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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-253

No. COA21-464

Filed 5 April 2022

Cabarrus County, Nos. 99 CRS 11458, 99 CRS 11495, CRS 11496, 00 CRS 4650

STATE OF NORTH CAROLINA,

v.

MICHAEL RAY TRULL.

Appeal by defendant from order entered 19 January 2021 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 23 February 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.

Appellate Defender Glenn G. Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Michael Ray Trull ("Defendant") appeals from an order (the "Order") denying his *pro se* motion for post-conviction DNA testing, pursuant to N.C. Gen. Stat. § 15A-269(a). After careful review of the record and Defendant's assertions, we affirm the decision of the trial court.

I. Factual & Procedural Background

¶ 2 The record tends to show the following: In July 2000, a jury found Defendant

guilty of one count of misdemeanor injury to personal property and two counts of felony assault with a deadly weapon inflicting serious injury upon a person. At trial, Defendant admitted to attaining the status of an habitual felon. With respect to the assault and habitual felon convictions, the trial court imposed two concurrent sentences of 188 to 235 months of confinement. The trial court also imposed a sentence of 120 days of confinement for the conviction of injury to personal property, set to run concurrently with the assault and habitual felon sentences. Defendant filed written notice of appeal from the judgments.

¶ 3 This Court addressed the merits of Defendant's direct appeal. By an unpublished opinion filed 2 April 2002, this Court found no substantive errors but remanded to the trial court for correction of a clerical error. *State v. Trull*, No. 01-241, 2002 N.C. App. LEXIS 1802 (N.C. App. Apr. 2, 2002) (unpublished) ("*Trull I*"). In *Trull I*, this Court described the relevant factual background as follows:

> On 7 July 1999, defendant entered the Black Pearle Restaurant and Bar located in Concord, North Carolina at approximately 9:00 p.m. Over the next four hours, defendant became intoxicated and began to bother bar patrons. Observing defendant's intoxication, Linda Cefalo ("Cefalo"), the bar owner, approached defendant. After several verbal exchanges, defendant took money from his pocket and threw it at Cefalo. Cefalo subsequently removed defendant's beer from the bar. Becoming angered, defendant used his hand to knock all remaining items from the bar in the direction of Cefalo.
>
> Cefalo retrieved a baseball bat from behind the bar and

> asked defendant to leave several times. Michelle Morrison ("Morrison")[,] a bar co-owner, heard the commotion and appeared from the kitchen holding an eighteen-inch police "mag" flashlight. Defendant then removed a pocketknife with a three-inch blade from the pocket of his pants. Defendant's sister, Deborah McCoy ("McCoy") grabbed defendant and tried to pull him from the bar. As McCoy and defendant were exiting the bar, Cefalo remark[ed], "bye don't come back." Defendant suddenly turned around, charged at Cefalo, and tackled her to the ground. Upon impact, defendant and Cefalo "slammed" into a bannister and a table. At some point during the altercation, defendant cut Cefalo's right forearm with his knife. Morrison managed to pull defendant off of Cefalo. Defendant then began to punch Morrison about the face and body. Cefalo grabbed her bat and struck defendant. Morrison and Cefalo struck defendant several times as the fight continued. Morrison "pinned" defendant to the ground in order to keep him from hitting her again; however, she began to bleed profusely as a result of the cut to her face. Defendant then took this opportunity to exit the bar.

Id. at *1–3.

¶ 4 While serving his sentences in the North Carolina Department of Corrections, Defendant filed on 5 March 2018 a *pro se* motion for post-conviction DNA testing of the knife admitted into evidence as State's Exhibit 4 during the July 2000 trial. In the motion, Defendant alleged, *inter alia*: (1) he did not own or possess a pocketknife on the date of the incident; (2) the victims' cuts were not consistent with knife wounds; (3) the victims' testimonies supported Defendant's contention he did not use a knife during the altercation; and (4) the jury would have had a different outcome had the

DNA testing results been available to them.

¶ 5 On 26 March 2019, the trial court entered an order granting Defendant's request to locate and preserve existing biological evidence and ordering the State to file a response to Defendant's motion within sixty days; the State did not a file a response within this time frame.

