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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-682

Filed 2 April 2025

Franklin County, Nos. 18CRS52378, 20CRS50452, 23CRS234

STATE OF NORTH CAROLINA

v.

BRADLEY JAY JOHNSON, Defendant.

Appeal by Defendant from judgments entered 6 October 2023 by Judge Cynthia King Sturges in Franklin County Superior Court. Heard in the Court of Appeals 28 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Marc Bernstein, for the State.

W. Michael Spivey for Defendant.

GRIFFIN, Judge.

Defendant Bradley Jay Johnson appeals from the trial court's judgments entered after a jury found him guilty of larceny of swine and misdemeanor assault inflicting serious injury. Defendant raises seven issues on appeal. Defendant contends the trial court erred by (1) denying his Motion to Dismiss the larceny of swine charge; (2) excluding certain testimony offered by Defendant; (3) denying

Defendant the right to be heard at sentencing; (4) ordering attorney fees be imposed as court costs; (5) denying Defendant the opportunity to be heard when awarding attorney fees; and (6) ordering restitution. Defendant also argues he received ineffective assistance of counsel. We hold the trial court did not err and Defendant did not receive ineffective assistance of counsel.

I. Factual and Procedural Background

Defendant was employed by Elton Futrell as a supervisor at First Line Farm, LLC. First Line Farm was a pig nursery that housed pigs until they were ready to be moved to a “finishing farm” to be slaughtered. First Line Farm did not own the pigs but rather produced them under a contract with “Smithfield Foods” and “Smithfield” owned the pigs. Along with generally caring for the pigs, Defendant was tasked with killing and disposing of “culls.” Culls were pigs either sick, injured, or slow to gain weight that were moved into separate pens. Eventually these pigs would either become suitable to move back with the other pigs or be killed and placed in the “dead box.”

Sometime around October or November 2018, Mr. Futrell, Defendant’s employer and the owner of First Line Farm, discovered forty-two of the “culls” were missing. Around that same time, Gary Murphy, an investigator hired by “Smithfield Hog Production,” discovered a Craigslist post advertising the sale of pigs. Mr.

Murphy was also made aware of several pigs who were being housed in a homemade pen. Mr. Murphy then visited the homemade pen and observed approximately forty pigs matching the description of the pigs that had disappeared from First Line Farm. Upon further investigation, Mr. Murphy discovered Defendant relocated the pigs to Farm Animal Save Group. Mr. Murphy spoke with Caroline Byrd, an employee of Farm Animal Save Group, and she informed him of where the pigs were obtained and showed Mr. Murphy a copy of the receipt. The receipt, dated 15 October 2018, was a written acknowledgment signed by “B.J.” that he had the authority to dispose of the pigs. Mr. Murphy went to First Line Farm and asked to see B.J., who turned out to be Defendant. When Mr. Futrell learned about the incident, Mr. Futrell fired Defendant.

Mr. Murphy reported the incident to the Franklin County Sheriff's Office, and Detective William Garrett was assigned to the case. Detective Garrett arrested Defendant for larceny of swine. Defendant explained to Detective Garrett that the pigs in question were not up to standard and were to be euthanized. Defendant admitted he listed them on social media (Craigslist) as an attempt to sell them, but also stated he wanted to save them instead of euthanizing them.

After Defendant was fired, Defendant and Mr. Futrell did not have any interactions until 1 January 2019. On that date, Defendant went to Mr. Futrell's

office. Defendant appeared unsettled and was asked to leave. Defendant's girlfriend, minor son, and another employee, Mayra Chavez, were present. When Mr. Futrell arrived, Defendant and Mr. Futrell got into an argument which resulted in a physical altercation. Defendant threw a glass bottle which hit Mr. Futrell, and Mr. Futrell's truck windshield was busted.

Defendant was subsequently indicted by a Franklin County Grand Jury for larceny of swine, felony assault inflicting serious bodily injury, and for being a habitual felon. Defendant's case came on for trial on 2 October 2023 in Franklin County Superior Court before the Honorable Cynthia K. Sturges. The State presented testimony from Detective Garrett, Mr. Futrell, Ms. Chavez, and Mr. Murphy. Defendant also testified. Defendant moved to dismiss all charges for insufficiency of the evidence at the close of the State's evidence and again at the close of all the evidence. Defendant's Motions were denied by the trial court.

