Gold's Gym.

[Defendant's counsel]: Object for hearsay.

The Court: Overruled

Q: You can answer.

A: I made telephone contact with Gold's Gym and spoke with a manager at that location who advised me that [Defendant] had not been a member there since June of 2016 and that Ms. Morris had never been a member there. The person I spoke with at Gold's Gym was actually able to check the entire Gold's Gym database and said that Ms. Morris had never been a member at Gold's Gym and, again, [Defendant] had not been since June of 2016.

N.C. Gen. Stat. § 8C-1, Rule 801(c) (2017) states hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "However, out-of-court

statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay.” *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). “In particular, statements of one person to another to explain subsequent actions taken by the person to whom the statements were made are admissible as non-hearsay evidence.” *Castaneda*, 215 N.C. App. at 147, 715 S.E.2d at 293 (citing *State v. Coffey*, 326 N.C. 268, 282, 289 S.E.2d 48, 56 (1990)).

In the present case, the State argues Detective Ingram’s testimony about his call with the manager at Gold’s Gym was not hearsay because it was offered to explain the detective’s subsequent actions. We agree. On cross-examination, Defendant’s counsel asked whether Detective Ingram obtained the security videos from Gold’s Gym, a question that implies the detective did not complete a thorough investigation. The State conducted a redirect examination to rehabilitate the witness and Detective Ingram’s response explained why it was not necessary to his investigation for him to pull the security videos: because he had already obtained the information he needed from the call—that Defendant was not a member of the gym.

We find this Court’s decision in *State v. Cardenas*, 169 N.C. App. 404, 610 S.E.2d 240 (2005), upon which the State relies, persuasive. In *Cardenas*, the defendant “questioned [a detective] extensively about the events and evidence which led to the investigation and arrest of [the] defendant[.]” including “his investigation of and conversation with [an informant].” *Cardenas*, 169 N.C. App. at 407, 610 S.E.2d

at 243. This Court noted that “[t]he transcript indicates [the] defendant’s trial strategy may have been to question the thoroughness and validity of [the detective’s] investigation and to proffer evidence to show [the informant’s] bias and motive in exchange for providing information about [the] defendant.” *Id.* Subsequently, “[o]n redirect, the State asked [the detective] about the conversation with [the informant] which spurred the investigation of [the] defendant.” *Id.* The defendant objected, arguing it was hearsay, and the trial court overruled the objection but offered a limiting instruction. *Id.* at 408, 610 S.E.2d at 243. On appeal, this Court held the trial court did not err in overruling the hearsay objection because the defendant “‘opened the door’ to this line of questioning by cross-examining [the detective] concerning [the informant’s] credibility and evidence that led the detectives to [the] defendant[,]” and because “the testimony was not ‘offered for the truth of the matter asserted[,]’” but “was intended to explain the detectives’ subsequent conduct.” *Id.* at 408, 610 S.E.2d at 243.

In the present case, as in *Cardenas*, Defendant “opened the door” by pursuing a trial strategy of questioning “the thoroughness and validity” of Detective Ingram’s investigation through his questioning of whether he followed up on obtaining the security camera footage. *Cardenas*, 169 N.C. App. at 407, 610 S.E.2d at 243. As in *Cardenas*, Detective Ingram’s testimony about his conversation with the Gold’s Gym

manager was offered to explain his subsequent conduct in his investigation by choosing not to request the security footage.

Defendant's argument that the testimony concerned "what [Detective Ingram] did not do as opposed to explaining his subsequent actions" is unpersuasive. Deciding not to pursue a particular lead is as much "subsequent conduct" as deciding to pursue that lead, and in both instances, testimony concerning out-of-court statements that is necessary to explain that decision is not hearsay because it is not offered for the truth of the matter asserted. Defendant's attempt to distinguish *Cardenas* by arguing that "Detective Ingram's testimony about the Gold's Gym contact was not about what he did, but what the manager told him after reviewing the business records" is similarly unavailing. In the present case, the testimony about the manager's statement that Defendant and Ms. Morris were not members of Gold's Gym was necessary to explain why Detective Ingram did not believe it was necessary to request the security footage. Whether they in fact were members or not was irrelevant. The trial court properly overruled Defendant's hearsay objection.

4. Defendant's Correspondence Obtained from the Jail

Defendant argues the trial court "erred and plainly erred by allowing the State to introduce, over objection, copies of personal letters written by the defendant which the jailer allowed a detective to copy at the jail prior to said letters being mailed to the recipients." Defendant makes two arguments concerning the letters: (1) the



letters were not properly authenticated by the State, and (2) the copying of the letters obtained through the jail by a detective violated Defendant's constitutional rights.

A. Authentication of the Letters by the State

Defendant first argues the trial court erred in admitting the letters into evidence because they were not properly authenticated by the State. On appeal, we review a trial court's ruling determining that a document has been sufficiently authenticated *de novo*. *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) (citation omitted).