¶ 6 On 24 June 2019, Defendant filed an addendum to his 5 March 2018 motion. On 8 November 2019, the trial court entered a second order on Defendant's motion for post-conviction DNA testing. In this order, the trial court appointed counsel to Defendant to "determin[e] whether there are grounds for Defendant's Motion" and directed appointed counsel to investigate and report his findings within sixty days of the entry of the order. The trial court also ordered the State to file a response within thirty days to the 26 March 2019 order and Defendant's addendum to his motion.

¶ 7 On 5 December 2019, the State filed a response to Defendant's motion and addendum, in which the State stipulated "that the knife in question was related to the prosecution and that the knife was not previously tested." The State contended that Defendant failed to meet his burden in proving the "materiality" prong of N.C. Gen. Stat. § 15A-269(a).

¶ 8 On 30 November 2020, counsel appointed pursuant to the 8 November 2019 order filed a report of investigation regarding the merits of Defendant's previously filed motion and addendum. Counsel asserted the facts of the case, in light of the

entire record, "support a finding that the biological evidence that is the subject of Defendant's Motion for Post-Conviction DNA Testing is material to his defense."

¶ 9 On 19 January 2021, the trial court entered the Order, denying Defendant's motion for post-conviction DNA testing based on its conclusion that Defendant failed to meet "his burden to show that the biological evidence is material" as required by N.C. Gen. Stat. § 15A-269. On 16 April 2021, Defendant appealed from the Order.

II. Jurisdiction

¶ 10 As a preliminary matter, this Court must determine whether it has jurisdiction to address Defendant's appeal. "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Jamerson*, 161 N.C. App. 527, 528, 588 S.E.2d 545, 546 (2003) (citation omitted). A "defendant may appeal an order denying the defendant's motion for DNA testing" pursuant to N.C. Gen. Stat. § 15A-270.1. N.C. Gen. Stat. § 15A-270.1 (2021). In such a case, the defendant's notice of appeal must be filed "with the clerk of superior court and [served] upon all adverse parties within fourteen days after entry of the judgment or order . . . ." N.C. R. App. P. 4(a)(2).

¶ 11 We have held that an appellant's failure to follow Rule 4 of the North Carolina Rules of Appellate Procedure deprives this Court of jurisdiction to consider the appeal. *See State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011) ("A jurisdictional default . . . precludes the appellate court from acting in any manner

other than to dismiss the appeal[.]").

¶ 12 Here, the Order was entered on 19 January 2021. Defendant filed a *pro se*, written notice of appeal dated 25 January 2021, which was file-stamped by the clerk of superior court on 16 April 2021. Thus, the notice of appeal was not filed "within fourteen days after entry of the . . . . order[.]" *See* N.C. R. App. P. 4(a)(2). Furthermore, the notice of appeal does not indicate whether it was served on the State, nor does it specify to which court Defendant appealed. *See id.*; N.C. R. App. P. 4(b). Therefore, we conclude we are without jurisdiction to address Defendant's appeal.

¶ 13 Recognizing Defendant's notice of appeal was untimely and insufficient, counsel appointed to represent Defendant on appeal filed a petition for writ of *certiorari* on 17 November 2021, requesting this Court review the Order pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. In his petition for writ of *certiorari*, Defendant argues: (1) Rule 21 expressly authorizes this Court to review his appeal; (2) his *pro se* notice of appeal was untimely due to his incarceration; (3) the State has not been misled or otherwise unfairly prejudiced by the defects in Defendant's notice of appeal; (4) it would be unfair to not reach the merits of Defendant's appeal; and (5) Defendant "presents a meritorious claim" because there is conflicting evidence as to whether Defendant was in possession of or used a knife to cause the victims' injuries, and whether "one juror changed her vote in open court

before ultimately voting to convict [Defendant] of both felony assaults." The State "takes no position" as to whether Defendant's petition should be granted and acknowledges the decision rests squarely within this Court's discretion.

¶ 14 A "writ of *certiorari* may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1) (emphasis added). In this matter, we exercise our discretion and grant Defendant's petition for writ of *certiorari*. *See id.*

III. Issue

¶ 15 The sole issue on appeal is whether the trial court erred in denying Defendant's motion for post-conviction DNA testing of the pocketknife recovered from the scene.

