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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-399

No. COA20-376

Filed 7 June 2022

Lee County, Nos. 14CRS53533, 15CRS61, 17CRS206, 18CRS324-325

STATE OF NORTH CAROLINA

v.

EMMANUEL EDWARD SANDERS, JR.

Appeal by Defendant from Judgments entered 30 October 2018 by Judge Charles W. Gilchrist in Lee County Superior Court. Heard in the Court of Appeals 3 November 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

Dobson Law Firm, by John E. Ryan III, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Emmanuel Sanders, Jr. (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of First-Degree Murder, Second-Degree Kidnapping, Breaking and Entering, Conspiracy to Commit Robbery with a Dangerous Weapon, and two counts of Robbery with a Dangerous Weapon. The Record tends to reflect

the following:

¶ 2 On 20 January 2015, a Lee County Grand Jury indicted Defendant for First-Degree Murder, Robbery with a Dangerous Weapon, First-Degree Kidnapping, and Conspiracy to Commit Robbery with a Dangerous Weapon. Subsequently, Defendant was indicted for First-Degree Burglary and Conspiracy to Commit Burglary on 20 March 2017 and superseding indictments for those offenses and Conspiracy to Commit Robbery with a Dangerous Weapon were issued on 2 January 2018.[1]

¶ 3 In December 2014, Defendant signed a waiver of assigned counsel. However, in January 2015, following the original indictment, Defendant was provided appointed trial counsel. Trial counsel withdrew and new trial counsel was appointed to represent Defendant in February 2015. This second trial counsel subsequently withdrew. Defendant's case was subsequently declared a capital case and two lawyers were appointed to represent Defendant. In June 2016, one of these lawyers also withdrew and another lawyer was assigned to Defendant's case as trial counsel.

¶ 4 In January 2016, Defendant filed a document captioned "Letter Rogatory for Relief" invoking Hague Convention and declaring himself a "Moor" and member of

[1] A review of the Record reveals Defendant was only indicted on one charge of Robbery; however, two counts of Robbery were submitted to the jury. Nevertheless, Defendant does not raise the indictment issue on appeal, and therefore, we do not address it. Moreover, although Defendant was indicted on one count of burglary, the State proceeded on the lesser charge of felonious breaking and entering at trial.

the "Moor-ish Holy Temple of Science" and "the tribe of Washitaw de Dugdamoundyah" and demanding dismissal of the charges against him. Defendant filed a second such "Letter Rogatory" in April 2016. Defendant apparently also indicated to his appointed counsel during this time that he wished to proceed pro se.

¶ 5 At a 13 June 2016 hearing, Defendant further asserted he wished to discharge his defense team and pursue his own defense premised on his claim to be exempt from prosecution as a Moorish national. The same day, the trial court entered an Order on its own motion raising the issue of Defendant's "capacity to proceed and waive counsel based on [D]efendant's written motion and in-court statements reflecting possible delusional thinking regarding his alleged immunity from the law of the United States, and his desire to represent himself in this capital case." The trial court ordered Defendant undergo examination at Central Regional Hospital-Butner Campus. Defendant's appointed counsel attempted to have Defendant independently examined by a psychiatrist, Dr. George Corvin, but Defendant refused to meet or speak with Dr. Corvin. Nonetheless, Dr. Corvin drafted a letter opining Defendant lacked capacity to represent himself based on the information Dr. Corvin gleaned from speaking with defense counsel, examining Defendant's medical records, and reviewing Defendant's pro se pleadings. Meanwhile, Defendant was examined by Dr. Charles Vance who opined that Defendant was capable to proceed to trial. Specifically, Dr. Vance found Defendant "showed a good understanding of the nature

of the legal proceedings against him, as well as the relevant courtroom personnel." When Dr. Vance questioned Defendant on the effectiveness of using a sovereign-citizen style defense strategy, Defendant acknowledged that "if they fail, they fail." Dr. Vance also found a sample "Letter for Rogatory Relief" form online that was "almost word-for-word identical to that submitted by [Defendant]."

