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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-90

Filed 31 December 2024

Mecklenburg County, No. 21 CRS 228547

STATE OF NORTH CAROLINA

v.

KERBY DEMARCO MCLEAN, Defendant.

Appeal by Defendant from judgment entered 21 April 2023 by Judge Justin N. Davis in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Tirrill Moore, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant-appellant.*

MURPHY, Judge.

Based upon our Supreme Court's recent decision in *State v. Singleton*, a defendant challenging the jurisdictional sufficiency of an indictment on appeal must show that the indictment wholly fails to allege a crime. Without such a showing, a defendant's jurisdictional argument necessarily fails. Here, where Defendant failed to establish on appeal that his indictment wholly failed to allege a crime, the

indictment was sufficient to establish subject matter jurisdiction. Defendant's remaining arguments—instructional error, the authentication of evidence at trial, and error under *Batson v. Kentucky*—also fail. Accordingly, Defendant has not demonstrated any reversible error at his trial.

### **BACKGROUND**

Defendant Kerby Demarco McLean appeals from his 21 April 2023 conviction on a single charge of obtaining property by false pretenses from the alleged victim, Ervin Collins. Defendant was indicted on 28 March 2022 in an indictment using the following language:

on or about and between the 5th day of November, 2020, and the 23rd day of March, 2021, in Mecklenburg County, Kerby Demarco McLean did unlawfully, willfully, feloniously, knowingly, and designedly with the intent to cheat and defraud obtain United States currency from Ervin Collins, by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: this United States currency was obtained by means of said defendant. The defendant told the victim that the defendant's company, known as J. Capital Holdings, could help him purchase a home, when in fact the victim paid the defendant \$6,000.00 in United States currency for the down payment on a home. The victim advised that the defendant has failed to provide the service that he was paid for and has failed to return his money.

The transaction referenced in the indictment between Defendant and Collins was alleged to have been documented in a contract dated 11 November 2020.

Defendant was tried beginning in April 2023. During voir dire, Defendant

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objected on *Batson* grounds to the State's exercise of peremptory strikes, and the trial court denied the objection on the basis that Defendant had not made a prima facie showing of discrimination:

THE COURT: All right. The doors are closed, we're now outside the presence of the jury. There's a matter that counsel for the defendant[] . . . wanted to take up outside the presence of the jury. So . . . I'll hear from you.

[DEFENDANT'S TRIAL COUNSEL]: Thank you, Your Honor. At this time, the defense is making a challenge under [*Batson v. Kentucky*] regarding juror number two and juror number eight that were just struck, and I unfortunately knew their names. I believe that he has their pink sheets. But the basis of the challenge is that Mr. McLean has a constitutional right to have a jury made up of his peers. As you can tell, he is African American. The State just struck both, and the only two, African American jurors that were currently impaneled. And so we are making that challenge that this was made based on -- needs to be based on a non-racially motivated reason, and we ask that the State be questioned on that for the record.

THE COURT: All right. [State], I will hear from you with regard to a neutral justification.

[STATE]: Yes, Your Honor. I just want to ensure, under the *Batson* challenge, are you finding that there's a prima facia case of discrimination on my part?

THE COURT: Let me ask a few more questions of [Defendant's counsel]. What other -- what other basis are you alleging?

[DEFENDANT'S TRIAL COUNSEL]: Well, so what -- yes, so I don't believe number two and eight said anything that the other jurors didn't do as far as their criminal background, their real estate experience, their belief of the police that would prejudice them in any way from being -- in fact, both of them said they could be fair and could be

here on time everyday. So I don't believe they have provided -- that two or eight said any reason that would not be provided for not a prima facia case of racially motivated striking.

THE COURT: What is it that you say, I mean, other than the race of the two individuals, what else is there that indicates an inference of -- of the State engaging in discrimination?

[DEFENDANT'S TRIAL COUNSEL]: I don't think there needs to be. I think what the case suggests is that -- and I'm looking at this cheat sheet -- that they -- well, so we do have the burden to show the inference and I believe the inference is that the only -- both black jurors said nothing that was different than anything else -- anyone else to get them struck, and the only thing that is different is their race.

THE COURT: How many other jurors of -- of color are remaining on the jury?

[DEFENDANT'S TRIAL COUNSEL]: Of color there were a few, but they were the only two African American males. I don't believe they were replaced with African American males. The case law says -- so [*Johnson v. California*], 545 U.S. 162, 2005 says we do have a burden, however, [*State v. Hoffman*], 1998, says that this was not intended to be a high hurdle for defendant to cross, and it does not require, according to [*Batson*], direct evidence of discrimination.

THE COURT: I believe there are other African American jurors remaining on this jury, aren't there, counsel?

[DEFENDANT'S TRIAL COUNSEL]: There are. What I'm saying is African American males.

THE COURT: Okay. Well, in the Court's discretion, I'm going to find that there has not been a prima facia showing at this point. And so I'm going to deny the challenge.

[DEFENDANT'S TRIAL COUNSEL]: I understand, Your

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Honor. We'd just renew our motion for the record.

THE COURT: All right, sir.

The jurors in question, Jurors 2 and 8, each answered questions from the State uneventfully, with the two men disclosing that they both had very minor criminal histories with driving on a suspended license and marijuana possession, respectively. Several other jurors had similar minor criminal histories, many of whom were not stricken by the State.