On 6 October 2023, Defendant was convicted of larceny of swine, misdemeanor assault inflicting serious injury, and for being a habitual felon. The court included restitution and attorney fees in Defendant's larceny of swine judgment. Defendant timely appeals.

II. Analysis

Defendant contends the trial court erred by (1) denying his Motion to Dismiss

the larceny of swine charge; (2) excluding certain testimony offered by Defendant; (3) denying Defendant the right to be heard at sentencing; (4) ordering attorney fees be imposed as court costs; (5) denying Defendant the opportunity to be heard when awarding attorney fees; and (6) ordering restitution.¹ Defendant also argues he received ineffective assistance of counsel. We hold the trial court did not err and Defendant did not receive ineffective assistance of counsel.

A. Motion to Dismiss

Defendant argues the trial court erred by denying his Motion to Dismiss for insufficient evidence. Specifically, Defendant contends there was a fatal variance between the information listed in the indictment and the evidence presented at trial. Defendant alleges the State failed to prove the name listed in the indictment, Murphy Brown, LLC DBA Smithfield Foods, existed or owned the pigs. Additionally, Defendant alleges the State presented insufficient evidence to prove Defendant committed a “trespassory taking,” an element required to prove larceny.

¹ Defendant filed a petition for writ of certiorari asking this Court to review despite potential defects in his notice of appeal. To the extent Defendant’s appeal was imperfect, we elect to review the appeal. N.C. R. App. P. 21; *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 43 (2018).

We review a trial court's denial of a defendant's motion to dismiss *de novo*. *State v. Golder*, 374 N.C. 238, 249–50, 839 S.E.2d 782, 790 (2020). To survive a motion to dismiss for insufficient evidence, the State must present substantial evidence of (1) each essential element of the charged offense, and (2) the defendant being the perpetrator of the offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). Substantial evidence may be direct or circumstantial. *State v. Wright*, 275 N.C. 242, 249–50, 166 S.E.2d 681, 686 (1969). “Direct evidence is that which is immediately applied to the fact to be proved, while circumstantial evidence is that which is indirectly applied, by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred.” *Id.* (citation omitted). “[T]he law does not distinguish between the weight given to direct and circumstantial evidence[.]” *State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001). “The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both[.]” *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984), and that is “whether a [r]easonable inference of the defendant's guilt of the crime charged may be drawn from the evidence,” *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

In ruling on a motion to dismiss, the court must consider all evidence “in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]” *Id.*

This Court has previously held a “[a] variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction.” *State v. Clagon*, 279 N.C. App. 425, 431, 865 S.E.2d 343, 347 (2021) (citation omitted). To establish a fatal variance, the defendant must prove a variance between the offense charged and the evidence presented at trial. *Id.* The variance must be fatal, meaning “the defendant must show a variance regarding an essential element of the offense.” *Id.* (citation and internal quotations omitted). *See State v. Lopez* _ N.C. App. _, _, 905 S.E.2d 272, 278 (2024) (“A variance between an indictment and the evidence produced at trial ‘is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged.’” (quoting *State v. Tarlton*, 279 N.C. App. 249, 253, 864 S.E.2d 810, 813 (2021))).

Here, Defendant contends the information listed in the indictment was inconsistent with the evidence presented at trial. Defendant first alleges the State failed to present sufficient evidence to prove that the name listed in the indictment,

“Murphy Brown, LLC DBA Smithfield Foods,” existed or owned the pigs. We disagree.

To support a conviction of common law larceny, the State must prove the defendant engaged in a trespassory taking with the intent to permanently deprive the owner of his personal property. *State v. Sisk*, 285 N.C. App. 637, 641, 878 S.E.2d 183, 186 (2022). “The elements of common law larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner’s consent; and (4) with the intent to deprive the owner of his property permanently.” *Id.* (citations and internal quotations omitted).

Implicit in this definition is that there needs to be an identifiable owner of the stolen property. *State v. Greene*, 289 N.C. 578, 584–85, 223 S.E.2d 365, 369–70 (1976). “[T]he indictment in a larceny case must allege a person who has a property interest in the property stolen and [] the State must prove that that person has ownership[.]” *Id.* at 584, 223 S.E.2d at 369. We recognize “[i]f the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit.” *Id.* at 585, 223 S.E.2d at 370.