IV. Standard of Review

¶ 16 "Our standard of review of a trial court's denial of a motion for postconviction DNA testing is analogous to the standard of review for a motion for appropriate relief." *State v. Tilghman*, 261 N.C. App. 716, 718, 821 S.E.2d 253, 256 (2018) (citation and quotation marks omitted); *see also State v. Lane*, 370 N.C. 508, 517, 809 S.E.2d 568, 574 (2018). "Findings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*." *State v. Gardner*, 227 N.C. App. 364, 365–66, 742 S.E.2d 352, 354 (2013) (citation omitted).

V. Analysis

¶ 17 On appeal, Defendant argues the trial court erred in "denying his motion for post-conviction DNA testing of the pocketknife recovered from the scene [of the assaults] where there is at least a reasonable probability that favorable DNA results would have affected the outcome at trial." "Specifically, there is a reasonable probability that favorable DNA test results—that is—results that do not match Morrison, Cefalo, or [Defendant]—would have led one or more jurors to convict [Defendant] of only misdemeanor [assault inflicting serious injury], and not felony [assault with a deadly weapon inflicting serious injury]."

¶ 18 Pursuant to N.C. Gen. Stat. § 15A-269:

> (a) [a] defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> > (1) Is material to the defendant's defense.
> >
> > (2) Is related to the investigation or prosecution that resulted in the judgment.
> >
> > (3) Meets either of the following conditions:
> >
> > > a. It was not DNA tested previously.
> > >
> > > b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

> (b) The court shall grant the motion for DNA testing and, if testing complies with FBI requirements, the run of any profiles obtained from the testing, upon its determination that:
>
> > (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
> >
> > (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
> >
> > (3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269(a)–(b) (2021).

¶ 19 Defendant asserts, without providing any legal authority to support his argument, this Court "should (1) assume that post-conviction DNA testing would produce results that are favorable to the defendant, and then (2) ask whether there is at least a reasonable probability, in light of those results, that at least one juror would have harbored a reasonable doubt regarding the defendant's guilt." We disagree with Defendant's assessment regarding this state's law governing post-conviction DNA testing.

¶ 20 The North Carolina General Statutes and applicable caselaw do not allow this Court to presume post-conviction DNA testing would produce favorable results for a defendant. Rather, N.C. Gen. Stat. § 15A-269 specifically requires the "materiality" condition be met before the trial court may grant the motion for DNA testing. N.C.

Gen. Stat. § 15A-269(b)(1).

¶ 21 Our Supreme Court has interpreted this statutory subsection as placing the burden on the defendant to "prov[e] by a preponderance of the evidence every fact essential to support the motion for postconviction DNA testing . . . ." *Lane*, 370 N.C. at 518, 809 S.E.2d at 574 (quotation marks omitted). This burden includes the materiality showing required by N.C. Gen. Stat. § 15A-269(a)(1). *State v. Foster*, 222 N.C. App. 199, 205, 729 S.E.2d 116, 120 (2012). A defendant must provide specific reasons why the requested DNA evidence would be "material to [his] defense." N.C. Gen. Stat. § 15A-269(a)(1); *see Gardner*, 227 N.C. App. at 369, 742 S.E.2d at 356. Conclusory statements regarding materiality are insufficient to allow the trial court to grant a motion for post-conviction DNA testing. *Gardner*, 227 N.C. App. at 369, 742 S.E.2d at 356.

¶ 22 Evidence is "material" within the meaning of N.C. Gen. Stat. § 15A-269(b)(2) when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Lane*, 370 N.C. at 519, 809 S.E.2d at 575 (citations omitted). "The determination of materiality must be made in the context of the entire record, and hinges upon whether the evidence would have affected the jury's deliberations." *Id.* at 519, 809 S.E.2d at 575 (citations and quotation marks omitted).