N.C. Gen. Stat. § 8C-1, Rule 901 (2017) states "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "Rule 901 does not require the proponent of evidence to conclusively prove that tendered documents or electronic evidence is definitively a record, only that the evidence is relevant for the jury to conclude that it is authentic." *Crawley*, 217 N.C. App. at 516, 719 S.E.2d at 637. This Court summarized the rules governing authenticity of handwriting in *State v. Owen*, 130 N.C. App. 505, 503 S.E.2d 426, *disc. rev. denied*, 349 N.C. 372, 525 S.E.2d 188 (1998):

[I]t is a well-settled evidentiary principle that a jury may compare a known sample of a person's handwriting with the handwriting on a contested document without the aid of either expert or lay testimony. However, before handwritings may be submitted to a jury for its comparison, the trial court must satisfy itself that there is enough similarity between the genuine handwriting and the disputed

handwriting, such that the jury could reasonably infer that the disputed handwriting is also genuine.

*Owen*, 130 N.C. App. at 509, 503 S.E.2d at 429 (internal citations and quotation marks omitted).

In the present case, when the State sought to introduce the letters, the trial court held a *voir dire* hearing to determine whether the letters could be sufficiently authenticated to admit them into evidence. Detective Aliza Alston (“Detective Alston”) with the Greensboro Police Department testified during the hearing that on 11 March 2017, she asked a lieutenant at the Guilford County Jail, where Defendant was confined at the time, to hold letters written by Defendant. She testified she first picked up a group of papers on 3 April 2017, which were photocopies of letters written by Defendant and addressed to Defendant’s mother and his girlfriend, Ms. Morris, with a return address to Defendant, and another letter addressed to Ms. Morris on 10 April 2017. Detective Alston read the contents of the letters during *voir dire*, which were addressed to “Ma,” “Carla Baby,” and “Baby,” and which provided instructions on how Defendant’s mother and Ms. Morris were to coordinate their testimony, detailed instructions for Ms. Morris to testify as to how the revolver seized at Defendant’s residence was hers, detailed instructions for Ms. Morris to obtain forged discharge papers from an employee at Moses Cone Hospital that would serve

as an alibi for the robbery, and included the letter Ms. Morris was to deliver to the hospital employee.

The State provided a handwriting sample from Defendant by which the trial court could compare the handwriting in the photocopied letters. During *voir dire*, Lisa Harmon (“Ms. Harmon”), an employee of the Clerk of Superior Court of Guilford County, testified she was a “custodian of the courthouse records and files that come through this courthouse” and testified that a notarized letter signed by Defendant was in the Superior Court file in the name of Defendant. At the conclusion of *voir dire*, the trial court ruled that, based on Detective Alston’s testimony she picked up the photocopied letters, the similarity and uniqueness of the handwriting, Defendant’s presence at the jail and the absence of codefendants who would have incentive to frame Defendant, and because there is “a process or system that we know how letters are written in the jail and picked up,” that the letters would be admitted to evidence.

Defendant argues the letters could not be sufficiently authenticated because “no jailer actually testified as to how the letters came into their possession, the jail mail procedures, or the chain of custody until turned over to the detective.” We disagree. Establishing a chain of custody is not an independent, additional condition of establishing a matter is what it claims to be. N.C.G.S. § 8C-1, Rule 901(b), “[b]y way of illustration only, *and not by way of limitation*” provides a list of “examples of

authentication or identification conforming with the requirements” of Rule 901. N.C.G.S. § 8C-1, Rule 901(b) (emphasis added). Testimony establishing chain of custody is but one nonexclusive method of establishing authenticity, and other types of authentication suffice to conform with the requirements under Rule 901. For instance, authenticity may be established by “[c]omparison by the trier of fact or by expert witnesses with specimens which have been authenticated.” N.C.G.S. § 8C-1, Rule 901(b)(3).

In *State v. Owen*, cited by the State, this Court held the trial court, having determined that a signature on another exhibit was properly authenticated, could determine there was sufficient similarity between the handwriting of that and a signature on a disputed note to submit the exemplar document and the contested document to the jury. *Owen*, 130 N.C. App. at 509-10, 503 S.E.2d at 429-30. Moreover, under Rule 901, authentication may be established through “Distinctive Characteristics and the Like[.]” such as “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” N.C.G.S. § 8C-1, 901(b)(4).

The State also cites *State v. Young*, where this Court held the trial court did not err in admitting a contested letter as being sufficiently authenticated, where, although the co-defendant witness testifying to the authenticity of the letter from the defendant lacked familiarity with the defendant’s handwriting as required by Rule

901(b)(2), the content of the letter contained intimate knowledge of the crime, unique names the defendant and co-defendant used to refer to each other, and had a return address to the defendant, permitting an inference of authenticity under Rule 901(b)(4). *State v. Young*, 186 N.C. App. 343, 353-54, 651 S.E.2d 576, 583 (2007).