Later during the trial, the State introduced the contract signed by Collins, allegedly at the behest of Defendant. The State attempted to authenticate the document in the following colloquy with the alleged victim:

[COLLINS:] [Defendant] proceeded, you know, sending me the paperwork to fill out for the home. I processed it, you know, filled it out, got it back to him, and once I signed off on it, everything was in his hands after that.

[THE STATE:] Now, prior to filling out that paperwork, did you do anything else with [ ] Defendant regarding purchasing the home?

[COLLINS:] No, I didn't.

[THE STATE:] Did you ever look at homes with [ ] [D]efendant?

[DEFENDANT'S COUNSEL]: Objection. Leading.

THE COURT: Overruled.

[COLLINS:] I did.

[THE STATE:] When did you do that?

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[COLLINS:] Shortly after he told me everything looked good with processing the paperwork.

[THE STATE:] Okay. So the paperwork that we're talking about, who gave you that paperwork?

[COLLINS:] Kerby McLean.

[THE STATE:] And --

[COLLINS:] It was from Jay Capital Holdings, I think, and KDM Ventures, I believe.

[THE STATE:] May I approach, Your Honor?

THE COURT: Yes, sir.

[THE STATE:] Now, I'm showing you what's previously been marked as Exhibit No. 1. Do you recognize this document?

. . . .

[COLLINS:] I do.

[THE STATE:] What is this document?

[COLLINS:] This is the contract that he had me fill out to start the process of my home.

[THE STATE:] And what is the top line on this contract called?

[COLLINS:] This says contract for financial funding services.

[DEFENDANT'S COUNSEL:] Objection. It hasn't been introduced as evidence yet so can't be reading it to the jury.

THE COURT: That's overruled.

[THE STATE:] And how do you know this is the document that you filled out?

[COLLINS:] I remember correctly.

[THE STATE:] Is there handwriting on here?

[COLLINS:] Yes.

[THE STATE:] If you flip through this document, is there any signatures that belong to you?

[COLLINS:] Yes. This one belongs to me on page 3.

[THE STATE:] And is that your signature?

[COLLINS:] That is my signature.

[THE STATE:] Okay. And that's on page 3 of this document?

[COLLINS:] Uh-huh.

[THE STATE:] Now, is this in the same or substantially similar fashion as when you prepared it?

[COLLINS:] No. This confidential line was not there.

[THE STATE:] Okay. Do you notice anything else about this -- if you want to go through this, is there anything else different about this entire contract than when you filled it out?

[COLLINS:] Yes.

[THE STATE:] Now, I don't want you to go over it if there has been any changes. You're looking at page 5 right now?

[COLLINS:] Uh-huh.

[THE STATE:] Is there a difference on page 5?

[COLLINS:] Completely big difference on page 5.

[THE STATE:] Okay. Is there anything else on here that's not consistent with the contract that you signed initially?

[COLLINS:] Page 11 and page 12 was not here.

[THE STATE:] So other than page 5 at the bottom of the page and page 11 and 12, is this in the same or similar fashion as when you completed it?

[COLLINS:] No, it's not.

[THE STATE:] No, I mean other than page 5, this one section right here, and page 10 and 11?

[COLLINS:] Oh, this is different.

[THE STATE:] Yes, that's why I'm saying that. So other than that, is it in the same or similar fashion as when you completed this?

[COLLINS:] Yes.

[THE STATE:] Other than those things that you mentioned, has it been altered in any way on the other pages that are familiar?

[COLLINS:] Yes, it has.

[THE STATE:] Other than this page --

[COLLINS:] Oh.

[THE STATE:] -- and 10 and 11, hasn't been altered in any way?

[COLLINS:] Correct.

[THE STATE:] Your Honor, at this time, wish to introduced State's Exhibit No. 1.

THE COURT: All right. It will be admitted.

Immediately after this exchange, Defendant objected on the bases of allegedly improper authentication and hearsay:



[DEFENDANT'S COUNSEL:] Thank you. I have two objections. The first is under 901 Rules of Evidence for lack of authentication. This witness has testified that it is not in the same -- it was not -- it's not the same contract that he signed. It was changed on, I think, multiple pages, 5, 10, and 11. I'm not exactly sure the page numbers he said, but that's at least a three pages, I believe, that are different than what he said that he saw originally, so he doesn't have proper knowledge that this has not been altered in any way or this is the same contract that he signed.

The other issue is under 803, there is not an exception to hearsay for this. It can't come in for the truth of the matter. It's not a business record because Mr. Ervin Collins was not the person who wrote this contract, so he can't establish that it's part of normal business procedure. And so it can't come -- if there is no exception for it to be under the truth of the matter. If it wants to come in for corroboration or illustrative purposes, that's different and then we would ask for a limited instruction that it should not be considered as substantive evidence.

THE COURT: All right. Yes, sir, [State].

[THE STATE:] Yes, Your Honor. When we are looking at this, unfortunately, when you submit applications, somethings do change on here. If I may I approach so Your Honor can see a copy of what I'm talking about?

THE COURT: Yes, sir.

([The State] approached the bench.)

THE COURT: This is a copy of what the witness has as well; is that correct?

[THE STATE:] What the witness has, yes, Your Honor. I'm holding it in my hand right now. Your Honor, you can see the day that he stated that was his handwriting on the top of page 1. As we turn to page 3, you can see where he said that i[s] his signature under the borrower's signature. This is the contract that he filled out. He said it's in the same

or substantially similar, minus the exceptions that he made, which with contracts some things to go on from there. He did mention number 5 and just as reasoning from looking at it, if you look at the signature on page 3 and also on page 8, the defendant -- or the victim in this case has clearly said those are his signature, and you can clearly see.