¶ 23 In his first argument, Defendant contends DNA evidence on the knife would

be material to his defense because "DNA evidence *can be* 'highly probative' in determining whether a given defendant has committed a particular offense" and "[t]he 'unparalleled' accuracy of DNA evidence . . . favors a conclusion that post-conviction DNA testing would be material in this case." (Emphasis added). Defendant failed to explain how the knife would be material to his defense in this case; rather, he solely made conclusory statements regarding DNA testing in general. *See Gardner*, 227 N.C. App. at 369, 742 S.E.2d at 356. This apparent argument is without merit.

¶ 24 In his second argument, Defendant asserts "the sheer amount of blood on the scene, as described by the victims of the offense, supports [his] contention that blood would have been on the pocketknife if he had used it as the State alleged." Essentially, Defendant is attempting to use post-conviction DNA testing to prove a lack of blood on the knife, and thus his innocence, with respect to committing the offense of assault with a deadly weapon.

¶ 25 In *State v. Brown*, our Court specifically rejected such a similar argument. 170 N.C. App. 601, 609–10, 613 S.E.2d 284, 288–89 (2005), *superseded by statute on other grounds*, N.C. Gen. Stat. § 15A-270.1, *as recognized in*, *State v. Norman*, 202 N.C. App. 329, 332, 688 S.E.2d 512, 515 (2010). There, we denied the defendant's petition for writ of *certiorari* because review was not available to him pursuant to Rule 21. *Brown*, 170 N.C. at 607–08, 613 S.E.2d at 288. Additionally, we declined to exercise

our discretion under Rule 2 because the "defendant . . . failed to demonstrate that review is necessary in order to prevent manifest injustice," in part, because the defendant was seeking to be exonerated from his conviction by showing an absence of DNA evidence. *Id.* at 608–09, 613 S.E.2d at 288–89. We held "the post-conviction DNA testing statute does not apply" when a defendant "desires to demonstrate a lack of biological evidence . . . ." *Id.* at 609, 613 S.E.2d at 289 ("This is not a case in which DNA testing would point to another perpetrator.").

¶ 26 In the instant case, Defendant is undisputedly the perpetrator of the assaults. He nevertheless argues he did not use a knife; hence, his convictions for assault *with a deadly weapon* inflicting serious injury upon a person cannot stand. He is attempting to use the requested biological evidence to show an absence of the victims' blood on the knife. N.C. Gen. Stat. § 15A-269 is not applicable for such uses. *See id.* at 609, 613 S.E.2d at 289. Therefore, we must dismiss this argument.

¶ 27 Next, Defendant argues "there was conflicting evidence as to whether [he] employed a knife" during the altercation with the victims. We disagree.

¶ 28 The transcripts reveal neither victim saw Defendant's knife, witnessed Defendant in possession of the knife before the incident, nor heard anyone warn Defendant had a knife. The first victim, Cefalo, gave the following testimony regarding her wound and the knife:

> [Cefalo]: His sister was wrestling me for the bat, and we

were in a good—gosh, I'd say a good 30-second tug-of-war there, and then Preach, who was helping Cindy Davis—I don't know his real name—he got Deborah McCoy off of me. I don't know how he did it, and the bat fell. And that's when I looked—when I finally had a chance to look up, I had saw where Mr. Trull had gotten on the ground and Michelle had him down, pinned him was either—she has her knee on his chest or something, and she was hitting him to defend herself, and I stood up and I looked down, and I felt wet. And then I saw my cut. And I said, "You cut me, man."

[State Prosecutor]: Where did you see a cut?

[Cefalo]: On my right forearm.

[State Prosecutor]: Had anyone else been involved in an altercation with you besides Mr. Trull?

[Cefalo]: No. Deborah McCoy only.

[State Prosecutor]: Was your arm cut before you—Mr. Trull charged you?

[Cefalo]: No.

[State Prosecutor]: Was there anything in the area where Mr. Trull approached you such as knives on the table or vases or anything of that nature?

[Cefalo]: No, sir. We were closed. The only thing I had on the table were salt and pepper shakers.

[State Prosecutor]: Any sharp edges on the salt or pepper shakers?

[Cefalo]: No. Oh, I'm sorry, I had a sugar caddy also.

[State Prosecutor]: What did you observe when you looked down at your—was it your right forearm?