Here, the State presented sufficient evidence to prove the name listed in the indictment, “Murphy Brown, LLC DBA Smithfield Foods” was the owner of the stolen

pigs. Testimony at trial showed Murphy Brown was a subsidiary of Smithfield Foods, and First Line Farm was the farm that contracted with Smithfield Foods to raise the pigs. The owner of the farm, Elton Futrell, specifically stated he “did not own the pigs.” He was “producing the animals under a contract with Smithfield foods.” Smithfield Foods worked in conjunction with Mr. Futrell to make decisions regarding raising the pigs, and Mr. Futrell reported to Smithfield Foods any issues concerning the pigs. While Smithfield Foods was occasionally referred to as “Smithfield” or “Smithfield Farms” throughout trial, that was not a fatal variation.

Our Supreme Court has held minor name discrepancies are not fatal when it does not prejudice the defendant. *See State v. Wilson*, 264 N.C. 595, 597, 142 S.E.2d 180, 181 (1965) (holding no error when the name listed in the indictment was “B. M. Hancock & Son, a corporation” but the corporation’s president and general manager referred to it as “B. M. Hancock & Son’s Feed Mill, Inc.” and “B. M. Hancock & Son, Inc.,” and other witnesses referred to it as “B. M. Hancock & Son’s, ‘B. M. Hancock & Son,’ ‘B. M. Hancock & Son’s Feed Mill,’ ‘B. M. Hancock’s Feed Mill,’ ‘B. M. Hancock’s Mill,’ and ‘B. M. Hancock.’”). There, the Court recognized that while “no attempt was made to stress or identify the precise corporate name[,] [t]he various names indicated were used interchangeably to identify the occupant of the building and the owner of the chattels therein.” *Id.* Thus, it was “apparent that all the

witnesses were talking about the same thing.” *Id.* (quoting *State v. Wyatt*, 254 N.C. 220, 221, 118 S.E.2d 420, 421 (1961)).

Here, like in *Wilson*, there were few variations of the name listed in the indictment. However, it was “apparent that all the witnesses were talking about the same thing.” *Id.* Moreover, our Supreme Court recently reaffirmed a long-standing principal that “it would not favor justice to allow [a] defendant to escape merited punishment upon a minor matter of form.” *State v. Singleton*, 386 N.C. 183, 192, 900 S.E.2d 802, 809 (2024) (quoting *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719 (1981)). Thus, we hold the name listed in the indictment, “Murphy Brown, LLC DBA Smithfield Foods,” and the variations of the same name used in trial, do not amount to a fatal variance.

Next, Defendant argues there was insufficient evidence presented to support a conviction of larceny because the State did not prove that Defendant engaged in a “trespassory taking.” We disagree.

“To constitute a larceny, a taking must be wrongful. In other words, the taking must be by an act of trespass.” *State v. Jones*, 369 N.C. 631, 634, 800 S.E.2d 54, 57 (2017). When a trespass occurs, “it must be against the possession of another” and “without his consent.” *Id.* Defendant incorrectly asserts that because he was in lawful possession of the pigs as an employee at First Line Farm, he could not have

committed a trespass. Here, the State presented sufficient evidence to show Defendant did not have the consent of Smithfield Foods to sell the pigs nor was it within Defendant's scope of employment. Moreover, Defendant had the pigs moved at night, which was against the facility's practice of not moving animals after dark. *See State v. Weaver*, 359 N.C. 246, 256, 607 S.E.2d 599, 605 (2005) (holding evidence insufficient to support lawful possession when the defendant "had no independent authority to write checks from R & D accounts or to use Shirley Weaver's signature stamp" even though Defendant "had access to the checks and signature stamp by virtue of her status as an employee at R & D"). The Court in *Weaver* held because there was no lawful possession, larceny was the appropriate conviction rather than embezzlement. *Id.* at 257, 607 S.E.2d at 605. Here, like in *Weaver*, Defendant had access to the pigs as an employee at First Line Farm, but he did not have the authority to sell them or hold himself out as having the authority to sell them. Because there was no lawful possession, there is no error in the larceny conviction.