I'll just point to the last letter of each signature. You can see that kind of swoop. However, when you look on page 5, it's a signature that's pretty similar, but it almost looks like it almost has an E at the end of it. It's a completely different signature and that's why he's saying that is not his and it's been altered. And he will testify to that when I'm going through this and explain all that to the jury. He is also saying that pages 11 and 12 [] are blank. They are stamped "confidential" [and] you can see they are blank. They [] have checklists, required documents to provide service and everything. He's saying those were not part of his original contract, and he will explain that.

The trial court denied the objections and admitted the contract into evidence.

After the close of all evidence, the trial court instructed the jury on the charge as follows:

[D]efendant has been charged with obtaining property by false pretenses. For you to find [D]efendant guilty of this offense, the State must prove five things beyond a reasonable doubt:

First, that [] [D]efendant made a representation to Ervin Collins.

Second, that this representation was false.

Third, that this representation was calculated and intended to deceive. Evidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud.

Fourth, that the alleged victim was in fact deceived by this representation.

And fifth, that [] [D]efendant thereby obtained US currency from Ervin Collins.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, [] [D]efendant made a representation and that this representation was false, that this representation was calculated and intended to deceive, that the alleged victim was in fact deceived by it, and that [] [D]efendant thereby obtained US currency from Ervin Collins, it would be your duty to return a verdict of guilty. If you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant moved to dismiss the case at the close of the State's evidence and at the close of all evidence, which the trial court denied.

Defendant was convicted of the offense and now appeals.

### **ANALYSIS**

On appeal, Defendant makes four distinct arguments. First, (A) he argues the indictment was jurisdictionally defective. Second, (B) he argues that the instructions provided to the jury were erroneous. Third, (C) he argues the trial court prejudicially admitted improperly authenticated evidence. Lastly, (D) he argues the trial court erred in denying a challenge to the striking of prospective jurors pursuant to *Batson v. Kentucky*. For the reasons discussed more fully below, Defendant has not established reversible error with respect to any of these arguments.

#### **A. Indictment and Subject Matter Jurisdiction**

Defendant first alleges that his indictment was fatally defective, thus stripping the trial court of subject matter jurisdiction over the charge. Defendant does not argue that he objected to the indictment at trial, instead challenging the indictment solely on the basis of subject matter jurisdiction for the first time on appeal. However, while it is correct that, “where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court[,]” *State v. Wallace*, 351 N.C. 481, 503 (2000), Defendant’s opening brief, which was filed before significant alterations in our caselaw, represented the scope of our review as a full inquiry into whether the indictment properly alleges all essential elements of an offense.

This type of inquiry is no longer the proper scope of our examination into alleged indictment defects on appeal when the only issue raised is subject matter jurisdiction. In *State v. Singleton*, our Supreme Court held that, while the sufficiency with which the elements of an offense are alleged in an indictment is still the proper subject of a *non-jurisdictional* challenge, the sole question affecting the existence of subject matter jurisdiction is whether the indictment wholly “fail[s] to charge a crime[,]” as distinguished from the failure to allege a crime’s elements:

The common law rule’s archaic notion of “jurisdiction” muddies the distinction between these two types of indictment defects—failure to charge a crime on the one hand, and failure to allege with sufficient precision facts and elements of a crime thereby permitting the defendant

to prepare a defense and the court to render judgment on the other. “It is the allegation of criminal conduct . . . that activates a court’s jurisdiction,” *Bennington v. Com.*, 348 S.W.3d 613, 622 (Ky. 2011), not a recitation of elements with perfection.

. . . .

Notably, subsection 15A-952(d) provides that “[m]otions concerning jurisdiction of the court or the failure of the pleading to charge an offense may be made at any time.” N.C.G.S. § 15A-952(d) (2023). Subsection 15A-952(d)’s phrase “failure of the pleading to charge an offense” is distinct from the language of subsection 15A-924(e), which concerns a failure “to charge the defendant with a crime in the manner required by subsection [15A-924](a).” *Compare* N.C.G.S. § 15A-952(d), *with* N.C.G.S. § 15A-924(e). This is also consistent with the bifurcation in N.C.G.S. §§ 15-153 and 15-155.

For example, a motion to dismiss an indictment for larceny that “fail[ed] to charge the defendant . . . in the manner required by subsection [15A-924](a),” N.C.G.S. § 15A-924(e), by failing to assert facts supporting each element of larceny, would be properly made in superior court under subsections 15A-924(e) and 15A-952(b)(6)(a) and would be subject to waiver for lack of timeliness. A motion to dismiss an indictment charging the accused with wearing a pink shirt on a Wednesday—conduct that does not constitute a criminal offense—would be properly made at any time under subsection 15A-952(d) and would not be subject to such waiver.

*State v. Singleton*, 386 N.C. 183, 199, 205. Accordingly, while we do review Defendant’s indictment for jurisdictional error, our review is limited to whether his indictment fails to allege criminal conduct.

While our Supreme Court has not given us guidance on the issue of what,

specifically, constitutes the failure to allege criminal conduct, the language in its analysis indicates that it is Defendant's burden to argue that the indictment fails to allege criminal conduct. *See id.* at 205. Here, Defendant's argument for the total failure to allege criminal conduct, as now required by *Singleton*, is set out in his reply brief as follows:

The indictment here simply alleges that Mr. McLean told Collins that he had a company that could help him get a house, Collins paid Mr. McLean, and that Mr. McLean had not yet provided the service he was paid for and had not yet returned the money. The indictment here "wholly fails to charge a crime against the laws of people of this State." [*Id.* at 215]. As such, the indictment in this case suffers from a jurisdictional defect, and "[t]o be sure, where a criminal indictment suffers from a jurisdictional defect, courts lack the ability to act." *Id.* This is so, even under the novel approach to indictments recently adopted by *Singleton*.