> [Cefalo]: Right forearm. I observed blood, lots of blood and it was a deep cut. It was open, and I just—I really didn't feel it. I guess adrenaline, maybe. I don't know, I just—like I said, I felt something wet.
>
> [State Prosecutor]: Did you ever see Mr. Trull or anyone else with a knife?
>
> [Cefalo]: No.
>
> [State Prosecutor]: Did you ever hear anyone warn about a knife?
>
> [Cefalo]: No.

¶ 29 On cross-examination, Cefalo was asked by defense counsel if she knew when she got cut. She responded, "Yes, sir, it was when [Defendant] slammed me into the table. . . . And that's when I felt wet coming down and it dripped onto my pants."

¶ 30 The second victim, Morrison, similarly testified that she had not seen the "knife on the date when th[e] incident occurred" and had not heard anyone warn about Defendant possessing a knife. Morrison described when she discovered her laceration to her face: "[Defendant] gave me one good punch and broke one good solid punch and I thought he broke my nose, because when he hit me I just felt blood just coming down my face."

¶ 31 Defendant also points to Detective Vince Nash's testimony on cross-examination in which he confirms that State Bureau of Investigation's ("SBI") comparison analysis on Defendant's fingerprints "revealed only a partial [print]," which could not be traced to Defendant. Defendant contends this physical evidence,

and the testimony of the victims are in conflict with the testimony of some of the eyewitnesses who claimed to have seen Defendant holding the knife.

¶ 32 Multiple witnesses testified they saw Defendant holding the knife either before or during the altercation. One of the bar patrons, Daniel Logan ("Logan"), testified he saw the attack and heard a woman say, "Don't touch him, he's got a knife." Logan then looked at Defendant's hand and saw a "pocket knife about six or seven inches long, [with a] black handle . . . ." He "didn't actually see . . . any gestures or motions or anything with the knife until [Defendant] was actually on the ground."

¶ 33 Megan Rizzo ("Rizzo"), a waitress at the restaurant where the incident occurred, testified, "Mr. Trull stood up [from the bar] . . . with his knife." She could see "all of the blade" as Defendant "held [the] knife in the air." Rizzo further testified, "[t]he knife came up and got [Morrison] in the face."

¶ 34 This Court has explained that the "presence of another's DNA or fingerprints on . . . evidence [does] not necessary exclude [a d]efendant's involvement in the crime." *State v. Alexander*, 271 N.C. App. 77, 82, 843 S.E.2d 294, 297 (2020). This is particularly true when there is substantial evidence of a defendant's guilt. *See id.* at 81–82, 843 S.E.2d at 297. Another person's DNA, besides a defendant's, may be present on an article of evidence because that person handled the evidence prior to the defendant's commission of the crime. *Id.* at 82, 843 S.E.2d at 297.

¶ 35 In this case, the eyewitness testimony of the bystanders in the restaurant

provides substantial evidence of Defendant's guilt as to the two charges for assault with a deadly weapon inflicting serious injury upon a person. *See id*. at 81–82, 843 S.E.2d at 297. Although the knife may have had a partial fingerprint belonging to someone besides Defendant, this evidence is not dispositive evidence or proof of Defendant's innocence as to the convictions of assault with a deadly weapon inflicting serious injury upon a person. *See id.* at 82, 843 S.E.2d at 297. Therefore, Defendant failed to show through this evidence "there is a reasonable probability that, had the [DNA] evidence been disclosed to the defense, the result of the proceeding would have been different." *See Lane*, 370 N.C. at 519, 809 S.E.2d at 575; *see also* N.C. Gen. Stat. § 15A-269(b)(2).

¶ 36 In his last argument, Defendant contends the trial court's instruction of a lesser-included offense, and "the behavior of the jury itself, especially toward the end of the trial, also supports the conclusion that defense-favorable DNA evidence might have resulted in a more favorable verdict." We find this argument unpersuasive.

¶ 37 "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771, (2002) (citations omitted). "If there are two or more offenses for which the jury could return a verdict, it *may* return a verdict with respect to any offense, including a lesser included offense on which the judge charged, as to which it agrees." N.C. Gen. Stat.

§ 15A-1237(e) (2021) (emphasis added). This Court has held:

> It is the function of the jury to determine the facts in the case from the evidence[,] and it is the function of the jury to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony and determine what the evidence proves or fails to prove.

