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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-477

No. COA20-156

Filed 7 September 2021

Iredell County, Nos. 13 CRS 052197, 13 CRS 052198, 19 CRS 42

STATE OF NORTH CAROLINA

v.

NATHANIEL LEE JOYNER, Defendant.

Appeal by Defendant from judgment entered 25 April 2019 by Judge Lori I. Hamilton in Iredell County Superior Court. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Margaret A. Force, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant appeals from judgments entered following a jury trial finding him guilty of first-degree kidnapping, statutory rape, indecent liberties with a child, and attaining habitual felon status. On appeal, Defendant contends that the trial court erred in depriving him of an impartial trial and admitting certain evidence without

a detailed chain of custody. After careful review, we hold Defendant has failed to demonstrate error.

I. FACTS & PROCEDURAL BACKGROUND

¶ 2 The evidence presented at trial tends to show the following:

¶ 3 On 25 April 2010, Defendant saw T.P. (“Tori”), a fourteen-year-old girl, walking around the Park Drive neighborhood of Statesville, North Carolina, where Tori lived with her mother, L.P. (“Ms. Pope”).¹ Defendant offered to give Tori a ride to Taylorsville, North Carolina, promising her cigarettes and beer. Tori took Defendant up on the offer.

¶ 4 Instead of taking Tori to Taylorsville, Defendant drove her to his home on Harris Bridge Road in Stony Point, North Carolina. Defendant invited Tori into his bedroom where they smoked marijuana on Defendant’s bed. Defendant eventually asked Tori to lay back on the bed; when she refused, Defendant got on top of her, put his hands around her neck, and choked her until she lost consciousness.

¶ 5 When Tori awoke, Defendant was lying naked on the bed beside her. She was missing most of her clothing from the waist down, including her underwear and pants. As she dressed, Tori noticed sperm or semen coming out of her vagina. She

¹ We refer to the alleged minor victim and her mother by pseudonym to protect the identity of the child.

then went to a neighbor's house to ask for a ride home. The neighbor agreed, and he dropped Tori off at her home in Statesville around 1:00 A.M. on 26 April 2010.

¶ 6 Tori went to directly to her bedroom. She took off the clothes she was wearing at the time—a tank top, jeans, and a pair of sneakers—and put them in her closet. Some time later, Ms. Pope noticed scratches and bruises on her daughter's legs and neck as well as redness around her eyes. Tori told her mother that Defendant had choked her and took her clothes off. Tori and Ms. Pope eventually confronted Defendant the next day, on 27 April 2010, after spotting him driving around Statesville. Ms. Pope called the police and officers arrived shortly to speak with all three parties.

¶ 7 As part of the police investigation, Tori went to the emergency room to complete an examination and rape kit in accordance with the sheriff's office sexual assault protocol. Following the medical examination, Tori gave a statement during a recorded interview to a forensic interviewer, Colleen Medwid.

¶ 8 Police obtained several articles of clothing from Tori for examination; however, only a pair of jeans and a shirt were forwarded to the State Bureau of Investigation's ("SBI") crime lab for analysis. The SBI placed these items under an alternate light source to identify potential bodily fluids, revealing a possible stain in the crotch of Tori's jeans and another on her shirt. The SBI took cuttings of the sections of clothing and conducted a DNA analysis with a sample voluntarily provided by Defendant. The

SBI isolated the bodily fluids on the cutting from the jeans into non-sperm and sperm fractions. The non-sperm fluids were determined to be a mixture; Tori was identified as the primary contributor, while Defendant could not be ruled out as a possible contributor. The sperm fluids predominantly matched Defendant's DNA.

¶ 9 While the police investigation was underway, Defendant was convicted of an unrelated offense and began serving a 125-month prison sentence. In July 2013, more than three years after the alleged rape, Defendant was indicted for assault by strangulation, first-degree kidnapping, statutory rape of a person who is 13, 14, or 15 years old, and indecent liberties with a child. In January 2019, nearly six years after his arrest, Defendant's case had not been tried, and a grand jury indicted Defendant for attaining habitual felon status.² The charges were consolidated for trial, which commenced on 10 April 2019.