¶ 6 On 16 December 2016 the trial court conducted a competency hearing. Dr. Vance and Dr. Corvin both testified at the hearing and submitted their respective forensic reports into evidence. The trial court also examined Defendant regarding his request to proceed pro se.

> Q: What is your position on that today? Are you asking to represent yourself?
>
> A: I'm demanding to represent myself.
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> . . .
>
> Q: Obviously most folks who are charged with capital murder are represented by lawyers. Do you understand that?
>
> A: Yes, sir.
>
> Q: And you understand, generally speaking, you have a constitutional right to represent yourself, if you want to do that. Do you understand that?
>
> A: Yes, sir.
>
> Q: Okay. . . . I'm just asking for the straightforward practical reason why you don't want . . . [lawyers] representing you in this case.

> A: Simply I have no problem with any of these two women representing me. I mean, not representing me, but counseling me. . . . But as far as representing me as my personage, no. They can counsel me in my legal affairs according to the Sixth Amendment, the assistance of counsel.
>
> . . .
>
> Q: When I'm talking about you being represented by counsel, I mean them being your lawyer as you come in here to court. They argue on your behalf and they advise you on what the best course to follow is with respect to your defense.
>
> A: Yes, sir.
>
> Q: Okay?
>
> A: Basically what I'm saying is that I can come in here as my own lawyer.
>
> Q: You want to be your own lawyer?
>
> A: Yes, sir.
>
> Q: Okay.
>
> A: I am, in fact, my own lawyer.
>
> Q: All right. Very well. I have some other questions I want to ask you then.
>
> A: Okay.

The trial court went on to explain to Defendant that if he decided to represent himself that he would have to follow the rules of evidence and procedure and the trial court would not give him legal advice concerning defenses, jury instructions, or other legal

issues that may be raised during the trial. The trial court informed Defendant of the charges he was facing, and the maximum possible punishment he was facing if convicted, which in his case would be death or the mandatory minimum of life without parole. Defendant stated he did not have any questions about his rights and then reiterated that he was "asserting [his] right [to represent himself] voluntarily, intelligently, and knowingly. No one has threatened [me] in any type of way, shape, or form." Upon the conclusion of the hearing, based on all the evidence presented and the trial court's own independent inquiry, the trial court ruled "Defendant has the capacity to proceed. Defendant will be allowed to represent himself. Counsel are removed but to remain as stand by counsel."

¶ 7 Jury selection for the case commenced on 4 September 2018. For its part, the State exercised a total of ten peremptory challenges during jury selection. After the ninth peremptory challenge, Defendant made a Batson objection arguing that four out of the nine peremptory challenges used by the State were against minorities, and that the excused minorities were capable of serving and qualified to vote for the death penalty. The trial court found Defendant failed to establish a prima facie case and continued on with jury selection. When the State made its tenth and final peremptory challenge, Defendant made a second Batson objection. Following the same line of reasoning, Defendant argued the State had:

> struck five out of 11 or 45.5 percent of the qualified minority

> jurors and has struck five out of the 22, or 23 percent of qualified white jurors. They have struck qualified minority jurors at almost twice the rate of qualified white jurors.

Once again, the trial court found Defendant had not made a prima facie showing that the exercise of the peremptory challenge was motivated by racial discrimination.

¶ 8 The jury was impaneled, and trial began on 27 September 2018. The evidence presented at trial tended to show that at approximately 5:30 a.m. on 22 November 2013, Anthony Giles and his wife Marjorie Giles were awakened by two armed intruders forcibly entering their home through the front door yelling "Sheriff's Department! Get on the ground!" One of the intruders remained at the front door, while the other approached the bedroom and pointed an assault rifle towards Ms. Giles and ordered her to get on the ground. Ms. Giles observed that the intruder, later identified as Defendant, was a six-foot tall, black man with shoulder length dreadlocks. Defendant wore a black toboggan, a light gray sweatshirt with the writing "Sheriff" on it, khaki cargo pants, black work-style boots, and gloves.