As discussed in Mr. McLean's brief, the indictment not only fails to allege a crime, but it failed to put Mr. McLean on notice of what he was charged with. As is clear from Argument II, Mr. McLean and the State had vastly different interpretations of what conduct was covered by the indictment. Mr. McLean's counsel believed he was charged with some misrepresentation related to J. Capital Holdings: "That's what he's charged with, what's what we're on notice for, not whether he's a real estate agent." Yet, as discussed below, the State believed otherwise. The indictment in the present case certainly did not provide adequate notice of which conduct the State would rely upon to obtain a conviction. Even under *Singleton*, the indictment in this case was jurisdictionally invalid and the conviction must be vacated.

This argument, even if true, would not establish that Defendant's indictment failed to allege a crime; rather, it would only establish that Defendant received inadequate

notice of the offense alleged.<sup>1</sup> Under *Singleton*, these are two different concepts. *See id.* at 210 (“An indictment might fail to satisfy constitutional purposes by failing to provide notice sufficient to prepare a defense and to protect against double jeopardy, or it might fail to satisfy relevant statutory strictures by failing to assert facts supporting every element of a criminal offense. However, because these deficiencies do not implicate modern jurisdictional concerns, the analytical framework that mandated reflexive vacatur of convictions and dismissal of charges if the indictment contained either a statutory or constitutional defect is inappropriate.”). Defendant has therefore not demonstrated jurisdictional error.

Defendant also argues that, to the extent we are unconvinced by his argument for jurisdictional error, we should decline to apply *Singleton* to this case because doing so would violate his due process rights. For this contention, he relies upon *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001) (“[L]imitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process.”), and *Bowie v. Columbia*, 378 U.S. 347, 354 (1964) (“When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law.”). However, we note that *Bowie*, the

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<sup>1</sup> To the extent Defendant also argues the indictment only alleged a simple nonpayment for a service, we note that Defendant omits the following critical language: “Kerby Demarco McLean did unlawfully, willfully, feloniously, knowingly, and designedly with the intent to cheat and defraud obtain United States currency from Ervin Collins, by means of a false pretense which was calculated to deceive and did deceive.”

most on-point of these cases, announced its due process holding in a very different context than the case before us.

There, the issue was whether a South Carolina statute, which had, via judicial construction, grown more expansive than its plain language implied, would apply, in its then-modern interpretation, to the conduct of the defendants multiple years prior:

[W]e agree with petitioners that § 16-386 of the South Carolina Code did not give them fair warning, at the time of their conduct in Eckerd's Drug Store in 1960, that the act for which they now stand convicted was rendered criminal by the statute. By its terms, the statute prohibited only 'entry upon the lands of another after notice from the owner prohibiting such entry.' There was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises after being asked to leave. Petitioners did not violate the statute as it was written; they received no notice before entering either the drugstore or the restaurant department. Indeed, they knew they would not receive any such notice before entering the store, for they were invited to purchase everything except food there.

*Id.* at 355. It was in this context that the U.S. Supreme Court reiterated the already-established principle that,

[w]hen a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law in its primary sense of an opportunity to be heard and to defend his substantive right.

*Id.* (marks omitted) (citing *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930)).



Here, Defendant engaged in no previously-legal conduct that was turned criminal by judicial operation. Moreover, perhaps more saliently, Defendant was never denied any identifiable procedural right, as the first instance of any jurisdictional challenge to his indictment was on appeal to this court. Thus, while the standards applicable to our review of jurisdictional defects in indictments did change drastically in *Singleton*, Defendant has been given a full opportunity to argue jurisdictional error on appeal, just as he would have prior to the issuance of *Singleton*. The presence of *Singleton* in our jurisprudence is no less just to him as it is to future defendants or petitioners whose crime, indictment, trial, conviction, and appeal—or motion for appropriate relief or petition, as the case may be—all take place in the future.<sup>2</sup>

### **B. Instructional Error**

Defendant next argues that the trial court erred in its instructions to the jury insofar as the instructions did not specify what misrepresentation was alleged of him and therefore were at variance with the indictment. When properly preserved, as Defendant has here, “[w]hether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*.” *State v. Barron*, 202 N.C. App. 686, 694 (2010), *rev. denied*, 364 N.C. 327 (2010). “The prime purpose of a court’s

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<sup>2</sup> Indeed, it is difficult to conceive of a specific procedural unfairness to Defendant in this case unless Defendant had deliberately delayed raising issues with his indictment until he appealed. This is the type of bad faith gamesmanship *Singleton* sought, in part, to correct, and it is a behavior we will neither assume of Defendant nor honor with the trappings of Due Process. *Singleton*, 386 N.C. at 192.

charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *State v. Cameron*, 284 N.C. 165, 171 (1973), *cert. denied*, 418 U.S. 905 (1974). “[A]n error in jury instructions is prejudicial and requires a new trial only if ‘there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.’” *State v. Castaneda*, 196 N.C. App. 109, 116 (2009) (quoting N.C.G.S. § 15A-1443(a) (2007)).