¶ 10 At trial, Tori, several law enforcement officers, and SBI lab personnel testified for the State consistent with the above recitation of the facts. Tori also told the jury that she returned home at 1 A.M. on 26 April 2010 following the alleged rape and climbed into bed with her mother. She further testified that she went to school that morning and, after returning home that evening, told her mother that she had been sexually assaulted by Defendant.

² Defendant moved to dismiss his case for violation of his right to a speedy trial in October 2018. That motion was denied by the trial court and is not otherwise pertinent to this appeal.

¶ 11 Ms. Pope testified to a conflicting version of events, initially telling the jury on direct examination that she learned of the alleged rape after Tori came home one day in April 2010 crying and upset. Then, on cross-examination, Ms. Pope testified that she first heard about the alleged rape from Tori at 9 A.M. on 26 April 2010 after returning home from working the night shift at her job, contradicting herself and Tori’s earlier testimony. Defendant’s counsel questioned how she could have spoken to her daughter at 9 A.M. in light of Tori’s testimony that she attended school that day, leading Ms. Pope to further contradict Tori by stating her daughter had not gone to school on the day following the alleged rape. Defendant’s counsel continued to press Ms. Pope on these inconsistencies, leading Ms. Pope to tell the jury that she did not remember the specific timing or content of the conversation—or what she told police about the same—because it occurred so many years prior to trial.

¶ 12 After deviating from the subject of when Tori first told Ms. Pope about the alleged rape, Defendant’s counsel eventually returned to the topic. At times, Ms. Pope offered unequivocal, but contradictory, testimony as to when she learned about the rape and where she and her daughter were on the days in question. At other times, Ms. Pope testified that she could not remember when she saw her daughter or what was discussed. The trial court eventually interrupted cross-examination, excused the jury, and informed the parties that it was concerned Ms. Pope—and, by extension, the jury—was confused by the repeated questioning given the unclear

testimony. After a 15-minute recess, the trial court permitted questioning to resume, but cautioned Defendant's counsel that she was opening herself up to objections to some questions as asked and answered. Defendant's counsel expressed concern that Ms. Pope may have conferred with the prosecutor during the recess, and the trial court told counsel that she could ask Ms. Pope about that issue once cross-examination resumed. The jury was called back into the courtroom, and Defendant's counsel continued her questioning. Ms. Pope then testified that the prosecutor told her during the recess to be honest in her testimony and, when pressed about when Tori told her about the alleged rape, she testified at times that she could not remember when she was told, nor could she recall where her daughter was at the times in question. Still, Ms. Pope in other instances gave definitive but contradictory answers about the timing of events and continued to unequivocally contradict portions of her daughter's testimony. The prosecution made several objections on asked-and-answered grounds, all of which were overruled by the trial court.

¶ 13 The trial court again interrupted Defendant's counsel during her cross-examination of Ms. Medwid, the forensic interviewer who took a statement from Tori. Specifically, the trial court sustained its own objection to Defendant's counsel's questioning on the ground that it was repetitive of other evidence published to the jury. After cautioning Defendant's counsel on the issue, cross-examination resumed without further interruption.

¶ 14 Police also gave unclear testimony as to how Tori's clothing was collected for analysis. One officer with the Statesville Police Department testified that either Ms. Pope or Tori gave him a bag of clothing when officers first met with them and that he turned the clothes over to the Iredell County Sheriff's Department. A different officer with the Iredell County Sheriff's Department later testified that she collected the clothing from Tori. Tori, for her part, testified that she gave the clothing to a law enforcement officer or district attorney at her home or at an office. She also identified the clothing examined by the SBI as the jeans and shirt she was wearing when she was raped, and confirmed they were the clothing items she provided to police.

¶ 15 Following the presentation of evidence and during the charge conference, the trial court informed the parties that it intended to give an instruction on false, contradictory, or conflicting statements. When Defendant objected to the instruction, the trial court responded with what it "th[ought] the State's argument would be." The State agreed with the trial court's hypothetical argument and then offered additional reasons for the instruction, after which the trial court ruled that it would give the instruction.