B. Excluding Testimony

Defendant contends the trial court erred by excluding testimony offered by Defendant. Specifically, Defendant alleges the statement offered should have been admitted as a hearsay exception. We disagree.

This Court reviews a trial court's decision to exclude or admit evidence under

an abuse of discretion standard. *Cash v. Cash*, 284 N.C. App. 1, 7, 874 S.E.2d 653, 658 (2022). We must evaluate whether the trial court’s decision “is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *State v. Bettis*, 206 N.C. App. 721, 724–25, 698 S.E.2d 507, 510 (2010) (citation and internal quotations omitted).

“In order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record.” *Id.* at 726, 698 S.E.2d at 511 (quoting *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010)). Our Supreme Court has specified “the essential content or substance of the witness’ testimony must be shown before we can ascertain whether prejudicial error occurred.” *Jacobs*, 363 N.C. at 818, 689 S.E.2d at 861.

Here, the statement Defendant alleges should have been admitted was a statement made by Defendant’s son during the physical altercation with Defendant and Mr. Futrell. The child stated, “Dad, Dad, Dad. Do something. He’s going to get a gun.” Defendant, while testifying, told the court what his son said. The State objected as to what the child said, and the court sustained the State’s objection and instructed the jury to disregard Defendant’s testimony about his son’s exclamation. Because the statement was made, and the trial court instructed the testimony be

stricken, there was no offer of proof necessary. We can understand “the essential content or substance of the witness’ testimony.” *Jacobs*, 363 N.C. at 818, 689 S.E.2d at 861.

Assuming without deciding whether the decision to allow the testimony was error, we hold the exclusion of this testimony was not prejudicial. *See Id.* at 825, 689 S.E.2d at 865 (“[E]videntiary error does not necessitate a new trial unless the erroneous admission was prejudicial.” (quoting *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009))). The same applies to the exclusion of evidence. *Id.*

Evidentiary error is prejudicial “when 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.” *Id.* at 825, 689 S.E.2d at 865–66 (quoting N.C. Gen. Stat. § 15A-1443(a)). Defendant has not met this burden.

Defendant argues the testimony was essential because it went to the issue of whether Defendant acted in self-defense. We disagree. Defendant did not claim self-defense or raise an issue of self-defense at trial. It is a well-established law in this State that a party cannot raise a new theory on appeal if it was not raised at trial. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996). *See Weil v. Herring*, 207 N.C. 6, 175 S.E. 836, 838 n.3 (1934) (“[T]he law does not permit parties to swap horses between courts in order to get a better mount.”). Moreover, prior to the statement in

question being made at trial, the jury heard testimony from Defendant that he thought Mr. Futrell was going outside to get a gun. Thus, the statement in question is not necessary and certainly not prejudicial because Defendant's own statement is duplicative of the same evidence. *See Gaddy v. N.C. Nat'l Bank*, 25 N.C. App. 169, 173, 212 S.E.2d 561, 564 (1975) ("It is well settled that exception to the admission of evidence will not be sustained when evidence of like import has theretofore been, or is thereafter, introduced without objection."). Defendant has not shown that absent the alleged error, there is a reasonable possibility a different result would have been reached at trial. *Jacobs*, 363 N.C. at 825, 689 S.E.2d at 865–66.

C. Defendant's Right to Be Heard During Sentencing

Defendant contends he was denied his statutory right to be heard at sentencing pursuant to N.C. Gen. Stat. § 15A-1334(b), and that he was prejudiced as a result. We disagree.

When a defendant raises a challenge under section 15A-1334(b), "[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to the defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Griffin*, 109 N.C. App. 131, 132, 425 S.E.2d 722, 723 (1993) (quoting *State v. Lane*, 39 N.C. App. 33, 38, 249 S.E.2d 449, 452–53 (1978)).

Section 15A-1334(b) provides in relevant part that “[t]he defendant at the hearing may make a statement in his own behalf.” *State v. Jones*, 253 N.C. App. 789, 797, 802 S.E.2d 518, 523 (2017) (quoting N.C. Gen. Stat. § 15A-1334(b) (2023)). While section 15A-1334(b) allows a defendant the right to speak at sentencing, the statute “does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf.” *State v. McRae*, 70 N.C. App. 779, 781, 320 S.E.2d 914, 915 (1984).