Here, Defendant was charged with obtaining property by false pretenses. The elements of this offense, as commonly set out, are “(1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person.” *State v. Compton*, 90 N.C. App. 101, 103 (1988); *see also* N.C.G.S. 14-100 (2023); *State v. Pierce*, 279 N.C. App. 494, 497-99 (2021), *rev. denied*, 883 S.E.2d 458 (2023) (Mem). “The gist of obtaining property by false pretense is the false representation of a . . . fact intended to and which does deceive one from whom property is obtained. The [S]tate must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged.” *State v. Braswell*, 225 N.C. App. 734, 740 (2013).

Defendant’s specific contention with respect to instructional error is that the instructions permitted the jury to find he committed any one of a number of misrepresentations, only some of which were reflected in his indictment. The

relevant instructions, as stated previously, were as follows:

The defendant has been charged with obtaining property by false pretenses. For you to find defendant guilty of this offense, the State must prove five things beyond a reasonable doubt:

First, that the defendant made a representation to Ervin Collins.

Second, that this representation was false.

Third, that this representation was calculated and intended to deceive. Evidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud.

Fourth, that the alleged victim was in fact deceived by this representation.

And fifth, that the defendant thereby obtained US currency from Ervin Collins.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant made a representation and that this representation was false, that this representation was calculated and intended to deceive, that the alleged victim was in fact deceived by it, and that the defendant thereby obtained US currency from Ervin Collins, it would be your duty to return a verdict of guilty. If you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Meanwhile, the indictment provided that,

on or about and between the 5th day of November, 2020, and the 23rd day of March, 2021, in Mecklenburg County, Kerby Demarco McLean did unlawfully, willfully, feloniously, knowingly, and designedly with the intent to cheat and defraud obtain United States currency from Ervin Collins, by means of a false pretense which was

calculated to deceive and did deceive. The false pretense consisted of the following: this United States currency was obtained by means of said defendant. The defendant told the victim that the defendant's company, known as J. Capital Holdings, could help him purchase a home, when in fact the victim paid the defendant \$6,000.00 in United States currency for the down payment on a home. The victim advised that the defendant has failed to provide the service that he was paid for and has failed to return his money.

Specifically, Defendant alleges that the State's evidence advanced at least six misrepresentations that could have caused Defendant to be convicted on theories not reflected in the indictment given the generality of the instructions, including that Defendant falsely (1) held himself out as a real estate agent; (2) represented he was going to help Collins buy a house; (3) held himself out as affiliated with a business; (4) indicated his companies were registered to do business in North Carolina; (5) indicated his companies were registered to do business in New York; and (6) indicated to Collins that he would refund the money.

In this case, Defendant's arguments on appeal, in substance, allege error with respect to the failure of the trial court's instructions to divide the core misrepresentation they referenced into subparts consistently with the indictment. This is not what our caselaw requires. Generally speaking, "[a] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds 'no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury.'" *State v. Ledwell*, 171 N.C. App. 314, 320 (2005)

(quoting *State v. Clemmons*, 111 N.C. App. 569, 578 (1993)).

As an allegedly comparable scenario, Defendant relies primarily on *State v. Locklear*. *State v. Locklear*, 259 N.C. App. 374, 383-84 (2018). There, we held that not only instructional error, but also *plain* instructional error, occurred where, in addition to evidence of the misrepresentation alleged in the indictment, “evidence was introduced that [the] defendant signed her ex-husband’s name on a deed, overstated the personal items allegedly destroyed in the fire, and sought money for rent that was not used for rent.” *Id.* at 384. In *Locklear*, the specific language of the indictment alleged that the defendant

unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, did obtain or attempt to obtain \$331,500.00 from North Carolina Farm Bureau Mutual Insurance Company by means of a false pretense which was calculated to deceive and did deceive. *The false pretense consisted of the following: filing a fire loss claim under the defendant’s home owner insurance policy, when in fact the defendant had intentionally burned her own residence*, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

*Id.* at 380 (emphasis in original).

In reasoning that the instructions, in light of the evidence, improperly allowed the defendant to be convicted on bases not present in the indictment, our analysis rested on the proposition that the “defendant sign[ing] her ex-husband’s name on a deed, overstat[ing] the personal items allegedly destroyed in the fire, and [seeking] money for rent that was not used for rent” were distinct actions not referred to in the

indictment. *Id.* at 3884. We interpreted the language of the indictment itself—referring to the defendant as “filing a fire loss claim under the defendant’s home owner insurance policy, when in fact the defendant had intentionally burned her own residence,” *id.* at 380 (emphasis omitted)—as indicating the *specific lie* that the defendant did not burn her house down. The narrowness of the indictment is, in part, what made *Locklear*, by its own terms, “an exceptional case.” *Id.* at 384.

Generally speaking, however, indictments that refer to misrepresentations that, by their nature, encapsulate multiple lies are generally not interpreted as referring to a single instance of lying. For example, in *State v. Barker*, the indictments alleging that the defendant had obtained property by false pretenses read as follows:

[t]he jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain U.S. currency in the amount of \$7,000.00 from Geraldine Hoenig by means of a false pretense which was calculated to deceive and did deceive. This property was obtained by means of approaching the victim and claiming that her roof needed repair, and then overcharging the victim for either work that did not need to be done, or damage that was caused by the defendant, with no intention of providing professional services to the victim in return for the U.S. currency that he fraudulently acquired.

....

[t]he jurors for the State upon their oath present that on or about the date of offense shown and in the county named

above the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain or attempt to obtain U.S. currency in the amount of \$7,300.00 from Nellie Harward by means of a false pretense which was calculated to deceive and did deceive. This property was obtained by means of approaching the victim and claiming that her shed roof needed repair, and at the time the defendant intended to use substandard materials and construction to overcharge the victim.