¶ 16 At the conclusion of trial, the jury found Defendant guilty of first-degree kidnapping, incident liberties with a minor, statutory rape, and attaining habitual felon status. The jury found Defendant not guilty of assault by strangulation. Defendant was sentenced to concurrent active sentences of 117 to 150 months for

first-degree kidnapping, 117 to 150 months for indecent liberties, and 386 to 472 months for statutory rape. Defendant gave oral notice of appeal in open court.

II. ANALYSIS

A. *Deprivation of an Impartial Trial*

¶ 17 Defendant first contends that the trial court was unfairly biased against him as evidenced by: (1) its interruption of his cross-examination of Ms. Pope; (2) its decision to sustain its own objection during the cross-examination of the forensic interviewer, Ms. Medwid; and (3) its discussion during the charge conference as to why it would be giving a jury instruction on contradictory statements. Defendant raised no objection to these actions below. We therefore address whether his arguments have been preserved before holding Defendant has failed to demonstrate error.

I. *Preservation*

¶ 18 Defendant contends his challenge to the trial court's *sua sponte* objection during the cross-examination of Ms. Medwid is automatically preserved as violative of N.C. Gen. Stat. § 15A-1222 (2019), which prohibits expressions of opinion by a judge in the presence of the jury. *See State v. Primus*, 227 N.C. App. 428, 433, 742 S.E.2d 310, 314 (2013) (noting that violations of Section 15A-1222 are preserved without objection as violations of a statutory mandate). We agree.

¶ 19 Defendant acknowledges, however, that his challenges to the trial court’s interruption of the cross-examination of Ms. Pope and its statements during the charge conference are unpreserved because he did not object and neither involve comments before the jury governed by Section 15A-1222. Defendant asks us to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review these unpreserved alleged errors “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.” N.C. R. App. P. 2 (2021).

¶ 20 “Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*.” *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphases in original) (citations and quotation marks omitted).

¶ 21 We decline, in our discretion, to exercise Rule 2 to review the statements made by the trial court outside the presence of the jury for error under Section 15A-1222. As Defendant notes in his brief, our Supreme Court has held that statute does not apply to statements made when the jury is not present, *State v. Rogers*, 316 N.C. 203, 220, 341 S.E.2d 713, 723 (1986), *overruled on separate grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), and we decline to exercise Rule 2 to bypass binding precedent.

¶ 22

We likewise decline to invoke Rule 2 to review Defendant's argument for structural or constitutional error because he has not shown this to be an exceptional case. "It is well recognized . . . that the trial judge . . . has a wide discretion in controlling the scope of cross-examination," *State v. Daye*, 281 N.C. 592, 596, 189 S.E.2d 481, 483 (1972), and "the trial judge has a duty to question a witness in order to clarify the testimony being given." *State v. Efird*, 309 N.C. 802, 808-09, 309 S.E.2d 228, 232 (1983). A trial court also has discretion to limit witness testimony that is unduly repetitive, *State v. Hatcher*, 136 N.C. App. 524, 526, 524 S.E.2d 815, 817 (2000), or has the tendency to confuse the jury. *State v. McNeil*, 99 N.C. App. 235, 244, 393 S.E.2d 123, 128 (1990). Here, the trial court's statements on the record disclose that it was interrupting the cross-examination of Ms. Pope for all these permissible reasons. And it does not appear the interruption substantively altered the course of Ms. Pope's testimony; despite Defendant's assertions to the contrary, the transcript reveals that Ms. Pope continued to give the same flatly contradictory answers following the recess, and her inability to recall particular facts continued after the break in testimony.³

³ For example, Ms. Pope testified before the trial court's interruption that she was at home with her daughter on the night of the rape and through the following morning, despite also testifying that she was at work during those hours and therefore could not have known where her daughter was in that time frame. Ms. Pope gave substantively identical testimony shortly after cross-examination resumed following the break by the trial court. She also continued to contradict her daughter's testimony. Ms. Pope contradicted herself and her daughter before and after the trial court's