¶ 9 While Defendant was focusing on Ms. Giles, Mr. Giles—who had been asleep on the sofa prior to the break-in—entered the hallway leading to the bedroom. Defendant, hearing Mr. Giles moving behind him, turned around, stated "I thought I told you to get on the ground," and shot at Mr. Giles. After firing the shot, Defendant turned back around and continued securing Ms. Giles by zip-tying her hands behind her back. Subsequently, Defendant ordered her to get up and show him where the

safe was. Ms. Giles denied there was a safe but told Defendant there was money in the kitchen. At this point, Defendant received a phone call. Defendant asked the caller "where are you all at" and told the caller to "come back down here" and then to "just stay there."

¶ 10 After Defendant hung up the phone, he forced Ms. Giles into the kitchen at gunpoint. Once in the kitchen, Ms. Giles indicated to a cabinet where Mr. Giles usually kept a bank bag with around $60,000 to $80,000 of cash. Defendant retrieved the bank bag, looked inside the bag to confirm there was cash inside, and ordered Ms. Giles back to her bedroom. Once inside the bedroom, Defendant zip-tied Ms. Giles' ankles, told her to stay on the bed if she wanted to live, and took her cell phone. Ms. Giles heard Defendant's footsteps walking through the house, followed by the sound of the front door opening and closing. She got up out of bed and pulled the zip-tie from her ankles, and with the help of her children, removed the zip-ties off her wrists and called 911. Ms. Giles found her husband unresponsive, and when EMS arrived, they confirmed Mr. Giles was dead.

¶ 11 It was not until about a year later, around November 2014, that the Lee County Sheriff's Office received information linking Defendant to the crime. During an investigative interview, Brittany Chivaro revealed her boyfriend, Harley Chavis, had told her about the robbery and murder. Chavis had recounted that he, along with a black male known as "Genesis"—whose first name was Emmanuel—, CJ Mintz, and

another man named Derrick had committed the robbery and Defendant had killed the man in the home.

¶ 12 Both Chavis and Mintz testified at trial. Chavis testified he regularly saw Defendant—who he knew by the name "Genesis"—at a home in Wilmington, N.C., where he often hung out and drank beer with individuals including CJ Mintz. On 21 November 2013, during one such visit, Defendant inquired whether Chavis wanted to make some money by breaking into an underground gambling spot. They left Wilmington to drive to Sanford at around 12:00 a.m. that night. Mintz drove the car with Chavis and Derrick in the backseat, while Defendant sat in the passenger seat and provided directions. On their way to Sanford, they stopped and Defendant obtained three firearms. After driving up a dirt road leading through mobile homes, the group reached their destination. Defendant told Mintz to wait in the car and led Chavis and Derrick to the home. Defendant armed himself and Derrick with assault rifles and gave Chavis a pistol. Upon reaching the home, Defendant "shouldered the front door" and ran in with Derrick. Chavis waited on the front porch. Chavis observed a man appearing to raise a gun and Chavis ran from the home. Chavis heard two gunshots and saw Derrick departing the home. Shortly thereafter, the three returned to the waiting car and drove back to Wilmington. During the ride back, Defendant made a phone call in which he stated "man, I had to shoot him." The next day, Defendant told Chavis, Mintz, and Derrick that someone had been killed

during the robbery.

¶ 13 Mintz corroborated this testimony testifying that he also regularly hung out and drank beer with Chavis and Derrick where he would see Defendant—who he also knew as "Genesis." At Defendant's request, Mintz agreed to drive the group to Lee County. During the trip, they stopped at a Walmart where Defendant met someone and received "a large gun." After reaching the destination, Mintz waited 30-45 minutes until Chavis returned to the car with Derrick and Defendant arriving shortly after. Defendant gave Mintz a black and silver pistol. Later evidence tended to show this pistol, including the serial number, matched a pistol owned by Mr. Giles and that Ms. Giles reported missing after the robbery and murder.