Here, as evidenced by the transcript, Defendant expressed his desire to be heard at sentencing and it was denied by the trial court. Despite the court’s initial response, Defendant persisted and expressed he had something to bring to the court’s attention. The court responded it would hear from him at “a later time,” and Defendant replied by stating, “My motion of discovery is false against me.” The trial court, albeit frustrated with Defendant for continuously interrupting, instructed Defendant if he wished to be heard further, he may do so through his attorney. Defendant did not express a desire to speak on this issue any more during sentencing.

Defendant has not shown how the trial court’s procedural conduct was prejudicial. Although we recognize the trial court initially denied Defendant the opportunity to speak, Defendant spoke anyway, and the trial court immediately followed up by stating Defendant could continue voicing his concerns later through

his attorney. Defendant was not denied the right to be heard, as he was told he would have an opportunity to raise the issue later, and Defendant chose to not press the matter. *Cf. Griffin*, 109 N.C. App. at 132–33, 425 S.E.2d at 723 (holding prejudicial conduct when the defendant’s right to testify under section 15A-1334(b) was “effectively chilled” by the trial court’s statement that allowing the defendant to speak “would be a big mistake”); *Jones*, 253 N.C. App. at 802, 802 S.E.2d at 526 (holding reversible error where “the trial court first acknowledged an explicit request by the defendant to address the court and then abruptly entered judgment without giving the defendant an opportunity to speak”). Here, unlike *Griffin* and *Jones*, Defendant’s right to make a statement at sentencing under section 15A-1334(b) was not chilled, nor was Defendant denied the opportunity to speak. Defendant was told he could speak later and raise the issue through this attorney, and he chose not to do so. Thus, Defendant cannot show prejudice and the trial court’s conduct does not amount to reversible error.

D. Attorney Fees

Defendant contends the trial court erred by ordering attorney fees be imposed as court costs and by denying him an opportunity to be heard. We disagree.

This Court “conducts a *de novo* review of a question of law to determine whether a trial court has violated a statutory mandate.” *State v. Rutledge*, 267 N.C. App. 91, 95, 832 S.E.2d 745, 747 (2019).

Pursuant to section 7A-304, when a defendant is convicted, trial courts must evaluate certain costs incurred against the defendant. N.C. Gen. Stat. § 7A-304 (2023). Only upon entry of a written order, supported by findings of fact and conclusions of law, may trial courts waive or reduce costs assessed under this section. *Id.* Imposition of attorney fees against a convicted, indigent defendant for costs incurred by a defendant’s appointed counsel are governed by a separate statute, section 7A-455(a). N.C. Gen. Stat. § 7A-455(a) (2023).

“In certain circumstances, trial courts may enter civil judgments against convicted indigent defendants for the attorneys’ fees incurred by their court-appointed counsel.” *State v. Friend*, 257 N.C. App. 516, 522, 809 S.E.2d 902, 906 (2018) (citing N.C. Gen. Stat. § 7A-455). Factors such as “the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases” are to be considered. *Id.* (quoting N.C. Gen. Stat. § 7A-455(b) (2023)). “Before imposing a judgment for these attorneys’ fees, the trial court must afford the defendant notice and an opportunity to be heard.” *Id.*

Outside of a civil judgment, our Courts have recognized attorney fees may be

imposed as a condition of probation or as a condition of work release or post-release supervision. *See State v. Gibson*, 278 N.C. App. 295, 301, 861 S.E.2d 766, 771 (2021) (holding the trial court did not err by imposing attorney fees as a condition of probation as it “is automatically included in each probationary judgment” authorized by statute (citing N.C. Gen. Stat. § 15A-1343(b)(10) (2019))); *State v. Wingate*, 149 N.C. App. 879, 881–82, 561 S.E.2d 911, 913–14 (2002) (holding the trial court was permitted to recommend the defendant pay \$231.00 in costs and \$400 in attorney fees as a condition of work release).