¶ 23 Similarly, the trial court’s discussion of the jury instruction on false, contradictory, or conflicting statements during the charge conference does not appear exceptional. A trial court has a positive duty “to instruct the jury on all substantial features of the case arising on the evidence.” *State v. Garrett*, 93 N.C. App. 79, 82, 376 S.E.2d 465, 467 (1989). Defendant does not contend on appeal that the instruction was improper. Given that the instruction appears to have been warranted, we will not presume the trial court was biased against Defendant based on the conversational tone of the discussion between the trial court and counsel that is common to charge conferences.⁴

¶ 24 In sum, Defendant has not shown exceptional circumstances in either instance, collectively or individually. Even though Defendant asserts structural and constitutional error, this alone—without some indication that the error impacted the proceedings—does not make the case exceptional warranting Rule 2 review. *Cf. State v. Davis*, 202 N.C. App. 490, 497, 688 S.E.2d 829, 834 (2010) (declining to invoke Rule

intervention on the same points Defendant contends were critical to a successful cross-examination. And though Defendant asserts the break in proceedings led Ms. Pope to “walk[] back much of her testimony . . . , instead answering defense counsel’s later timeline questions with variations of ‘I don’t know[.]’ ” the transcript shows Ms. Pope testified to an inability to recall the same facts before the recess.

⁴ The trial court’s sustaining of its own objection during the cross-examination of Ms. Medwid, discussed *infra* in Defendant’s challenge under Section 15A-1222, is also so anodyne as to not warrant Rule 2 review for structural or constitutional error. *See, e.g., State v. Long*, 113 N.C. App. 765, 771, 440 S.E.2d 576, 579 (1994) (holding the trial court’s sustaining of its own objections to the defendant’s questioning of a witness did not violate the defendant’s state and federal constitutional rights); *State v. Hughes*, 54 N.C. App. 117, 121, 282 S.E.2d 504, 507 (1981) (holding trial court’s sustaining of its own objection during cross-examination was not error).

2 to review an unpreserved constitutional challenge to the admission of evidence when other unchallenged evidence established the same facts). As noted above, it appears from the record that the trial court intervened for appropriate—if unartfully expressed—purposes. Combined with the fact that the interruptions did not appear to have prejudiced Defendant, this is not the rare exceptional case warranting Rule 2 review. We therefore limit our review to Defendant’s challenge that the trial court’s *sua sponte* objection during the cross-examination of Ms. Medwid amounted to an impermissible expression of opinion in violation of Section 15A-1222.

II. *Standard of Review*

¶ 25 We review a judge’s comments for a violation of Section 15A-1222 under the totality of the circumstances. *State v. Gell*, 351 N.C. 192, 207, 524 S.E.2d 332, 342 (2000). It is not enough that the comments may have been prejudicial; instead, “[t]he criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury.” *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 11 (1951) (citations omitted). Ultimately, “[t]his Court will not interfere with the trial court’s exercise of its duty to control the conduct and course of the trial absent a showing of manifest abuse.” *State v. Long*, 113 N.C. App. 765, 771, 440 S.E.2d 576, 580 (1994) (citation omitted).

III. *Intervention During the Cross-examination of Ms. Medwid*

¶ 26 In this case, the State closed its direct examination of Ms. Medwid by publishing her interview with Tori to the jury. On cross-examination, the bulk of the questioning focused on a beat-by-beat recounting of the interview's contents with occasional questions designed to prompt contradictions in Tori's testimony. Defendant's counsel at one point asked Ms. Medwid if she believed it strange that Tori stated she was unconscious for four to five hours while the alleged rape occurred; when Ms. Medwid was unable to agree to that characterization of the interview's contents, defendant's counsel pressed the issue by asking Ms. Medwid whether Tori stated she blacked out while with Defendant from 8:00 P.M. to 1:00 A.M. This prompted the trial court to sustain its own objection to counsel's question concerning the contents of the interview, stating "[w]ell, objection sustained. The video recording says what the video recording says, and it's been introduced and it's in evidence. It's been published. It's available if the jury wants to go back through it." Defendant's counsel asked to be allowed to continue the cross-examination barring an objection from the State, leading the trial court to reply, "[w]ell, you can continue, but just keep in mind what I just said." Cross-examination then continued without interruption.