In the present case, although there was no direct testimony about the process for copying mail at Guilford County Jail and the chain of custody in delivering the photocopies to Detective Alston, the trial court properly concluded the exemplar document in custody of the Clerk of Superior Court was both genuine and sufficiently similar to the handwriting in the letters that both the exemplar and the disputed letters could be submitted to the jury under Rule 901(b)(3). *See Owen*, 130 N.C. App. at 509-10, 503 S.E.2d at 429-30. Moreover, the content of the letters displayed intimate knowledge of the crime, pet names for Ms. Morris, and other information, such as Defendant's correct date of birth, that the letters were sufficiently authenticated to satisfy the requirements of Rule 901 through distinctive characteristics and the like under Rule 901(b)(4). *See Young*, 186 N.C. App. at 343-54, 651 S.E.2d at 583. There was ample evidence for the trial court to properly conclude "that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901.

**B. Constitutional Challenges to Interception of Defendant's Mail in Jail**

Defendant next argues that the trial court erred in admitting the letters into evidence because the “interception of his letters” while in jail violated Defendant’s First and Fourth Amendment rights. Defendant concedes he raises this constitutional challenge for the first time on appeal, but argues that he is entitled to plain error review as these constitutional challenges are to the admissibility of evidence. *See State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (“Plain error analysis applies to evidentiary matters and jury instructions.”). Our Supreme Court has summarized the rules governing plain error review as follows:

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

In this case, Defendant argues the opening and copying of his admittedly nonlegal outgoing mail by the Guilford County Jail violated his First and Fourth Amendment rights. Defendant cites *Altizer v. Deeds*, 191 F.3d 540 (4th Cir. 1999), in which the Fourth Circuit held “the opening and inspecting of an inmate’s outgoing mail is reasonably related to legitimate penological interests, and, therefore, constitutional[.]” *Id.* at 547-48. Although not controlling, we note this case is

contrary to Defendant's argument. Defendant also cites *State v. Kennedy*, 58 N.C. App. 810, 294 S.E.2d 770 (1982), and *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002). In *Wiley*, our Supreme Court held as follows:

When a prisoner or pretrial detainee is made aware that his nonlegal mail will be subjected to official scrutiny before reaching its intended recipient, pursuant to institutional policies to maintain order and safety, the inmate's constitutional rights are not violated by the subsequent examination of such mail because he or she has no reasonable expectation of privacy in it. Furthermore, because the prison officials had the right to examine these letters, "there is no rule 'requiring them to close their eyes to what they discover.'" Copying and forwarding such letters thus does not violate Fourth Amendment prohibitions.

*Wiley*, 355 N.C. at 604-05, 565 S.E.2d at 33 (internal citation omitted). Defendant argues that, because there is no evidence in the record that the Guilford County Jail had a policy for opening and searching outgoing mail of which inmates were on notice, the present case is distinguishable from *Wiley* and it is a question of first impression "whether there was a legitimate penological interest in intercepting and copying [Defendant]'s letters under the facts and circumstances of this case . . . ."

While we agree this case presents a distinct factual scenario from *Wiley*, we need not decide whether the trial court erred in admitting the letters into evidence because they violated Defendant's constitutional rights, because Defendant cannot show any error was plain error. Defendant must show any "error had a *probable* impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (emphasis in original) (citation omitted). Given the ample

evidence besides the letters from which the jury could conclude that Defendant committed the robbery with a dangerous weapon, Defendant cannot show that any error had a probable impact on the verdict. Evidence presented to the jury establishing Defendant's responsibility for the crime included: security footage; Ms. Brantley's original identification of Defendant in the photographic lineup and her in-court identification of Defendant; the distinctive revolver seized from the bag of the vacuum cleaner in Defendant's home that precisely matched the description given by Ms. Brantley and the security footage; Defendant's admission in the interview with detectives that he purchased the gun discovered in his home; and photographs of Defendant's shoes, which matched the shoes in the security footage, as well as photographs of Defendant wearing goggle sunglasses matching those used during the robbery. Because of this substantial evidence that Defendant committed the offense charged, Defendant cannot show any error in admitting the letters had a probable impact on the jury's finding him guilty.

### III. Conclusion

In summary, we hold that (1) Defendant waived his argument the trial court erred in denying his motion to suppress by failing to timely object and also failed to specifically argue plain error on appeal; (2) the trial court did not err in denying Defendant's *pro se* motion to dismiss as he waived the right to a preliminary hearing and, assuming he did not, was not entitled to dismissal of the charges; (3) the trial



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court did not err in permitting Detective Ingram to testify about his conversation with the gym manager because the out-of-court statements were offered to explain his subsequent actions; and (4) the trial court did not err in admitting the letters written by Defendant in jail because they satisfied Rule of Evidence 901's authentication requirement, and the trial court did not plainly err in admitting the letters despite any constitutional violations that might have resulted, as Defendant could not show any alleged error had a probable impact on the jury's determination. After considering Defendant's arguments in full, we find no error.

NO ERROR.

Judges BERGER and COLLINS concur.

Report per Rule 30(e).