*State v. Barker*, 240 N.C. App. 224, 229-30 (2015). In challenging both the indictment and the instructions that followed from it before us, the defendant alleged that the indictments did not specify the false statements made, arguing that the indictment's presentation of his overall scheme as the "misrepresentation" was insufficient:

Here, the indictments charging [the defendant] with obtaining property by false pretenses did not lucidly state the alleged false representations. . . . The [first] indictment averred that [the defendant] claimed [the first victim]'s roof needed repair, but did not aver that this claim was false. Rather, the indictment claimed only that [the defendant] overcharged [the first victim] for either work that did not need to be done, or damage that he caused. Later, the indictment alleged that [the defendant] had "no intention of providing professional services to the victim in return for the U.S. currency that he fraudulently acquired" but failed to allege any false promise that was made to which this allegation corresponds. In other words, the indictment could have alleged that [the defendant] falsely represented that he would provide professional services to [the first victim]. It did not.

. . . .

In relevant part, the [second] indictment alleged only that \$7,300[.00] "was obtained by means of approaching the [second] victim and claiming that her shed roof needed

repair, and at the time the defendant intended to use substandard materials and construction to overcharge the [second] victim.” Again, this indictment failed to aver that the claim that [the second victim]’s shed roof needed repair was false. It further failed to allege that the property received was obtained as a result of a misrepresentation, but rather alleged that it was obtained by overcharging for the work done.

We rejected this argument, defining the “misrepresentation” as being “that [the] defendant sought to defraud his victims of money by claiming their roofs needed repair when in fact no repairs were needed, and that [the] defendant initiated these repairs but either failed to complete them or used substandard materials in performing whatever work was done[.]” *Id.* at 230. This holding specifically contemplated that an entire scheme constituting multiple individual lies permissibly constituted a singular misrepresentation for purposes of the defendant’s indictment. We then went on to reject the defendant’s argument that the trial court plainly erred during jury instructions, holding that no error occurred at all because the “trial court was not required to instruct the jury on a specific misrepresentation in the indictment” and the trial court properly relied on pattern jury instructions. *Id.* at 235.

Here, Defendant’s indictment alleged that

on or about and between the 5th day of November, 2020, and the 23rd day of March, 2021, in Mecklenburg County, Kerby Demarco McLean did unlawfully, willfully, feloniously, knowingly, and designedly with the intent to cheat and defraud obtain United States currency from Ervin Collins, by means of a false pretense which was



calculated to deceive and did deceive. The false pretense consisted of the following: this United States currency was obtained by means of said defendant. The defendant told the victim that the defendant's company, known as J. Capital Holdings, could help him purchase a home, when in fact the victim paid the defendant \$6,000.00 in United States currency for the down payment on a home. The victim advised that the defendant has failed to provide the service that he was paid for and has failed to return his money.

As is proper under *Barker*, we understand the reference in Defendant's indictment to refer to the entire scheme in which Defendant induced Collins to pay him a total of \$6,000.00. *Id.* at 230. Taken in that context, the "various misrepresentations" that Defendant alleges differed from the indictment—holding himself out as a real estate agent, representing he was going to help Collins buy a house, holding himself out as affiliated with a business, and indicating his companies were registered to do business in one or more states—were not, in fact, discrete misrepresentations, but individual lies comprising the *singular* misrepresentation by which he indicated to Collins that he could help him purchase a home and procured Collins's money.<sup>3</sup>

Accordingly, *Locklear*—the holding of which was based on the idea that other misrepresentations in the record differed from the indictment—does not apply, *Locklear*, 259 N.C. App. at 383-84, and the jury instructions were not improper by

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<sup>3</sup> Among the purportedly distinct misrepresentations, Defendant also listed that Defendant told Collins he would refund the money. We list this item separately because, as an action that occurred later in time than Defendant's procurement of the money, we have no reason to believe the jury would have used this as the misrepresentation forming the basis for having obtained the property in the first instance.

virtue of their limited specificity.

### **C. Improperly Authenticated Evidence**

Defendant next argues that the trial court erred in admitting, without proper authentication, an exhibit purporting to be a contract between Defendant and Collins, but that was heavily altered relative to the contract as it existed when Collins last possessed it.<sup>4</sup> Specifically, Defendant argues that the document should not have been admitted because “the State never presented any evidence whatsoever about where it obtained [the document], nor about when or who made the alterations to the document” and that its admission was prejudicial to him.

“A trial court’s determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law.” *State v. Hicks*, 243 N.C. App. 628, 638 (2015) (quoting *State v. Crawley*, 217 N.C. App. 509, 515 (2011)). However, a defendant must also show prejudice, and thus “has the burden of showing [both] error and that there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred.” *State v. Locklear*, 349 N.C. 118, 149 (1998).

Under Rule 901(a), “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” N.C.G.S. § 8C-1,

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<sup>4</sup> Though Defendant also objected to the admission of the contract on hearsay grounds at trial, he has not made any arguments concerning hearsay on appeal.

Rule 901(a) (2023). “[T]he Rules of Evidence provide a multitude of methods by which evidence may be properly authenticated” pursuant to Rule 901, *see State v. DeJesus*, 265 N.C. App. 279, 288, *rev. denied*, 372 N.C. 707 (1019) (Mem), including, non-exhaustively, the following:

- (1) Testimony of Witness with Knowledge.--Testimony that a matter is what it is claimed to be.
- (2) Nonexpert Opinion on Handwriting.--Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
- (3) Comparison by Trier or Expert Witness.--Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
- (4) Distinctive Characteristics and the Like.--Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
- (5) Voice Identification.--Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
- (6) Telephone Conversations.--Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
- (7) Public Records or Reports.--Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public

record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient Documents or Data Compilations.--Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or System.--Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods Provided by Statute.--Any method of authentication or identification provided by statute.