¶ 14 Cell site location information data from two "tower dump" searches indicated there were two phone calls from Chavis' cellphone to Defendant's phone at 5:42 a.m. on 22 November 2013.[2] These calls were triangulated to three cell towers near the

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[2] As the Supreme Court of the United States has explained:

> Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called "cell sites." Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings. Cell sites typically have several directional antennas that divide the covered area into sectors.
>
> Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several

crime scene.

¶ 15 In addition to this evidence, the State, over Defendant's objection, sought to introduce evidence related to Defendant's prior 2005 robbery conviction for purposes of showing identity, common scheme or plan, and/or modus operandi for the crime under Rule 404(b) of the North Carolina Rules of Evidence. Following a hearing, the trial court overruled the objection and allowed the testimony. However, at Defendant's request, the trial court gave a limiting instruction before the 404(b) evidence was presented to the jury and another instruction with the final jury charge explaining to the jury that they could only consider the evidence of the prior robbery

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> times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.
>
> Wireless carriers collect and store CSLI for their own business purposes, including finding weak spots in their network and applying "roaming" charges when another carrier routes data through their cell sites. In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years phone companies have also collected location information from the transmission of text messages and routine data connections.

Carpenter v. United States, 138 S. Ct. 2206, 2211–12, 201 L. Ed. 2d 507 (2018).

conviction for the purpose of identity.

¶ 16 The following testimony, elicited from the prior victim and investigating officer, reflected the following. The prior victim, Demetrice McLaughlin (McLaughlin), testified on the night of 21 October 2005 between 10:00 and 11:00 p.m., Defendant knocked on McLaughlin's door to buy some marijuana from him. Defendant had been to McLaughlin's house around thirty to forty times prior to the night of the robbery. They completed the transaction when McLaughlin heard another knock at the door and opened the door to find another individual named Ashley. Ashley stuck a gun in McLaughlin's stomach, and Defendant stuck a gun in his back. A struggle ensued, before finally Ashley hit McLaughlin in the head with his gun and a third man tied McLaughlin's hands behind his back with a belt. McLaughlin tried to escape by jumping out his front window and was shot three times. Defendant and Ashley searched McLaughlin's home and stole seven grams of Marijuana.

¶ 17 Upon the conclusion of the State's case-in-chief, Defendant presented no evidence on his own behalf. On 26 October 2018, the jury found Defendant guilty of First-Degree Murder, Second-Degree Kidnapping, Breaking and Entering, Conspiracy to Commit Robbery with a Dangerous Weapon, and two counts of Robbery with a Dangerous Weapon. On 30 October 2018, following a sentencing hearing, the trial court imposed consecutive sentences of life imprisonment without parole for

First-Degree Murder, thirty-three to fifty-two months for Second-Degree Kidnapping, thirty-three to fifty-two months for Conspiracy to Commit Robbery, and two sentences of eighty-four to 113 months each for the two counts of Robbery with a Dangerous Weapon. Defendant gave notice of appeal in open court on 30 October 2018.

Issues

¶ 18 The issues on appeal are whether the trial court: (I) erred by allowing Defendant to waive his right to counsel and proceed pro se; (II) erred by ruling Defendant did not establish a prima facie case of racially discriminatory peremptory challenges during jury selection; and (III) prejudicially erred by admitting evidence of Defendant's prior 2005 robbery conviction under Rule 404(b) of the North Carolina Rules of Evidence.

Analysis

I. Competency to Proceed Pro Se

¶ 19 Defendant contends the trial court erred by finding Defendant's waiver of counsel was knowing and intelligent contending he did not unequivocally express his desire to proceed pro se and the trial court did not adequately ensure Defendant understood the difference between being his own "lawyer" and having "counsel" or

"representation."[3] Defendant asserts the Record reflects he did not appreciate the consequences of his decision to proceed pro se and suggests he was confused about the role of his stand-by counsel.

¶ 20 "A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment." *State v. Waltington*, 216 N.C. App. 388, 393, 716 S.E.2d 671, 675 (2011) (citing *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963)). However, a criminal defendant also "has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972). "Before allowing a defendant to waive in-court representation by counsel, however, the trial court must [e]nsure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992).