¶ 27 We do not believe the trial court's decision to sustain its own objection amounted to an impermissible expression of opinion in violation of Section 15A-1222 under the totality of the circumstances. The trial court "must be left free to keep the

examination of witnesses under control and within the bounds of lawful, relevant, and nonrepetitive inquiry,” *State v. Hughes*, 54 N.C. App. 117, 121, 282 S.E.2d 504, 507 (1981), and this Court has held a judge may sustain her own objection to testimony on this basis if, in the totality of the circumstances, the trial court’s action was unlikely to “create[] an appearance to the jury of partiality on the trial judge’s part.” *Long*, 113 N.C. App. at 771, 440 S.E.2d at 579 (citation and quotation marks omitted). Viewed in the entire context of cross-examination, we see nothing in the trial court’s statements that likely led the jury to believe the judge was unfairly partial to the State, particularly when this was the sole statement before the jury that Defendant identifies as suggestive of bias. Defendant’s argument is overruled.

B. Evidence and Chain of Custody

¶ 28 Defendant next contends that the trial court erred in admitting Tori’s clothing and the DNA evidence recovered therefrom into evidence without a detailed chain of custody. The parties again dispute whether the issue has been preserved; assuming, *arguendo*, that Defendant lodged a timely objection to this evidence, we hold he has failed to demonstrate error.

I. Standard of Review

¶ 29 A trial court’s decision to admit physical evidence is discretionary, *State v. Ferguson*, 145 N.C. App. 302, 312, 549 S.E.2d 889, 896 (2001), and it “exercises [that] discretion ‘in determining the standard of certainty that is required to show that an

object offered is the same as the object involved in the incident and is in an unchanged condition.” *State v. Stinnett*, 129 N.C. App. 192, 198, 497 S.E.2d 696, 700 (1998) (quoting *State v. Campbell*, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984)). We will hold a trial court abused its discretion only “upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.” *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

II. *The Jeans and DNA Evidence*

¶ 30 Our Supreme Court has announced a two-part test for the admission of physical evidence:

The item offered [into evidence] must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change. . . . A detailed chain of custody need be established *only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered.*

Campbell, 311 N.C. at 388-89, 317 S.E.2d at 392 (emphasis added) (citations omitted).

Furthermore, “[o]ur courts have consistently stated that any weak links in a chain of custody go to the weight of the evidence, not its admissibility.” *Ferguson*, 145 N.C. App. at 313, 549 S.E.2d at 897 (citing *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392; then citing *State v. Smith*, 134 N.C. App. 123, 126, 516 S.E.2d 902, 905 (1999)). We have previously held that an alleged rape victim’s in-court identification of the

clothing she was wearing at the time of the crime was sufficient to render a detailed chain of custody unnecessary. *State v. Ferrell*, 46 N.C. App. 52, 56, 264 S.E.2d 134, 137 (1980).

¶ 31 Defendant nonetheless contends that a detailed chain of custody was required as a pre-requisite to admission because: (1) there was conflicting evidence as to which law enforcement officer received clothing from Tori, and Tori's testimony was equivocal on this point; (2) Tori's clothing came in contact with other clothing and objects during and after the alleged rape, suggesting a possible contact-transfer of Defendant's sperm to her jeans; and (3) Tori was on the last day of her menstrual cycle and wore the jeans for thirty minutes without a pad, tampon, or underwear following the alleged rape, yet no blood was found on the jeans tested by the SBI. None of Defendant's arguments demonstrate an abuse of discretion.

¶ 32 While two different law enforcement officers testified that they collected clothing and Tori stated she gave the jeans to an officer or district attorney at her home or an office, Tori made an unequivocal in-court identification of the jeans tested by the SBI as those she was wearing at the time of the alleged rape. Further, witness testimony clearly established that the jeans identified by Tori were checked out of evidence with the Iredell County Sheriff's Department,⁵ packaged for shipment to the

⁵ Though two different officers recalled collecting clothing from Tori, both testified that they delivered the items to the Iredell County Sheriff's Department.