Here, there was no civil judgment, but attorney fees were imposed as a condition of post-release supervision. On the judgment form, the trial court correctly included costs in the amount of \$385.50 in one box and attorney fees in the amount of \$8,925.00 in a separate box. The trial court expressly stated in the judgment form that “all monies shall be paid through post-release supervision.” Although the judge stated at trial attorney fees were to be taxed as regular costs and were not to be a civil judgment, the order differentiated those amounts and specified how the attorney fees were to be paid, through post-release supervision. *See Matter of R.S.M.*, 257 N.C. App. 21, 23, 809 S.E.2d 134, 135 (2017) (“Any conflict between the announcement of judgment in open court and the written order is resolved in favor of the written order.”); *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992) (“We

find the written judgment and commitment form to be controlling, as it modifies anything earlier ordered by the trial court.”). Thus, we hold the court properly ordered attorney fees separate from court costs.

We disagree with Defendant’s contention that the trial court denied him an opportunity to be heard when awarding attorney fees. “Whether the trial court gave a defendant adequate notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney is a question of law we review de novo.” *State v. Patterson*, 269 N.C. App. 640, 646, 839 S.E.2d 68, 73 (2020) (citations and internal quotations omitted). This Court has held, “before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under [section] 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue.” *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

However, this Court has also recognized, in the absence of a civil judgment, defendants do not have a right to be heard. *See Gibson*, 278 N.C. App. at 300–01, 861 S.E.2d at 771 (rejecting the defendant’s argument that the court should have afforded him an opportunity to be heard when attorney fees were imposed as a condition of probation). In *Gibson*, the Court reasoned, “this Court has only required notice and an opportunity to be heard when the court has imposed a civil judgment against an

indigent defendant for attorney’s fees.” *Id.* at 300, 861 S.E.2d at 771.

Here, because there was no civil judgment, and attorney fees were imposed as a condition of post-release supervision, there was no requirement that Defendant be heard on the issue of attorney fees.

E. Restitution

Defendant contends the trial court erred by ordering restitution because Defendant did not stipulate to the amount awarded and the State failed to present sufficient evidence to support the award. We disagree.

Our Supreme Court has held section 15A-1446(d)(18) is a constitutional statute that allows the issue of restitution to be preserved for appellate review without specific objection before the trial court. *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010). We review a restitution challenge de novo. *State v. Villarreal*, ___ N.C. App. ___, ___, 907 S.E.2d 80, 86 (2024).

Trial courts “may order restitution ‘for any injuries or damages arising directly and proximately out of the offense committed by the defendant.’” *Id.* (quoting N.C. Gen. Stat. § 15A-1340.34(c)). “A trial court’s judgment ordering restitution ‘must be supported by evidence adduced at trial or at sentencing.’” *Mumford*, 364 N.C. at 403, 699 S.E.2d at 917 (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)). “Issues at a sentencing hearing may be established by stipulation of counsel

if that stipulation is definite and certain.” *Id.* (citations and internal quotations omitted).

Here, when the issue of restitution was raised at trial the following exchange took place:

Court:

Does -- Mr. Draughn, does the defense consent to restitution in the amount of \$2,730 to Smithfield Foods and the same amount also in restitution to Elton Futrell for the --

Defense counsel:

Windshield?

Court:

-- for the restitution? I don't know what --

Prosecution:

A combination of medical --

Court:

Medical --

Prosecution:

-- and property damage from the assault.

Defense counsel:

Your Honor, those will be made a civil judgment against him. That's fine.

Court:

Okay. I'm not –

Prosecution:

And the State's not opposed to it.

Court:

I'm—I'm not inclined to make restitution a civil judgment. He can – he can work on it as part of post-conviction release. Post-release supervision.

Defense counsel:

Okay.

Court:

He can work on it.

Based on our review of the record, the stipulation was definite and certain. Defense counsel did not dispute the amount proposed and agreed to Defendant working on it as part of his post-release supervision. Defense counsel clearly stated “okay.” *Cf. Mumford*, 364 N.C. at 403–04, 699 S.E.2d at 917 (holding error but not prejudicial error in ordering restitution because it was unclear whether the defense counsel's statement “was a stipulation to the amount of the restitution or an affirmation that he was now clear on whether the insurance payments had been included on the worksheets”). Here, unlike in *Mumford*, the amount or what was

included in the amount was not contested and Defendant does not raise that as a concern. Defendant also concedes in his argument on appeal that “[c]ounsel was willing to consent to a civil judgment against [Defendant] in the amount proposed.” Thus, we hold the stipulation regarding restitution was definite and certain.