¶ 21 "First, waiver of the right to counsel and election to proceed pro se must be expressed "clearly and unequivocally." *Id.* "Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981). Furthermore, once a defendant clearly expresses his desire to have counsel removed and to proceed pro se, the trial court is

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[3] Defendant makes no argument that the evidence presented at this hearing required a determination Defendant was, in fact, not competent to stand trial or proceed pro se.

obligated to make further inquiry pursuant to N.C. Gen. Stat. § 15A-1242. *State v. Johnson*, 341 N.C. 104, 111, 459 S.E.2d 246, 250 (1995). N.C. Gen. Stat. § 15A-1242 states in relevant part:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2021).

¶ 22 In *Thomas*, our Supreme Court held where a defendant is confused about the choices available to them —i.e. proceed *in propia persona* or alternatively be represented by counsel—then they could not reflect a clear and unequivocal statement of desire to proceed pro se. *Thomas*, 331 N.C. at 675, 417 S.E.2d at 476. There, the defendant "sought to proceed to trial as lead counsel of a defense team which was to include licensed, appointed attorneys." *Id.* The trial court engaged in a lengthy colloquy with defendant in an attempt to explain to defendant what it meant to proceed pro se, and towards the end of the colloquy, defendant responded "I

do need legal assistance, but I am going pro se. I would like for the Court to appoint me an assistant that is going to help prepare me in this case and my legal defense. . . ." *Id.* The North Carolina Supreme Court concluded defendant's repeated requests to appear as "leading attorney" and as the head of "assistant" counsel did not amount to clear and unequivocal expressions of a desire to proceed pro se when after the trial court's colloquy, defendant continued to express confusion about the two mutually exclusive choices—to represent himself or be represented by counsel. *Id.* at 678, 417 S.E.2d at 477.

¶ 23 Here, Defendant attempts to analogize his case to *Thomas* and contends he did not unequivocally express a desire to proceed pro se pointing to his references to be being "represented" or "counseled." At the beginning of the trial court's inquiry to determine Defendant's competency to proceed pro se, Defendant stated:

> Simply I have no problem with any of these two women representing me. I mean not representing me, but counseling me. . . . But as far as representing me as my personage, no. They can counsel me in my legal affairs according to the Sixth Amendment, the assistance of counsel.

However, unlike in *Thomas*, here, the trial court adequately ensured Defendant understood the difference between counseling and representation by extensively questioning him about the use of the term "counseling" as follows:

> [Court]: When I'm talking about you being represented by counsel, I mean them being your lawyer as you come in here to court. They argue on your behalf and they advise you on what

> the best course to follow is with respect to your defense.
>
> [Defendant]: Yes, sir.
>
> [Court]: Okay?
>
> [Defendant]: Basically what I'm saying is that I can come in here as my own lawyer.
>
> Q: You want to be your own lawyer?
>
> A: Yes, sir.
>
> Q: Okay.
>
> A: I am, in fact, my own lawyer.
>
> Q: All right. Very well. I have some other questions I want to ask you then.
>
> A: Okay.

After Defendant stated he wanted to be his own lawyer, the trial court conducted the inquiry required under N.C. Gen. Stat. § 15A-1242. The trial court explained Defendant's right to proceed with two court appointed lawyers or represent himself and explained that if he decided to represent himself, he would act as his own lawyer in the courtroom. The trial court explained this meant following the same rules of evidence and procedure that a lawyer would and that the trial court could not give him legal advice during the trial. In response to each of these inquiries Defendant answered "Yes, sir" under oath affirming that he understood the consequences of representing himself. Next, the court explained the charges against Defendant and

the maximum possible punishment he was facing if convicted. Defendant again indicated he understood by answering "Yes, sir." Finally, at the end of the inquiry the trial court again asked Defendant if he waived his right to assistance by a lawyer and Defendant affirmatively stated he wished to represent himself. By inquiring of Defendant about his desire to proceed pro se and explaining what the trial court meant by being represented by counsel, along with complying with the statutory inquiry requirements under N.C. Gen. Stat. § 15A-1242, the trial court worked to adequately satisfy itself that Defendant understood his choice to proceed pro se and the consequences of that decision.[4] In turn, Defendant, after affirming he understood the choices available to him, unequivocally and affirmatively stated he wished to proceed pro se.