SBI, and ultimately tested positive for Defendant's DNA. Given Tori's unequivocal identification of the jeans as those delivered to law enforcement and the uncontradicted testimony establishing their delivery from the Sheriff's Department to the SBI, we do not believe the trial court abused its discretion in declining to require a more detailed chain of custody.

¶ 33 Defendant's remaining arguments—that Defendant's sperm may have been transferred to Tori's jeans by contact with other objects and that the absence of menstrual blood demonstrates the jeans were not the ones Tori wore on the night of the alleged rape—are too conjectural to show an abuse of discretion. First, neither theory was argued to the trial court in Defendant's chain of custody objections. Second, trial testimony discloses that Defendant's semen was found on a cutting from a larger stain on the crotch of Tori's jeans and that semen leaked from Tori's vagina into the jeans while she was wearing them; in the face of this evidence, the trial court was not required in the exercise of its discretion to *sua sponte* consider the speculative possibility that Defendant's sperm happened to transfer to the stained crotch of Tori's jeans through innocuous contact with other items tinged with Defendant's semen.⁶ Defendant's argument concerning the absence of menstrual blood after wearing the

⁶ It is also not entirely clear how this bears upon the chain of custody issue; whether Defendant's DNA was transferred to Tori's jeans before delivery to police through some means unconnected with the alleged rape would seem to go to the evidence's probative value rather than authentication concerns.

jeans without a pad, tampon, or underwear for thirty minutes is similarly attenuated, and Defendant's bare assertion to the contrary, lacking entirely in scientific or other authority, is unconvincing. We therefore hold that Defendant has failed to demonstrate error.

III. CONCLUSION

¶ 34 As explained above, we hold the trial court did not deprive Defendant of an unbiased trial in sustaining its own objection during cross-examination of Ms. Medwid. We affirm that the trial court acted within its discretion in admitting relevant evidence and facilitating jury comprehension of relevant facts and issues of law. As such, we hold Defendant received a fair trial, free from error.

NO ERROR.

Judges WOOD concurs.

Judge MURPHY concurs in part and concurs in result only in part by separate opinion.

Report per Rule 30(e).

MURPHY, Judge, concurring in part and concurring in result only in part.⁷

¶ 35 While I join the Majority in Part II(A) as to the lack of a violation of N.C.G.S. § 15A-1222, I do not join the Majority to the extent it discusses the merits of Defendant’s argument regarding structural error. *Supra* at ¶¶ 22, 24, 27. I also agree with the Majority regarding the trial court’s discussion of the jury instruction, as well as the evidence and chain of custody issues discussed in Part II(B). *Supra* at ¶¶ 23, 28-33.

ANALYSIS

A. Structural Error

⁷ “Under prior naming practices of this Court, I would have referred to my vote as ‘dissenting in part, and concurring in the judgment.’ See *Lippard v. Holleman*, [271 N.C. App. 401, 430, 844 S.E.2d 591, 611 (McGee, C.J., concurring in part, dissenting in part, and concurring in the judgment), *disc. rev. denied and appeal dismissed*, 375 N.C. 492, 847 S.E.2d 882 (2020), *cert. denied*, 2021 WL 2637859 (U.S. 28 June 2021)]. However, through its recent order in *Lippard*, 847 S.E.2d 882 (N.C. 2020), our Supreme Court has made clear that although a judge of this Court is opposed to the reasoning and analysis of a majority opinion, it is not proper to entitle the same as a dissent and such an opinion does not confer an appeal of right in accordance with N.C.G.S. § 7A-30(2). See [N.C.G.S. § 7A-30(2) (2019)] ([A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case: . . . (2) In which there is a dissent when the Court of Appeals is sitting in a panel of three judges.’). To the extent that I misconstrue the Supreme Court’s recent order regarding the applicability of N.C.G.S. § 7A-30(2), I dissent.” *State v. Stokley*, 2021-NCCOA-71, ¶ 51 n.1 (Murphy, J., concurring in result only); see also *State v. Miller*, 852 S.E.2d 704, 710 (N.C. App. 2020) (citations omitted) (“Lastly, we address the dissenting opinion. That opinion is part of a trend in this Court to issue dissents that are not actually dissents and often more closely resemble editorials than judicial opinions. These purported dissents have become so commonplace that they are undermining a fundamental principle of our appellate process—that a dissent from a panel opinion of this Court creates a right to appeal to our Supreme Court. . . . Here, too, this dissent is not a dissent, at least not in the traditional sense of an opinion disagreeing with the decision or judgment of the majority. . . . [T]his issue has no impact on the outcome of this appeal. Put simply, this dissent is an effort to force our Supreme Court to confront a legal issue of interest to our dissenting colleague although the case otherwise would not meet the criteria for review in our State’s high court.”), *appeal dismissed*, 377 N.C. 211, 856 S.E.2d 108 (2021).