N.C.G.S. § 8C-1, Rule 901(b) (2023). “It is not error for the trial court to admit evidence if it could reasonably determine that there was sufficient evidence to support a finding that the matter in question is what its proponent claims.” *DeJesus*, 265 N.C. App. at 288 (2019) (marks omitted) (citing *State v. Crawley*, 217 N.C. App. 509, 516 (2011)).

Here, the trial court determined, at a minimum, that the State had sufficiently authenticated the document via Collins’s testimony that some of the handwriting on the contract was his own and that some differed from his own, *see* N.C.G.S. § 8C-1, Rule 901(b) (2023), as is evident from the primary topic of the exchange between the trial court and the State after Defendant’s objection. This is one of the enumerated permissible bases for the authentication of evidence under Rule 901 and, at minimum, properly authenticated the portions of the document signed by Collins. *See*

*Fin. Corp. v. Transfer, Inc.*, 42 N.C. App. 116, 122 (1979) (holding that an invoice otherwise containing script that was not handwritten was properly authenticated as to the handwritten portions). Moreover, given the presence of at least some of Collins’s unaltered handwriting on the document, the handwriting, together with Collins’s testimony as to his familiarity with the printed portions of the contract, permitted the trial court to “reasonably determine . . . that the [contract was] what its proponent claim[ed].” *DeJesus*, 265 N.C. App. at 288; *see also* N.C.G.S. § 8C-1, Rule 901(a) (2023).

However, even assuming, *arguendo*, the printed portions of the contract were not properly authenticated, the admission of those portions did not prejudice Defendant. While Defendant cites Collins’s candor at trial as to the limitations of his knowledge of the contract for the proposition that the admission of the document itself was improper, we observe that all such testimony—including that the document was not “in the same or substantially similar fashion as when he prepared it[,]” that there was a “big difference on page 5[,]” and that further differences existed on pages 10 and 11—was presented to demonstrate that the contract was, for the most part, the same as the one Collins signed and was admitted to show that it had been changed specifically in the ways identified. This is significant for two reasons: first, because the authenticity of the unaltered, printed portions of the contract was not meaningfully salient to the jury; and, second, because the altered portions, insofar as they concerned alleged forgeries of Collins’s signature, were authenticated by one of

the methods enumerated in Rule 901(b). Thus, even if the printed portions of the contract had been insufficiently authenticated, the insufficiently authenticated portions of the contract would have minimally impacted the jury's consideration, and the bulk of the analytically salient portions of the contract were still otherwise properly authenticated.<sup>5</sup> Thus, there is no reasonable possibility that the printed portions of the contract, if improperly authenticated, affected the jury's verdict, and the trial court did not reversibly err in this respect.

#### ***D. Batson***

Finally, Defendant argues the trial court erred in ruling he had not established a prima facie case of racial discrimination pursuant to *Batson v. Kentucky*. Under *Batson*,

a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show . . . that the prosecutor has exercised peremptory challenges to remove [members] from the venire [on the basis of] race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen

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<sup>5</sup> The argument in Defendant's principal brief concerning prejudice also principally rests on the proposition that any forged signatures or alterations in the contract constituted additional misrepresentations exceeding the scope of his indictment. As we have already rejected the underlying premise of this argument in part B of this opinion, we are not convinced Defendant was prejudiced.

from the petit jury on account of their race.

....

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging [jurors of the excluded class].

*Batson v. Kentucky*, 476 U.S. 79, 96, 97 (1986) (marks and citations omitted). In other words, a *Batson* analysis consists of three steps. “First, the defendant must make a prima facie showing that the [S]tate exercised a race-based peremptory challenge.” *State v. Taylor*, 362 N.C. 514, 527 (2008), *cert. denied*, 558 U.S. 851 (2009). Second, “[i]f the defendant makes the requisite showing, the burden shifts to the [S]tate to offer a facially valid, race-neutral explanation for the peremptory challenge.” *Id.* “Finally, the trial court must decide whether the defendant has proved purposeful discrimination.” *Id.*

Here, the trial court denied Defendant’s objection under the first step of *Batson*, ruling that he had not successfully shown a prima facie case of discrimination. Specifically, he contends the trial court should have concluded Defendant established a prima facie case of discrimination when the State struck 100% of Black men from the jury. “[W]hen a trial court rules that a defendant has failed to demonstrate a prima facie case of discrimination, ‘[t]he trial court’s ruling is accorded deference on review and will not be disturbed unless it is clearly erroneous.’” *State v. Augustine*, 359 N.C. 709, 715 (2005), *cert. denied*, 548 U.S. 925 (2006) (citing *State v. Nicholson*, 355 N.C. 1, 21-22 (2002)).

In determining whether a defendant has made out a prima facie case of discrimination, our Supreme Court has instructed that we employ a variety of factors.