¶ 24 Moreover, the colloquy between Defendant and the trial court regarding the distinction between being represented by counsel and being counseled by them was entirely consistent with the role of stand-by counsel. *See* N.C. Gen. Stat. § 15A-1243 (2021) ("When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may determine that standby counsel should be appointed to assist the defendant when called upon and to bring to the judge's

[4] Indeed, Defendant's argument and this discussion ignores the fact the trial court went to great lengths prior to trial on its own Motion to satisfy itself of Defendant's competency and capacity to make the determination to proceed pro se.

attention matters favorable to the defendant upon which the judge should rule on his own motion."). Here, the trial court in its discretion acceded to Defendant's request to represent himself but determined Defendant's appointed lawyers should serve as stand-by counsel to assist Defendant when called upon.

¶ 25 Therefore, the Record before us supports the trial court's determination "[D]efendant has the capacity to proceed in this matter. The defendant has also made a knowing, intelligent, and voluntary waiver of his right to counsel." Thus, the trial court did not err in permitting Defendant to proceed pro se.

II. Prima Facie *Batson* Showing

¶ 26 Defendant next contends the trial court erred in concluding Defendant failed to make a prima facie showing of purposeful discrimination in the State's use of peremptory challenges. "When a defendant claims that the State has exercised its peremptory challenges in a racially discriminatory manner, a trial court conducts a three-step analysis pursuant to the decision of the Supreme Court of the United States in *Batson v. Kentucky*." *State v. Hobbs*, 374 N.C. 345, 349-50, 841 S.E.2d 492, 497 (2020) (citation omitted).

> First, the party raising the claim must make a prima facie showing of intentional discrimination under the "totality of the relevant facts" in the case. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving "purposeful discrimination.

State v. Waring, 364 N.C. 443, 474-475, 701 S.E.2d 615, 636 (2010) (citations omitted). "Step one of the *Batson* analysis, a prima facie showing of racial discrimination, is not intended to be a high hurdle for defendants to cross" and "the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *State v. Hoffman*, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998). The North Carolina Supreme Court has identified several factors that are relevant in considering whether a defendant has established the existence of the necessary prima facie case, including:

> the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995). Moreover, although a numerical analysis of strike patterns "is not necessarily dispositive" in determining that the defendant has succeeded in making out a prima facie case, such an analysis "can be useful in helping us and the trial court determine whether a prima facie case of discrimination has been established." *State v. Bennett*, 374 N.C. 579, 597–98, 843 S.E.2d 222, 234–35 (2020) (quoting *State v. Barden*, 356 N.C. 316, 344, 572 S.E.2d 108, 127 (2002)). "All in all, however, 'the defendant must make out a prima facie

case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' " *Id.* (quoting *Johnson v. California*, 545 U.S. 162, 168, 162 L. Ed. 2d 129, 138 (2005)).

¶ 27 "Generally, when a trial court rules that the defendant has failed to establish a prima facie case of discrimination, this Court's review is limited to a determination of whether the trial court erred in this respect." *State v. Bell*, 359 N.C. 1, 12, 603 S.E.2d 93, 102 (2004). However, "[t]o allow for appellate review, the trial court must make specific findings of fact at each stage of the *Batson* inquiry it reaches." *State v. Headen*, 206 N.C. App. 109, 114, 697 S.E.2d 407, 412 (2010) (quoting *State v. Cofield*, 129 N.C. App. 268, 275, 498 S.E.2d 823, 829 (1998)). Here, the trial court did not make specific findings of fact to permit appellate review. This constitutes error. We do not mean by this, however, that a trial court's findings on whether the moving party has established a prima facie case need to be extensive. Rather, these findings should reflect the dispositive ultimate facts demonstrating the trial court's processes of logical reasoning in reaching its decision. *Cf. Montgomery v. Montgomery*, 32 N.C. App. 154, 156–57, 231 S.E.2d 26, 28 (1977) (standing for the proposition, albeit in the civil context, a trial court's findings "must be the specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.").