In recognizing the stipulation was sufficient to support an order of restitution, we need not address Defendant’s sufficiency of the evidence argument. *See State v. Wright*, 212 N.C. App. 640, 646, 711 S.E.2d 797, 801 (2011) (“In the absence of an agreement or stipulation between [the] defendant and the State, evidence must be presented in support of an award of restitution.” (quoting *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992))). Here, there was a stipulation sufficient to support an order of restitution.

Lastly, Defendant contends, and the State agrees that there was a numerical error in the amount of restitution ordered for Elton Futrell. The Restitution Worksheet reflects \$2,973.00 is owed to Mr. Futrell, and \$2,730.00 is owed to Smithfield Foods, Inc. Defendant’s judgment reflects the same amounts. At trial, however, Defendant stipulated to restitution in the amount of \$2,730.00 to Mr. Futrell, and \$2,730.00 to Smithfield Foods, Inc. To the extent the amount of restitution stipulated to differs from the numerical value stated in the order, we remand for the trial correct to correct the amount of restitution agreed upon. *See*

Wright, 212 N.C. App. at 645, 711 S.E.2d at 801 (remanding the restitution order for the trial court to amend the order based on a numerical error). *See also State v. Moore*, 209 N.C. App. 551, 559, 705 S.E.2d 797, 803 (2011) (“Ordering restitution in an amount greater than the amount supported by the evidence violates the requirement of N.C. Gen. Stat. § 15A-1340.36(a).”). As a result, we remand the restitution order for the trial court to correct the amount owed to Mr. Futrell to the stipulated amount of \$2,730.00.

F. Ineffective Assistance of Counsel

Defendant argues he received ineffective assistance of counsel because his trial counsel waived his right to assert self-defense and conceded his guilt of assault. Considered together, Defendant asserts his trial counsel’s performance was deficient, and he was prejudiced by his performance. We disagree.

While the preferred method of raising an ineffective assistance of counsel claim is by a motion for appropriate relief in the trial court, “a defendant may bring his ineffective assistance of counsel claim on direct appeal. On direct appeal, [a] defendant’s ineffective assistance of counsel claim ‘will be decided on the merits when the cold record reveals that no further investigation is required[.]’” *State v. Phifer*, 165 N.C. App. 123, 127, 598 S.E.2d 172, 175 (2004) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)).

To challenge a conviction based on ineffective assistance of counsel, a defendant must establish that his counsel's conduct "fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). To meet this burden, the defendant must satisfy a two-part test. *Id.* at 562, 324 S.E.2d at 248. First, the defendant must prove that his counsel's performance was deficient, such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the defendant must prove his counsel's performance was prejudicial, such that "counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*" *Id.* An error made by counsel, even an unreasonable one, "does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248. To determine prejudice, this Court considers substantial evidence presented. *See State v. Todd*, 290 N.C. App. 448, 464, 892 S.E.2d 240, 252–53 (2023) (noting that because the State presented sufficient evidence of the defendant being the perpetrator of the offense, the defendant could not show prejudice as part of his ineffective assistance of counsel claim (citing *State v. Blackmon*, 208 N.C. App. 397, 403, 702 S.E.2d 833, 837 (2010))).

Defendant first contends his counsel was ineffective for waiving his self-defense instruction. Defendant primarily builds his contention on the fact that his own testimony “raised self-defense as a substantial feature of the case upon which the court was required to charge the jury.” Defendant relies on *State v. Ayers*, a case where this Court held a self-defense instruction was necessary because the evidence required it. 261 N.C. App. 220, 229, 819 S.E.2d 407, 413 (2018). In *Ayers*, however, the defendant gave the State prior notice of his intent to offer evidence of self-defense at trial. *Id.* at 224–25, 819 S.E.2d at 411. Unlike *Ayers*, the record here does not indicate there was any notice of intent to offer self-defense at trial.

As an initial matter, “we generally refrain from critiquing trial counsel’s decision to pursue or not pursue a particular defense.” *State v. Jones*, 260 N.C. App. 104, 107, 816 S.E.2d 921, 923 (2018). “Decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court.” *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002). When a theory of self-defense is invoked without proper notice, the appropriate sanction is “normally exclusion of evidence upon the State’s objection or refusal to give a jury instruction on self-defense.” *Jones*, 260 N.C. App. at 107, 816 S.E.2d at 924. Here, during Defendant’s testimony, the State informed the court it would request an instruction for the jury to not consider self-defense because Defendant had not given appropriate

notice. Defense counsel agreed to the instruction, but the State later withdrew its request, informing the court defense counsel agreed to not argue self-defense in closing.