MURPHY, J. concurring in part and concurring in result only in part.

¶ 36 Structural error “str[ikes] at fundamental values of our society and undermine[s] the structural integrity of the” trial’s framework. *Arizona v. Fulminante*, 499 U.S. 279, 294, 113 L. Ed. 2d 302, 321 (marks omitted), *reh’g denied*, 500 U.S. 938, 114 L. Ed. 2d 472 (1991). The following are examples of structural error:

(1) complete deprivation of right to counsel, [*Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963)];

(2) [the lack of an impartial] trial judge, [*Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927)];

(3) the unlawful exclusion of grand jurors of the defendant’s race, [*Vasquez v. Hillery*, 474 U.S. 254, 88 L. Ed. 2d 598 (1986)];

(4) denial of the right to self-representation at trial, [*McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122 (1984)];

(5) denial of the right to a public trial, [*Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984)]; and

(6) constitutionally deficient jury instructions on reasonable doubt, [*Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182 (1993)].

State v. Polke, 361 N.C. 65, 73, 638 S.E.2d 189, 194 (2006), *cert. denied*, 552 U.S. 836, 169 L. Ed. 2d 55 (2007); *see also State v. Hamer*, 2021-NCSC-67, ¶ 13. Importantly, the United States Supreme Court has found that defendants have “the right to have an impartial judge[,]” regardless of what evidence the prosecution presents against them. *Tumey v. Ohio*, 273 U.S. 510, 535, 71 L. Ed. 749, 759 (1927) (holding the lack

MURPHY, J. concurring in part and concurring in result only in part.

of an impartial trial judge is structural error).

¶ 37 The trial court, through its repeated insertions during the cross-examinations of Ms. Pope and Ms. Medwid, deprived the trial of its adversarial nature. “The common-law tradition is one of live testimony in court subject to adversarial testing[.]” *Crawford v. Washington*, 541 U.S. 36, 43, 158 L. Ed. 2d 177, 187 (2004). Adversarial proceedings help “to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing[.]” *Lilly v. Virginia*, 527 U.S. 116, 123, 144 L. Ed. 2d 117, 126 (1999).

“[T]he twofold aim of criminal justice is that guilt shall not escape or innocence suffer.” We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 1064 (1974) (marks and citation omitted) (quoting *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321 (1935), *overruled on other grounds by Stirone v. United States*, 361 U.S. 212, 4 L. Ed. 2d 252 (1960)). The trial court’s insertions during cross-examination, taken together, usurped the role of the prosecutor and constituted structural error under *Tumey*. *Tumey*, 273 U.S. at 535, 71 L. Ed. at 759; *see also State v. Nevills*, 158 N.C.

MURPHY, J. concurring in part and concurring in result only in part.

App. 733, 735, 582 S.E.2d 625, 627 (“Structural error may arise by the absence of an impartial judge.”), *disc. rev. denied and appeal dismissed*, 357 N.C. 581, 589 S.E.2d 361 (2003).

¶ 38 Structural error differs from other errors affecting individual parties. The United States Supreme Court recently defined structural error as follows:

Structural error affects the *framework within which the trial proceeds*, as distinguished from a lapse or flaw that is simply an error in the trial process itself. An error may be ranked structural, we have explained, if the right at issue is *not designed to protect the defendant from erroneous conviction* but instead protects *some other interest*, such as the *fundamental legal principle* that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.”