¶ 28 For example, in *State v. Taylor*, our Supreme Court held a trial court properly determined there was not a prima facie showing where the trial court observed the challenged prospective juror "expressed tremendous hesitation in being able to vote for the death penalty" and where the trial court also "reviewed the other African–American prospective jurors whom the state peremptorily challenged and determined there was no 'pattern of discrimination in the exercised peremptory challenges.' " 362 N.C. 514, 528–29, 669 S.E.2d 239, 255 (2008). The Supreme Court reviewed the record and determined it supported the trial court's reasoned decision. *Id.* [5]

¶ 29 Here, in the absence of any findings, we are simply unsure of the trial court's reasoning for its decision. Thus, in the absence of such findings of fact, we are unable to undertake effective appellate review to determine whether the Record supports the reasoning the trial court applied. Therefore, we remand this matter for the limited purpose of allowing the trial court to make specific findings of fact supporting its decision to permit further appellate review. *See State v. Hood*, 273 N.C. App. 348,

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[5] Indeed, the Record here may well support findings supporting the trial court's decision. For example, it tends to show that although the prosecution struck 28% of non-white jurors compared to 10% of white jurors, each of the jurors that were struck, all expressed negative views towards the death penalty and/or knew potential trial witnesses. Further, out of a total of eighteen minority jurors questioned, the prosecutor accepted and passed seven non-white jurors and only struck five minorities—an acceptance rate of 58% and a strike rate of 41% of minority jurors questioned and not challenged for cause. *See State v. Bennett*, 374 N.C. 579, 600, 843 S.E.2d 222, 236 (2020) (Although not dispositive, "[t]o be sure, 'one factor tending to refute a showing of discrimination is the State's acceptance of black jurors.' " *State v. Thomas*, 329 N.C. 423, 431, 407 S.E.2d 141, 147 (1991) (citing *State v. Smith*, 328 N.C. 99, 121, 400 S.E.2d 712, 724 (1991))).

357, 848 S.E.2d 515, 522 (2020) (remanding for a new Batson hearing where "trial court's summary denial of Defendant's Batson challenge precludes appellate review."). The trial court, in its discretion, may—but is not required—to conduct any further evidentiary hearings it deems necessary to its determination and fact finding process.

III. 404(b) Evidence

¶ 30 Defendant contends the admission of Defendant's prior robbery conviction to show identity was error because the prior robbery was not sufficiently similar to the offense charged at trial. Rule 404(b) states, in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, absence of mistake, entrapment, or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b). "Though [Rule 404(b)] is a rule of inclusion, [it] is still constrained by requirements of similarity and temporal proximity." *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012). "Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate the same person committed them." *Id.* And although the similarities need not "rise to the level of the unique and bizarre," *Id.* (citation omitted)., "characteristics inherent to most crimes of that type" is insufficient to show similarity for the purpose

of Rule 404(b). *State v. Carpenter*, 361 N.C. 382, 390, 646 S.E.2d 105, 110 (2007) (citation and quotation omitted). For example, in *State v. Al-Bayyinah*, the North Carolina Supreme Court held the trial court erred by admitting evidence of two prior armed robberies of a grocery store when the only common facts were that the defendant wore dark clothing that obscured the face of the robber, carried a weapon, demanded money, and immediately fled—all characteristics generic to the crime of robbery. 356 N.C. 150, 154-155, 567 S.E.2d 120, 123 (2002).