There is “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. Counsel is given wide latitude in matters of strategy, and the burden to show that counsel’s performance fell short of the required standard is a heavy one for [the] defendant to bear.” *State v. Oglesby*, 382 N.C. 235, 243, 876 S.E.2d 249, 256 (2022) (citations and internal quotations omitted). Defendant has not met this burden. Instead of self-defense, defense counsel seemed to take the position that Defendant did not intend to hit Mr. Futrell with the bottle. Defense counsel tended to focus on how Defendant was apologetic and remorseful for his actions. Defendant even admitted he only threw the bottle to “create a diversion where . . . [Mr. Futrell] didn’t come at [him] with a gun.” And to “hopefully slip past him and go on back to the house about [his] day.” Moreover, immediately after throwing the bottle, Defendant apologized.

Aside from defense counsel’s strategy, the evidence presented did not support a self-defense instruction. Self-defense requires a showing of an imminent threat, and there is no evidence in the record to suggest that Defendant was in imminent or “immediate danger.” *See State v. Norman*, 324 N.C. 253, 266, 378 S.E.2d 8, 16 (1989)

("[W]e decline to expand our law of self-defense beyond the limits of immediacy and necessity[.]"); *State v. Holshouser*, 267 N.C. App. 349, 353, 833 S.E.2d 193, 197 (2019) ("As is true in the context of self-defense claims, a defendant seeking to avail himself of the affirmative defense of justification must show that he reasonably believed he was under an impending threat of death or serious bodily injury." (citations omitted)). Here, according to Defendant's own testimony, Mr. Futrell was near his car when Defendant threw the bottle from the office window and hit Mr. Futrell. Thus, it does not appear as if Defendant was in immediate danger when Defendant threw the bottle and hit Mr. Futrell. Therefore, we hold substantial evidence was presented to support an assault conviction absent any self-defense instruction. Moreover, even if an instruction on self-defense was appropriate, Defendant has failed to demonstrate a reasonable probability that had defense counsel raised self-defense as a defense, the outcome of trial would have been different. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

Next, Defendant argues his counsel was ineffective for conceding Defendant's guilt on the assault charge. Defendant contends his counsel adopted Mr. Futrell's version of the events rather than Defendant's version. The specific statement challenged is when defense counsel stated "when [Mr. Futrell] turned to go, he was trying to—he ended up being hit in the face by my client[.]" and "[o]nce that was done,

my client immediately apologized to him.” This statement does not appear to be an adoption of Mr. Futrell’s testimony, but rather a synopsis of Defendant’s own testimony and incorporation of defense counsel’s strategy. By stating “he ended up being hit in the face by my client” and “my client immediately apologized to him It was not his intention to hit or injure or cause any pain to Mr. Futrell” illustrates defense counsel was trying to prove Defendant did not intend to hit Mr. Futrell with the bottle, which coincides with Defendant’s own testimony. Thus, we disagree with Defendant’s contention that defense counsel’s statement was conceding Defendant’s guilt. Furthermore, even if defense counsel’s statement was erroneous, Defendant has failed to demonstrate a reasonable probability that had defense counsel not made the statement, the outcome of trial would have been different. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

Defendant’s arguments for his ineffective assistance of counsel claim, even considered collectively, do not rise to the level of deficient and prejudicial performance. We hold Defendant’s ineffective assistance of counsel claim is without merit.

III. Conclusion

We hold the trial court properly denied Defendant’s Motion to Dismiss, did not err by excluding certain testimony offered by Defendant, did not deny Defendant the

right to heard at sentencing, did not order attorney fees be imposed as court costs, provided Defendant the opportunity to be heard when awarding attorney fees, and properly ordered restitution based on a stipulation. We remand the restitution order for the trial court to amend the order based on clerical error. Lastly, we hold Defendant did not receive ineffective assistance of counsel.

NO ERROR.

Judges COLLINS and WOOD concur.

Report per Rule 30(e).