The factors, as set out in *State v. Nicholson*, include

whether the “prosecutor used a disproportionate number of peremptory challenges to strike African-American jurors in a single case,” [*State v. Smith*, 351 N.C. 251, 262 (2000)]; whether the defendant is a “member of a cognizable racial minority,” *State v. Porter*, 326 N.C. 489, 497[] . . . (1990); and whether the [S]tate’s challenges appear to have been motivated by racial discrimination, *id.* Other factors a court may examine include “the victim’s race, . . . the race of the State’s key witnesses,” and “whether the prosecutor made racially motivated statements or asked racially motivated questions of black prospective jurors . . . that raise[d] an inference of discrimination.” *State v. Gregory*, 340 N.C. 365, 397-98[] . . . (1995), *cert. denied*, 517 U.S. 1108[] . . . (1996).

*State v. Nicholson*, 355 N.C. 1, 22 (2002).

In Defendant’s case, his argument on appeal pertains primarily to the portion of the State’s strikes used against Black individuals—and, specifically, Black males—relative to jurors of other backgrounds, with the remainder of his argument pertaining primarily to the State’s *lack* of justification to strike Juror 2 and Juror 8. For this proposition, Defendant points us to *State v. Bennett*, a case in which, when the trial court ruled Defendant failed to make out a prima facie case,

all of the State’s peremptory challenges were directed to African American prospective jurors, . . . the State did not peremptorily challenge any white prospective juror, and . . . neither of the African American jurors that the State peremptorily challenged provided any answers during the course of the jury selection process that cast any doubt



upon their ability to be fair and impartial to the State.

*State v. Bennett*, 374 N.C. 579, 602 (2020). In that case, our Supreme Court held that the strike rate, standing alone, established clear error on the part of the trial court when the State did not otherwise have any clear justification for striking the jurors it struck. *Id.* at 599.

However, we have generally reserved the application of *Bennett* for cases in which the State exercised *all* of its strikes against Black jurors. *State v. Campbell*, 272 N.C. App. 554, 564 (2020) (“Our Supreme Court’s recent decision in *Bennett* does not affect the result of this case. . . . Here, one of the State’s peremptory challenges was exercised against a white prospective juror and three were exercised against African American prospective jurors. . . . While we are concerned that it appears seventy-five percent of the State’s peremptory challenges involve African American prospective jurors, this standing alone is not sufficient to sustain a *Batson* challenge.”), *aff’d*, 384 N.C. 126 (2023). This is because “[t]he trial court’s orders concerning jury selection are entitled to deference on review.” *Id.* at 560. “Thus, we ‘must uphold the trial court’s findings unless they are clearly erroneous.’” *Id.* at 561. (citing *State v. Cofield*, 129 N.C. App. 268, 275 (1998)).

Here, the statistics, standing alone, do not rise to the level of demonstrating clear error in the trial court’s prima facie determination under *Bennett*. At the time he objected to the strikes at trial, see *State v. Dixon*, 291 N.C. App. 444, 457-58 (2023), *disc. rev. denied*, 904 S.E.2d 531 (N.C. 2024), the State had exercised two peremptory

strikes against Black men and one strike against a white woman, and the panel consisted of two Black men, three Black women, three men who were not Black, and four women who were not Black. While we are cognizant that Defendant specifically argues—and argued at trial—that the striking of Black *men* was the basis for his *prima facie* case and acknowledge the possibility that such a claim might be raised successfully in a future case, we cannot ignore the fact that any rationally-conducted statistical analysis must take the sample size into account.<sup>6</sup> Here, the number of Black men stricken was two, and the number of peremptory strikes exercised by the State at the time of the *Batson* objection was three. Standing alone, we cannot say a mere two stricken jurors of a cognizable demographic group being stricken—alongside one who was not—establishes enough of a numerical pattern to rise to the level of *Bennett* or otherwise demonstrate clear error on appeal.

The inability of the statistics, standing alone, to carry Defendant’s case is compounded by the fact that the factors set out in *Nicholson* generally do not support Defendant’s argument. Setting aside the strike proportions and assuming, *arguendo*, that Black men are a proper analytical class for purposes of isolating a cognizable

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<sup>6</sup> Indeed, the viability of such a claim is an outstanding legal question in our jurisdiction. See *State v. Hewitt*, COA17-1157-2, 277 N.C. App. 219, 2021 WL 1541488, \*4 (unpublished) (Murphy, J., concurring) (“[I]f we were to consider this matter without remanding to the trial court, I would invoke Rule 2 of the North Carolina Rules of Appellate Procedure to consider the impact of the 100% strike rate of African American males by the State and the interplay of the Supreme Court of the United States’ holdings in *Batson v. Kentucky*, 476 U.S. 79[] . . . (1986), *modified*, *Powers v. Ohio*, 499 U.S. 400[] . . . (1991), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127[] . . . (1994).”). However, even if conceptually viable, this is not a case where such a claim would prevail.

minority, Defendant has not pointed us to—nor do we discern—any racially motivated statements by the State, racially charged questions asked of the prospective jurors, or any further material in the record that would lead us to believe racial discrimination occurred. *Nicholson*, 355 N.C. at 22. Moreover, Defendant has not pointed us to any information in the record indicating the race of the victim or the race of the key witnesses, and we will not assume that these factors tend to show racial discrimination unless Defendant has created a record on which we can analyze those facts. *State v. Campbell*, 384 N.C. 126, 135-36 (2023). Bearing all this in mind, Defendant has not cleared the high hurdle required to show clear error on appeal.

### **CONCLUSION**

Defendant has shown no jurisdictional error in his indictment, no prejudicial error in the jury instructions or the admission of the allegedly improperly authenticated contract, and no clear error under *Batson*.

NO ERROR.

Judges ARROWOOD and GRIFFIN concur in result only.

Report Per Rule 30(e).