¶ 31 Here, the trial court concluded the following similarities between the two crimes made the prior robbery admissible under Rule 404(b): (1) both crimes happened at "night, or at least times of reduced natural lighting"; (2) both involved weapons; (3) the victims were restrained in both crimes and shot when they tried to escape; (4) both crimes were planned and involved multiple perpetrators; (5) both occurred in a rural area inside the victim's home; and (6) both involved the taking of illegal contraband. However, a closer analysis shows that none of the similarities relied on by the trial court consisted of anything sufficiently similar for the purpose of Rule 404(b), and instead, all these characteristics are generic to the crime of armed robbery, kidnapping, and conspiracy to commit robbery. *Carpenter,* 361 N.C. at 390, 646 S.E.2d at 110. For example, while both crimes involved a weapon—a necessary element of armed robbery—the perpetrators used handguns in the first robbery, while the perpetrators used rifles in the second charged robbery. Further, in the first

robbery, Defendant had gone to the victim's house thirty or forty times prior to the robbery and gained entry to the house under the guise of buying drugs; whereas, the second robbery Defendant had never been to the victim's house and gained entry under the guise of police uniforms. Finally, while the victims were constrained in both crimes, in the first robbery the victims were constrained with a belt, while in the second robbery the perpetrators constrained the victims with zip-ties. Thus, the similarities in the commission of the two robberies were at best generalized similarities and tended to be more generic in the commission of a crime of the same type.

¶ 32 Nevertheless, presuming without deciding that the similarities between the two crimes were not sufficient to permit admission of the evidence of the prior robbery under Rule 404(b), "the improper admission of a defendant's prior conviction is not, however, reversible per se." *State v. Badgett*, 361 N.C. 234, 247, 644 S.E.2d 206, 214 (2007). Rather, "[d]efendant has the burden under N.C.G.S. § 15A-1443[a] of demonstrating that but for the erroneous admission of this evidence [in violation of Rule 404(b)], there is a reasonable possibility that the jury would have reached a verdict of not guilty." *State v. Burr*, 341 N.C. 263, 291, 461 S.E.2d 602, 617 (1995) (internal quotation marks omitted), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

¶ 33 Here, Defendant has not demonstrated a reasonable possibility of a different result but for the assumed erroneous admission of the 404(b) evidence because there was sufficient evidence to establish Defendant's guilt without the admission of the prior conviction. This evidence included: testimony implicating Defendant from his alleged co-conspirators; data from the cell phone tower closest to the mobile home showing Defendant received a phone call from a co-defendant's phone around the time of the robbery; victim's testimony; and out-of-court eyewitness identification. Thus, the circumstantial evidence in this case, excluding the 404(b) evidence, indicates it was not reasonably possible the jury would have arrived at a different verdict.

¶ 34 Furthermore, the trial court instructed the jury regarding the Rule 404(b) evidence prior to each witness's testimony and again during the final jury charge. The jury is presumed to have adhered to this mandate, and Defendant, therefore, cannot demonstrate prejudice. *See State v. Thompson*, 359 N.C. 77, 112, 604 S.E.2d 850, 875 (2004) ("We presume, as we must, that the jury followed the instructions submitted to it by the trial court." (citation omitted)).

¶ 35 Thus, there is not a reasonable likelihood that the jury would have reached a different verdict given the other evidence presented in the State's case-in-chief and the trial court's limiting instructions to the jury regarding the 404(b) evidence. Therefore, Defendant has failed to establish that he was prejudiced and denied a fair

trial by the admission of the evidence. Consequently, we conclude there was no prejudicial error in the admission of the 2005 robbery conviction.

Conclusion

¶ 36 Accordingly, for the foregoing reasons, we conclude: (I) the trial court did not err in permitting Defendant to proceed pro se; (II) the trial court, on remand, is required to make findings of fact supporting its determination Defendant failed to establish a prima facie showing of purposeful discrimination in the State's use of peremptory challenges during jury selection; and (III) there was no prejudicial error in admitting evidence of the prior robbery under Rule 404(b) of the Rules of Evidence.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART; REMANDED FOR ADDITIONAL FINDINGS OF FACT.

Judges COLLINS and CARPENTER concur.

Report per Rule 30(e).