McCoy v. Louisiana, 138 S. Ct. 1500, 1511, 200 L. Ed. 2d 821, 833 (2018) (emphases added) (citations and marks omitted); *see also Fulminante*, 499 U.S. at 310, 113 L. Ed. 2d at 331 (noting “structural [error] affect[s] the framework within which the trial proceeds” and is not “simply an error in the trial process itself”).

¶ 39 In light of the nature of structural errors pertaining to the fairness of the legal system, prejudice is not required to award a defendant a new trial when there is structural error. *McCoy*, 138 S. Ct. at 1511, 200 L. Ed. 2d at 833-34. Further, “[structural] error is not subject to harmless-error review. . . . [The defendant is] accorded a new trial without any need first to show prejudice.” *Id.*; *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 165 L. Ed. 2d 409, 419 (2006) (marks

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omitted) (“[Structural errors] defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself.”). Here, if Defendant had preserved the structural error—the lack of an impartial judge protecting the adversarial natural of the trial—for appellate review, he would not have needed to demonstrate prejudice.

B. Preservation

¶ 40

Rule 10 of our Appellate Rules of Procedure requires 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. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

N.C. R. App. P. 10(a)(1) (2021). “The purpose of [Rule 10] is to require a party to call the court’s attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal.” *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991).

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¶ 41 The resolution of this matter is complicated by the procedural posture of Defendant's presentation of the structural error. Our Supreme Court has held that "[s]tructural error, no less than other constitutional error, should be preserved at trial." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). Defendant did not preserve this structural error, which like in *Garcia*, occurred during the course of trial, where counsel had an opportunity to object and preserve the structural error under Rule 10. Unpreserved structural error does not provide Defendant with the vehicle to obtain a new trial.

¶ 42 Having not preserved the issue, Defendant's remaining avenue for our review of the merits is through the exercise of our discretion under Rule 2, which provides:

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

N.C. R. App. P. 2 (2021) (emphasis added). "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (applying discretionary review under Rule 2 to the failure to preserve under Rule 10); *see also State v. Diaz*, 256 N.C. App. 528, 534, 808 S.E.2d 450, 455

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(2017) (noting we have the authority to suspend Rule 10(a)(1)'s preservation requirements under Rule 2 and review the merits in the interest of justice), *aff'd in part, rev'd in part on other grounds*, 372 N.C. 493, 831 S.E.2d 532 (2019).

C. Application of Rule 2

¶ 43 While structural error does not require prejudice to a defendant to demonstrate an “injustice” in our criminal justice system, such an error does not necessarily equate to a “manifest injustice to a party” under Rule 2. To properly apply Rule 2, we must look at the individual case and parties, as

Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*. This assessment—whether a particular case is one of the rare “instances” appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether substantial rights of an appellant are affected. *In simple terms, precedent cannot create an automatic right to review via Rule 2*. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.

State v. Campbell, 369 N.C. 599, 603, 799 S.E.2d 600, 602-03 (2017) (final emphasis added) (footnote omitted) (marks and citations omitted).

¶ 44 To look at the individual case and make an individualized decision to exercise our discretion under Rule 2 necessitates a consideration of the injustice to the party,

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here, the prejudice to Defendant as a result of the trial court's improper actions. As discussed in *Campbell*, the decision whether to invoke Rule 2 focuses on "specific circumstances," "individual cases," and "parties." *Id.*; see also *State v. Boykin*, 307 N.C. 87, 91-92, 296 S.E.2d 258, 260-61 (1982). In reviewing for manifest injustice to a party in deciding whether to invoke Rule 2, we must consider whether the defendant was prejudiced by the purported error.

¶ 45 After a careful review of the Record, even in the face of structural error, I decline to exercise Rule 2 discretion to award Defendant a new trial as he was not sufficiently prejudiced by this structural error.

CONCLUSION

¶ 46 As a result, I concur in the result reached in Part II(A) regarding Defendant's structural and constitutional error arguments. I otherwise join the Majority's opinion in full.