State v. Martin, 6 N.C. App. 616, 617, 170 S.E.2d 539, 540 (1969) (citation omitted).

¶ 38 A jury must be polled "[u]pon the motion of any party made after a verdict has been returned and before the jury has dispersed . . . ." N.C. Gen. Stat. § 15A-1238 (2021). "The judge may also upon his own motion require the polling of the jury. . . . If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations." *Id.* "A jury verdict is not defective if it appears that the juror eventually freely assented to the verdict." *State v. Asbury*, 291 N.C. 164, 171, 229 S.E.2d 175, 178 (1976).

¶ 39 Here, the jury was instructed on two lesser-included offenses of assault with a deadly weapon inflicting serious injury, as requested by defense counsel: assault inflicting serious injury and simple assault. The jury weighed the evidence, including Detective Nash's testimony which revealed Defendant's fingerprints could not be traced to the partial print on the knife as well as eyewitness testimony indicating Defendant possessed a knife, and determined the credibility of the witnesses. *See Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771.

¶ 40 After an initial round of deliberations, the jury returned its written verdicts and unanimously found Defendant guilty of two counts of felony assault with a deadly weapon inflicting serious injury and one count of injury to personal property. The jury was then polled at the request of defense counsel to ensure the jurors unanimously agreed and consented to the verdicts. One juror responded "no," when asked if she still agreed with the written verdicts. Counsel for Defendant made a motion for a mistrial, which was denied by the trial court. The trial court then ordered the members of the jury to return to the jury room to "continue deliberations until [they] reach a unanimous verdict." While in deliberations, the jury returned the following question to the trial court: "What happens if we find guilty on two charges and are not unanimous on the third charge[?]" Shortly thereafter, the jury reached a unanimous verdict as to all three charges. The jury was polled a second time, and all jurors confirmed returning guilty verdicts for the three offenses.

¶ 41 Here, the trial court judge properly directed the jury to continue deliberations after finding a verdict was not unanimous. *See* N.C. Gen. Stat. § 15A-1238. Based on the ample evidence presented at trial, the jury properly exercised its functions and ultimately returned a verdict of guilty as to both counts for assault with a deadly weapon inflicting serious injury, which it was statutorily allowed to do. *See Martin*, 6 N.C. App. at 617, 170 S.E.2d at 540; *see also* N.C. Gen. Stat. § 15A-1237(e). The jury's verdicts after the second round of deliberations were not defective because each

"juror eventually freely assented to the verdict[s]." *See Asbury*, 291 N.C. at 171, 229 S.E.2d at 178.

¶ 42 Additionally, the record tends to show the jury was unanimous as to two verdicts towards the end of their deliberations—this necessarily indicates the jury was unanimous as to at least one count of assault with a deadly weapon inflicting serious injury before coming to agreement on all three verdicts. Thus, Defendant has not shown the jury's verdicts would have resulted in a more favorable verdict had the jury been presented with biological evidence from the knife. *See Lane*, 370 N.C. at 519, 809 S.E.2d at 575.

¶ 43 In light of the substantial evidence presented to the jury and the record as a whole, Defendant has failed to show there exists a reasonable probability that the verdict would have been more favorable to Defendant if the knife were tested for DNA evidence. *See id.* at 522, 821 S.E.2d at 577 (citation omitted) ("Where ample evidence . . . supported a finding of defendant's guilt, defendant's motion for post-conviction DNA testing did not allege a 'reasonable probability that the verdict would have been more favorable to the defendant.'").

VI. Conclusion

¶ 44 We exercise our discretion and grant Defendant's petition for writ of *certiorari* pursuant to Rule 21. *See* N.C. R. App. P. 21(a)(1). We conclude Defendant failed to meet his burden of showing by the preponderance of the evidence there exists a

reasonable probability that the verdict would have been more favorable to Defendant had the jury been presented with DNA evidence from the knife. *See Lane*, 370 N.C. at 522, 821 S.E.2d at 577; *see also* N.C. Gen. Stat. § 269. Accordingly, we affirm the Order of the trial court.

AFFIRMED.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).